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

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

Reforming ‘Regulatory Reform’: A Progressive Framework for Agency Rulemaking in the Public Interest*

Daniel A. Farber, Lisa Heinzerling, and Peter M. Shane

For over three decades, “regulatory reform” has been an aspiration chiefly for opponents of regulation. “Better regulation” is a goal nearly everyone would embrace. But changes in the federal administrative process since the 1980s have frequently had the foreseeable, and often intended, effect of hindering efforts to protect the environment, public health, civil rights, and other well-established public interest goals.

The purpose of this Issue Brief is to envision what regulatory reform could look like from a different direction. Our specific focus is on administrative rulemaking, the primary target of contemporary law reform efforts. We ask, what if reformers started with full recognition of the value of administrative regulation in the public interest? Progressives have always argued for strengthening the law’s substantive requirements in advancing the public good, such as stronger rules against pollution or more robust protections for worker safety. But beyond any specific substantive agenda, it is worth asking whether there are potential changes in agency process and in the oversight of agencies that would improve the administrative state. Are there changes that could make regulation more evidence-based, more transparent, more inclusive, more accountable, and more efficient? If so, then progressives should take up the cause of regulatory reform as our own.

Our immediate aim is not to propose a specific text for the ideal progressive regulatory reform platform, but rather to set out a framework and illustrative suggestions to demonstrate that such a platform is plausible and significant. In Part I, we discuss ways of improving notice-and-comment rulemaking. In Part II, we cover the role of the White House Office of Information and Regulatory Affairs (OIRA). We seek to improve OIRA’s processes and reset its mission to better align with congressional mandates. We then analyze, in Part III, the rules governing judicial review of agency actions, with the aim of clarifying the law and making judicial review more effective and efficient. Finally, in Part IV, we advocate the repeal of the Congressional Review Act, to eliminate this avenue for special interests to ambush important regulations in Congress.

By focusing on rulemaking, we do not mean to slight the importance of other administrative activities such as issuing permits, distributing benefits, overseeing state regulatory programs, or enforcing legal requirements and issuing sanctions. But the biggest controversies over administrative law have involved rulemaking, which involves the most important and visible policy decisions. For that reason, we view this topic as the appropriate starting point for an agenda of progressive regulatory reform.

* This Issue Brief was initially published in October 2018.

I. IMPROVING NOTICE-AND-COMMENT RULEMAKING

When Congress enacted the 1946 Administrative Procedure Act (APA), it gave far less attention to rulemaking than it did to the relatively detailed processes for formal on-the-record agency hearings. That is no doubt because—insofar as agencies used any kind of procedurally elaborate tools for statutory implementation—administrative adjudication rather than rulemaking was the preferred process for policy elaboration. Lawyers and clients seeking to understand, for example, what the National Labor Relations Board considered an “unfair labor practice,” what the Federal Trade Commission considered an “unfair or deceptive trade practice,” or what the Federal Communications Commission considered broadcasting “in the public interest” had to synthesize those agencies’ views chiefly through analysis of their orders in individual proceedings.

In the 1960s and 1970s, however, informal rulemaking became the predominant tool of agency policy implementation as Congress vested authority in a host of new agencies to carry out ambitious missions in the public interest. Rules in general, and the APA rulemaking process in particular, held the promise of important gains in both fairness to the public and enhanced agency effectiveness:¹

- Rulemaking would provide wide and advance notice of legal requirements, thus increasing transparency (which facilitates oversight and accountability), while enhancing fairness to regulated parties;
- Rulemaking would facilitate broader public participation, which would produce more comprehensive fact-finding and public deliberation;
- Rules would help assure more uniformity in enforcement;
- Rulemaking would give agencies greater flexibility in structuring how information is gathered and vetted;
- Rulemaking would give agencies more control over the direction and scope of their policy making agenda, enabling them to focus on “social” or “legislative” facts rather than the idiosyncrasies of individual cases as they might be presented in case-by-case adjudication.

The advantages of rulemaking over adjudication seemed all the more tantalizing because the APA framework for the informal rulemaking process appeared to be both streamlined and straightforward.² An agency would first issue a notice of proposed rulemaking that describes “either the terms or substance of the proposed rule” or “the subjects and issues involved.” Next, with certain limited (although important) exceptions, the agency would provide an opportunity for interested persons “to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation.” Lastly, in issuing final rules, the agency would incorporate “a concise general statement of their basis and purpose,” and it would ordinarily publish its final rules at least thirty days before their effective date.

As the volume and significance of administrative rulemaking exploded, however, courts substantially elaborated these basic requirements, effectively requiring agencies (a) to issue notices of proposed rulemaking that genuinely enabled public deliberation and (b) to fashion statements of “basis and purpose,” which, far from being concise and general, now typically catalogue virtually every significant issue

¹ A still-useful discussion of the points that follow is Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163-164 (1986).

² 5 U.S.C. § 553(b), (c) (2016).

entailed in a rulemaking and the agency's course of action in addressing each issue. Congress likewise diminished the apparent simplicity of the process by requiring rulemaking agencies to provide additional layers of analysis (such as evaluating the impact of proposed rules on small businesses),³ to clear new information-reporting requirements with the Office of Management and Budget (OMB),⁴ and to meet guidelines on data quality that OMB would duly promulgate.⁵ And every president from Reagan onward has complicated the process further through a process of centralized OMB review of regulatory policymaking, which we discuss in Part II. Some of these changes have been helpful in improving agency deliberations; others have been sources of delay and influence by special interests.

Amidst all this complexity, the challenge for progressive reformers is to find ways of enabling the notice-and-comment process to fulfill its potential for enhancing agency transparency, accountability, and inclusiveness without simply adding to unproductive delay. In this part of the Issue Brief, we describe ways of improving the agency rulemaking process itself, focusing on the enhancement of direct public participation, a broader and more accountable use of advisory boards, disciplining *ex parte* contacts in rulemaking, and expanding the use of the petitioning process.

A. ENHANCING DIRECT PUBLIC PARTICIPATION

Aside from fulfilling the APA requirement for allowing public input, agencies have two direct incentives to engage the public in their rulemaking processes: (1) enriching the information-gathering process with regard to problems presented, available regulatory alternatives, and the likely impacts of proposed interventions, and (2) enhancing the public's acceptance of both the agency and its regulations as legitimate. Input, of course, may come from two very different kinds of sources—sophisticated and well-resourced stakeholders often represented through trade associations or civil society groups, and engaged, but not formally organized individuals who, despite their interest, may have fewer resources and less experience to draw on.

In theory, new information and communications technologies should enhance public participation of both kinds. The federal government has devoted substantial effort to the design of so-called “E-rulemaking,” which may usefully be defined as:

the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online, along with tools for searching, analyzing, explaining and managing the information they contain; and (iii) enable more effective and diverse public participation.⁶

It does not yet appear, however, that even the most creative e-rulemaking efforts have significantly increased meaningful public participation by individual members of the public. The great barriers to broader-based participation by members of the public are lack of awareness that rulemakings are occurring, lack of knowledge that

³ Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (2016).

⁴ Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* (2016).

⁵ Data Quality Act, Pub. L. No. 106-554, § 515 Appendix C (2000).

⁶ Committee on the Status and Future of Federal E-Rulemaking, *Achieving the Potential: The Future of Federal E-Rulemaking* 3 (2008), <https://scholarship.law.cornell.edu/facpub/1237/>.

participation is possible, lack of understanding about how to participate effectively, and—for those who overcome these initial barriers to participation—“information overload from the length and complexity of rulemaking documents.”⁷

Professor Cynthia Farina and the Cornell eRulemaking Initiative have done the most extensive analysis of the kinds of innovation in the rulemaking process that could potentially improve both the inclusiveness of the process and the value of public participation to the rulemaking agency.⁸ Their detailed investigation, based in part on case studies of three rulemakings in which they partnered with federal agencies to facilitate public input, yields two critical insights. The first is that no single design for a public comment process will fit all needs. Different rulemakings are likely to vary so greatly with regard to public awareness, scope of potential impact, and sheer complexity that it makes little sense to advocate a single detailed template for how agencies should attempt to identify, inform, and engage “missing stakeholders.” On the other hand, the comment process might well become more useful if agencies were required consciously to plan a comment process for any significant rule—a planning exercise that would seek to identify those groups of individuals most likely to be interested in or affected by a forthcoming rule, the subset of those individuals most likely to face barriers to participation in the rulemaking, and the forms of outreach and engagement most likely to yield additional information that could be of genuine use to the agency.

Through its December 2009 Open Government Directive,⁹ the Obama administration tried to put in place a foundation for “participatory” and “collaborative” government that would prompt a variety of such experiences. OMB could usefully be tasked to coordinate such efforts more systematically. For progressive regulatory reformers, it would be helpful if agencies were at least nudged to consider models of engagement that would truly be more meaningful in terms of value to both the agency and public participants. To take but one of many available possibilities, one could imagine an agency supplementing its conventional comment process with a “deliberative poll,” a technique that uses scientific random sampling to generate a group of participants who both engage with experts and assemble for small group discussion to provide decision-makers with evidence of public attitudes based on actual study and deliberation.¹⁰ There are also a variety of online tools available to agencies to facilitate and promote genuine citizen deliberation online.¹¹ The

⁷ Cynthia R. Farina & CeRI, *Rulemaking 2.0: Understanding What Better Public Participation Means, and Doing What It Take to Get It* (2013), https://www.americanbar.org/content/dam/aba/events/administrative_law/2013/04/administrative_lawandregulatorypracticeinstitute/Rulemaking.authcheckdam.pdf. See also Scott Wright, *The Participatory Journey in Online Consultations*, in STEPHEN COLEMAN AND PETER M. SHANE, EDs., *CONNECTING DEMOCRACY: ONLINE CONSULTATION AND THE FLOW OF POLITICAL COMMUNICATION* 149 (2012).

⁸ *Id.*; see also Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking* (2009) and *Report of the Committee on the Status and Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 279 (2010).

⁹ Presidential Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government (Jan. 21, 2009), <https://www.archives.gov/files/cui/documents/2009-WH-memo-on-transparency-and-open-government.pdf>; Memorandum from OMB Director Peter R. Orszag for the Heads of Executive Departments and Agencies re: Open Government Directive (Dec. 8, 2009), <https://obamawhitehouse.archives.gov/open/documents/open-government-directive>.

¹⁰ The technique was developed by Professor James Fishkin, currently the Director of the Center for Deliberative Democracy at Stanford University.

¹¹ Matt Leighninger, *Using Online Tools to Engage—and be Engaged by—The Public* (2011), <https://www.communityplanningtoolkit.org/sites/default/files/Using%20Online%20Tools%20to%20Engage%20-%20%20Deliberative%20Democracy.pdf>.

Administrative Conference of the United States (ACUS) might usefully stage trainings for relevant agency officials on the tools available for facilitating input and the advantages they may offer for different kinds of rulemaking. The aim would not be expanding the volume of public comments simply for the sake of volume, but rather engaging groups and individuals who might otherwise overlook or be overlooked by the rulemaking process, but whose participation would be genuinely meaningful in terms of value to both the individual and the agency.

B. MAXIMIZING THE UTILITY OF AGENCY ADVISORY BOARDS

As part of their public outreach strategy, agencies frequently draw upon the expertise and advice of advisory committees in doing their work. Indeed, some statutes require consultation with advisory committees prior to the issuance of rules,¹² and such groups might be used yet more widely both to ensure representation for significantly affected potential stakeholders and to give the agency the benefit of additional knowledge and experience. Using such committees to help with both agency agenda-setting and specific regulatory proposals could help overcome public perception that engaging with agencies is a waste of time because policymakers announce only rulemaking “proposals” to which they are already pre-committed. Progressives should encourage more and earlier use of such public boards.

To ensure that the advice and recommendations of advisory committees are credible and reliable, however, federal statutes and regulations must also require that the members of advisory committees be free from significant conflicts of interest.

The federal criminal code’s provisions on bribery, graft, and conflicts of interest of federal employees apply to advisory committee members as “special government employees.”¹³ These employees may not participate in any matter that has a direct and predictable effect on their financial interests, absent case-specific approval by a designated federal official.¹⁴ Regulations implementing these statutory provisions, issued by the Office of Government Ethics, establish uniform ethics rules for the federal government. They provide that a member of an advisory committee may participate despite a financial interest, “provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.” The Federal Advisory Committee Act (FACA) requires that advisory committees be “fairly balanced” and that their advice and recommendations not be “inappropriately influenced by the appointing authority or any special interest.” Individual statutes creating and empowering federal advisory committees likewise protect against conflicts of interest.

Recently, this structure has been turned on its head by decisions of the administrator of the Environmental Protection Agency (EPA). In a directive issued in October 2017, now-former Administrator Scott Pruitt barred all recipients of EPA grants from serving on any EPA advisory committee and removed from advisory committees individuals who had received such grants. The EPA then replaced those individuals with individuals who work for or receive financial support from industries regulated by the EPA. Administrator Pruitt took the position that receiving a grant from the EPA created an unacceptable conflict of interest, precluding membership on the agency’s advisory committees, while receipt of financial support from regulated industries created no such conflict.

¹² Clean Air Act, 42 U.S.C. § 7409(d)(2) (2016).

¹³ 18 U.S.C. § 202(a) (2018).

¹⁴ 18 U.S.C. § 208(a); 208(b)(1)-(3) (2018).

Administrator Pruitt's directive departs from decades of agency practice, and it has been challenged in court.¹⁵ To eliminate all doubt, we recommend that federal statutes on advisory committees and conflicts of interest be amended to make clear that receipt of government grants does not in and of itself constitute a conflict of interest precluding service on federal advisory committees. The contrary position taken by Pruitt deprives agencies of the expertise and advice of many employees of universities and other institutions that depend on government financial support. Moreover, when this position is paired with Pruitt's view that industrial financial support creates no such wholesale conflict of interest, advisory committees become skewed against academic participants and in favor of committees composed of industry-supported members. We believe this situation upends the federal structure of advisory committees and warrants legislative attention.

C. INCREASING TRANSPARENCY FOR EX PARTE CONTACTS IN INFORMAL RULEMAKING

Of course, not all the information relevant to administrative rulemaking comes to agency attention through structured forms of input. Information that comes to an agency behind closed doors can be valuable to the agency and need not be detrimental to the public. Yet public confidence, agency accountability, and the quality of policy deliberations are all put at risk when influential consultations occur that are not publicly docketed. For this reason, we recommend adjustments to the legal structure for ex parte contacts in rulemaking. This proposal is synergistic with our recommendations in Part II for increased transparency within the executive branch.

By general usage, an "ex parte" contact is a contact "on or from one side or party only."¹⁶ It is a contact that does not occur in the presence of other interested persons and is not disclosed to them.¹⁷ The APA prohibits ex parte contacts in formal adjudicatory hearings and "formal rulemaking" (a seldom-used mechanism), and it requires their disclosure if they do occur. The APA does not even mention ex parte contacts in the context of informal rulemaking.

For a brief period in the 1970s, the D.C. Circuit embraced constraints on ex parte contacts even in the context of informal rulemaking that did not involve what the court had previously called "resolution of conflicting private claims to a valuable privilege."¹⁸ However, the court quickly stepped away from these constraints in the context of informal rulemaking.¹⁹ Indeed, it came to believe that, in the informal rulemaking context, where there are no formal "parties" or even well-defined "sides," communications between persons outside the agency and persons inside the agency are not only proper, but healthy.²⁰

The benefits thought to accrue from undocketed and informal oral or written communications from outside parties to agency personnel include drawing upon

¹⁵ Complaint, *Physicians for Social Responsibility v. Pruitt*, No. 1:17-cv-02742 (D.D.C. Dec. 21, 2017), https://earthjustice.org/sites/default/files/files/01_Plaintiffs_Complaint_12-21-2017.pdf.

¹⁶ ESA L. SFERRA-BONISTALLI, ADMIN. CONFERENCE OF U.S., *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* 8 (2014) [hereinafter ACUS REPORT], https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%SD_0.pdf.

¹⁷ 5 U.S.C. § 551(14) (2018).

¹⁸ *Home Box Office (HBO) v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). The "conflicting claims" formulation comes from *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

¹⁹ *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

²⁰ *Sierra Club v. Costle*, 657 F.2d 298, 400-401 (D.C. Cir. 1981).

the expertise of these parties, engaging the participation of interested parties in the agency's work, making the government open and accessible to the public, and allowing the candid transmission of potentially sensitive information and views.²¹ The detrimental features of such communications include undue influence, inability to comment on the information and views presented, and development of a nonpublic docket parallel to the public docket.²² For example, this is why reports that Interior Secretary Ryan Zinke, like former Administrator of the EPA Scott Pruitt, has held frequent, off-the-record meetings with the industries he regulates²³ have drawn such public concern: such private consultations create the possibility of one process for regulated entities, and one for the rest of us.

Although some agencies have voluntarily embraced policies of disclosing or even limiting oral and written communications made during or after public comment periods,²⁴ few statutes contain such requirements or limitations. The Clean Air Act is a notable exception. It does not limit such communications, but it does require disclosure. The Act requires the EPA to docket "all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period" and "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking."²⁵ These communications are also to be made part of the record for judicial review.²⁶ We favor a similar approach for rule-makings conducted under other statutes.

We are concerned that the current practice of leaving the acceptance and disclosure of ex parte contacts mostly to agency discretion threatens the core values underlying our reform project. First, transparency and equal access to information suffer greatly when there is effectively a "parallel nonpublic docket[]" in administrative decision-making.²⁷ As the D.C. Circuit put it in its early case law in this area, "the elaborate public discussion...has been reduced to a sham" when there is "one administrative record for the public and this court and another for the [agency] and those 'in the know.'"²⁸ Second, alignment of agency decisions with the evidence before them is threatened when private parties may present information to the agency without subjecting it to the public vetting that accompanies publicly available information and views.

We propose amending the APA to incorporate the disclosure requirements of section 307 of the Clean Air Act, with two adjustments. First, the Clean Air Act refers only to "written comments and documentary information" and to "documents," thus

²¹ ACUS REPORT, *supra* note 16, at 16-19.

²² *Id.* at 19-24.

²³ Margaret Talbot, *Scott Pruitt's Dirty Politics*, NEW YORKER (Apr. 2, 2018), <https://www.newyorker.com/magazine/2018/04/02/scott-pruitts-dirty-politics>. Recently disclosed emails, exchanged between the EPA officials and industry representatives, further attest to the cozy relations between the agency and regulated industry. Juliet Eilperin, *Emails reveal close rapport between top EPA officials, those they regulate*, WASH. POST (July 1, 2018), https://www.washingtonpost.com/national/health-science/emails-reveal-close-rapport-between-top-epa-officials-those-they-regulate/2018/07/01/6c5a62b6-7642-11e8-805c-4b67019f4e4_story.html?noredirect=on&utm_term=.b171eaa824a1.

²⁴ ACUS REPORT, *supra* note 16, at 41-42, 53-64.

²⁵ See 42 U.S.C. § 7607(d)(4)(B)(i) (2018).

²⁶ *Id.* at § 7607(d)(7)(A).

²⁷ ADMIN. CONFERENCE OF U.S., REQUEST FOR PROPOSALS—MAY 23, 2013, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING, at 1 (2013), <http://www.acus.gov/sites/default/files/documents/Ex%20Parte%20RFP%205-23-13.pdf>.

²⁸ HBO v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977).

apparently excluding oral communications from the docketing requirement. As the D.C. Circuit has observed, however, “unless oral communications of central relevance to the rulemaking are also docketed in some fashion or other, information central to the justification of the rule could be obtained without ever appearing in the docket, simply by communicating by voice rather than by pen...”²⁹ We recommend that oral communications be included in the docketing requirement we propose.

The second adjustment we would make to the Clean Air Act’s docketing requirements, for purposes of amending the APA, would be to require agencies to include in the docket every post-comment-period communication, whether or not the agency deemed any such communication to be “of central relevance” to the rulemaking. Lack of “central relevance” would generally lead an agency to exclude a public communication from its rulemaking docket. Communications to the agency concerning a proposed or final rule, made privately rather than publicly, should be treated just like public comments are.³⁰

D. PROMOTING RULEMAKING PETITIONS

Just as the public is likely underinformed with regard to regulatory actions that administrative agencies undertake on their own initiative, most citizens are presumably unaware also of their legal right to petition for new agency regulations. A 2014 report by ACUS concluded that “few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking.”³¹ ACUS recommended that agencies simplify and regularize their practices for receiving and processing petitions, including enhanced communications between agencies and

²⁹ *Sierra Club v. Castle*, 657 F.2d 298, 402 (D.C. Cir. 1981).

³⁰ Even with respect to comments submitted to the public docket, accommodations are made for the confidential provision of protected information such as trade secrets. We do not take on the fight over these accommodations here.

Likewise, because this White Paper is focused on the process of promulgating regulations, we do not review in detail possible improvements in administrative transparency with regard to regulatory compliance. We would endorse the following statement in President Obama’s January 18, 2011 Memorandum to the Heads of Executive Departments and Agencies re: Compliance:

Greater disclosure of regulatory compliance information fosters fair and consistent enforcement of important regulatory obligations. Such disclosure is a critical step in encouraging the public to hold the Government and regulated entities accountable. Sound regulatory enforcement promotes the welfare of Americans in many ways, by increasing public safety, improving working conditions, and protecting the air we breathe and the water we drink. Consistent regulatory enforcement also levels the playing field among regulated entities, ensuring that those that fail to comply with the law do not have an unfair advantage over their law-abiding competitors. Greater agency disclosure of compliance and enforcement data will provide Americans with information they need to make informed decisions. Such disclosure can lead the Government to hold itself more accountable, encouraging agencies to identify and address enforcement gaps.

President Barack Obama, *Presidential Memoranda—Regulatory Compliance*, THE WHITE HOUSE (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>. Agencies can advance these goals by “mak[ing] readily accessible to the public, information concerning their regulatory compliance and enforcement activities, such as information with respect to administrative inspections, examinations, reviews, warnings, citations, and revocations.” *Id.*

³¹ ADMIN. CONFERENCE OF U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2014-6, PETITIONS FOR RULEMAKING (2014), <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf>.

petitioners, creating opportunities for the public to comment on petitions, formulating better agency responses to petitions, and “maintain[ing] a summary log or report listing all petitions, the date each was received, and the date of disposition or target timeline for disposition.”³² The petitioning process could prove a significant tool for progressive reform if the process were more widely appreciated and pursued not just by “sophisticated stakeholders,” but also by community groups and engaged citizens generally.

II. CONSTRAINING WHITE HOUSE REVIEW OF AGENCY RULES

In addition to recommending changes in the notice-and-comment stage of informal rulemaking, we propose major changes in the practice of White House review of significant agency rules, to promote greater transparency, timeliness, and consistency with statutory commands.

Presidents since Ronald Reagan have, by executive order, required agencies to submit significant regulatory actions to the White House for review.³³ The review is overseen by the White House Office of Information and Regulatory Affairs (OIRA) within the OMB. OIRA enlists the opinions of other executive branch agencies on the policies embodied in the actions under review and evaluates “significant” regulatory actions by reference to cost-benefit analyses prepared by agencies and submitted to OIRA. The current executive order on OIRA review defines a “significant” regulation action as one that has an annual economic effect of \$100 million or more; creates inconsistency with or otherwise interferes with an action of another agency; materially alters the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients; or raises “novel legal or policy issues.”³⁴ Although rules may thus be deemed significant because of their anticipated economic impact, they are, in actual practice, most often designated for review because of the novelty or sensitivity (in OIRA’s eyes) of the policy issues they raise.

This process has operated since 1993 under an executive order issued by President Bill Clinton.³⁵ That order sets out the basic structure under which White House review is conducted, even though several subsequent executive orders have refined the process to some extent.³⁶ Under the Clinton executive order, OIRA decides which regulatory actions must be submitted to it for review. The order provides that disputes between OIRA and the acting agency will be elevated, if need be, to the president, who will notify the agency and OIRA of “the President’s decision with respect to the matter.”³⁷ The order also sets out deadlines within which OIRA’s review is to be completed³⁸ and mandates specific elements of transparency in the review process.³⁹

³² *Id.*

³³ For the Reagan order, see Exec. Order No. 12,291, 3 C.F.R. § 127 (1981).

³⁴ Exec. Order No. 12,866, 58 Fed. Reg. 51734, § 3(f) (1993).

³⁵ *Id.* § 7.

³⁶ E.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

³⁷ See Exec. Order No. 12,866, *supra* note 34.

³⁸ *Id.* § 6(b).

³⁹ *Id.* §§ 4(c)(5), 6(b)(4)(C)(i), 6(b)(3), 6(b)(3)(E)(ii-iii).

OIRA's oversight of the rulemaking process has provoked a number of criticisms. These have focused on persistent delays of rules,⁴⁰ rejection of rules by OIRA without explanation, inconsistency of the cost-benefit criterion with many statutory mandates, displacement of the authority of the agency charged by Congress with acting, and a general lack of transparency. Despite these critiques, every president since Ronald Reagan has endorsed the process of requiring White House approval of significant regulatory actions. Even President Obama, who announced very early in his first term that he was conducting a top-to-bottom review of the OIRA process,⁴¹ ultimately embraced strict White House control over the rulemaking proceedings of the executive agencies.⁴²

OIRA systematically violates the Clinton executive order under which its review takes place. OIRA has interpreted the provisions setting out 90- or 120-day deadlines not to impose real constraints on its timing; its position is that it may simply ask an agency to ask for an extension—a request the agency will find hard to refuse, given OIRA's control over its rules—and this will allow OIRA to continue review of a rule indefinitely.⁴³ OIRA also does not comply with a number of the executive order's provisions requiring transparency. OIRA does not, for example, prepare a publicly available log detailing when and by whom any disputes between OIRA and the agency were elevated, nor does it always provide the agency with a written explanation of why OIRA rejected a rule.⁴⁴ In addition, the actual process for elevating issues to the president has, in contrast to the orderly process envisioned by the executive order, been unstructured.⁴⁵ Thus, one way to address several recurring criticisms would be for OIRA to hew more closely to the actual provisions of the Clinton executive order. Closer adherence to the existing executive order's provisions on review deadlines, transparency, and an orderly process for elevation of issues to the president would address some of the criticisms about undue delays, a lack of transparency, and a chaotic decision-making process.

We believe such reforms to the actual process of White House review are necessary, but not sufficient. Such procedural reforms would not address the basic criticisms that the process unlawfully supplants the authority of the agency Congress has charged with making the relevant decisions and that the cost-benefit criterion the executive order imposes is inconsistent with many of the regulatory statutes under which the agencies operate. In addition, the transparency-related provisions of the existing executive order, even if closely followed, would not be sufficient to achieve the degree of transparency we would propose. To address these concerns, we propose four additional, and more fundamental, reforms.

Our first proposal is to return the White House review process to the understanding articulated when President Reagan issued the first executive order creating a systematic process of White House review. In 1981, soon after he entered office, President Reagan issued an executive order providing for an approval process quite

⁴⁰ CURTIS W. COPELAND, *LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* (2013), <https://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf>.

⁴¹ Presidential Memorandum of January 30, 2009: Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009).

⁴² Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

⁴³ 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, 359 (2014).

⁴⁴ *Id.* at 362.

⁴⁵ *Id.* at 369.

similar to the one provided for by the Clinton executive order. The Office of Legal Counsel (OLC) in the Department of Justice reviewed Reagan's executive order for legality. In its opinion confirming the legality of the executive order, OLC emphasized that the executive order did not purport to displace the authority of the acting agency.⁴⁶ OLC stated that "a wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official."⁴⁷ Notably, however, even though Section 9 of the Clinton order purports to preserve agency decision-making authority, that promise is undermined by the explicit provision that the president will be the decider when issues are elevated to the president as a result of OIRA review.⁴⁸

We believe the Reagan order had it right (although we recognize that, in practice, under that order, too, the President and his aides actually displaced the authority of the relevant agency).⁴⁹ Just as Congress's instructions as to the *decisions* an agency makes should be followed and not countermanded by the president and aides in the White House, so, too, should Congress's instructions as to the *decision-maker* be followed. Some statutes explicitly delegate decision-making authority to the president; most do not.⁵⁰ Yet the Clinton executive order on regulatory review treats all laws delegating authority to executive agencies as if they delegate decision-making authority to the president. We think the presumption should be reversed: that laws delegating decision-making authority to executive agencies do not delegate decision-making authority to the president.⁵¹

The review process as currently structured allows evasion of legislative instructions about delegation in another way as well. They allow other agencies to play a decisive role in shaping the policies of an agency charged by Congress with making those policies.⁵² When a rule of the EPA, for example, is sent to the White House for review, it is circulated to all other agencies that might have an interest in it, including the Department of Agriculture, the Department of Energy, and other agencies that Congress did not choose as the decision-maker. These agencies have interests and constituencies that are often opposed to the basic mission of the EPA. To allow them to have a decisive influence on the rule that emerges from the White House review process is to disrespect the choice Congress made in giving decision-making authority to the EPA. Under our approach, no agency other than the one (or ones) chosen by Congress as the decision-maker would have decisive power over a rule. Agencies may still consult with other agencies in the rulemaking process; indeed,

⁴⁶ Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59 (1981).

⁴⁷ *Id.* at 62-63.

⁴⁸ Exec. Order No. 12,866, *supra* note 34, at § 7 (when OIRA and agency disagree, issue will be elevated and these actors will be notified of "the President's decision with respect to the matter"). In a case challenging OIRA's role in reviewing rules under Exec. Order No. 12,866, the court noted potential constitutional concerns with OIRA's interference with agencies' statutory duties but did not rule on these issues. *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566, 570 (D.D.C. 1986).

⁴⁹ Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2502-05 (2011).

⁵⁰ Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 *COLUM. L. REV.* 263 (2006).

⁵¹ Peter L. Strauss, *Foreword: Overseer or "The Decider" The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 695 (2007). We disagree with then-professor Elena Kagan's proposed presumption that such laws delegate decision-making authority to the president. See Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2246 (2001).

⁵² Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *HARV. L. REV.* 1838, 1941-43 (2013).

some statutes require such consultation. But the final decision would rest with the decision-maker chosen by Congress.

Our second proposal is to reorient the White House review process to focus on whether a proposed regulatory action is consistent with the underlying statute, and away from the current focus on satisfying a quantified cost-benefit standard. Very few federal regulatory statutes establish formal cost-benefit analysis as the decision-making criterion. Injection of a formal cost-benefit standard into the White House review process drives a wedge between statutory standards and the standards the White House applies. Most environmental statutes do require some consideration of costs, and courts have called for quantification of risks to the extent possible. Some statutes may also call for some kind of consideration of whether costs are disproportionate to benefits, but monetizing benefits is, so far as we are aware, required by only one statute, the 1996 amendments to the Safe Drinking Water Act. The current approach inevitably leads to overemphasis on factors that can be easily quantified, encourages dubious efforts to convert all benefits to monetary terms, conflicts with the precautionary approach embodied in many statutes, and disfavors regulatory programs that aim to protect against future harms. This impairs the integrity of Congress's delegation of authority to the agency, contrary to separation of powers principles. For these reasons, we believe that rather than asking, "Does this rule satisfy cost-benefit analysis?" OIRA should ask, "Does this rule establish a policy that is consistent with the underlying statutory framework and the evidence before the agency? Has the agency engaged in a rigorous analysis of the evidence?" Under this approach, White House review would not inject a new, extra-statutory consideration—satisfaction of a quantified cost-benefit criterion—into the decision-making process on rules.

Our third proposal is to beef up the existing provisions on the transparency of regulatory review. The Clean Air Act offers a good model in this regard. The Clean Air Act requires the EPA to place in the rulemaking docket all drafts of proposed and final rules submitted to OIRA, documents accompanying them, and written comments by other agencies along with the EPA's responses to them.⁵³ We would propose that these requirements be applied to all agencies and that the documents not only be added to the public docket but be included in the administrative record for judicial review.

These reforms could come about in two different ways. Reform could come from a new president, through issuance of an executive order modifying the process of White House review to put our reforms into place. However, given the enthusiasm of all presidents to date, across decades and across political parties and philosophies, for the version of regulatory review we are proposing to change, we are not optimistic that reform will come through a future president.

Reform could also come from Congress. Congress could prescribe a regulatory review process that embodies the reforms we recommend. Although adherents of the unitary executive theory—holding that the president alone controls the "executive power" provided in the Constitution—might balk at a legislative adjustment of the White House review process, we do not believe the Constitution forbids Congress from specifying decision-makers and decision-making criteria in a way that binds the president.

⁵³ 42 U.S.C. § 7607(d)(4)(B)(ii) (2016).

Our final recommendation would be the repeal of Executive Order 13,771, issued by Donald Trump on January 30, 2017.⁵⁴ That order goes well beyond the information gathering and coordination roles on which earlier presidents relied to support the OIRA review process. Executive Order 13,771 purports to require agencies, in order to issue new rules, to identify two existing rules appropriate for revocation. It also purports to authorize OIRA to impose on rulemaking agencies an annual ceiling on the gross costs to the economy that may be imposed by new regulations. These provisions, which effectively amend agencies' existing statutory authorities, go well beyond any constitutionally rooted presidential role; the president's duty is to faithfully execute the law, not to amend the law by executive order.⁵⁵ Executive Order 13,771 is not only unwise as a matter of policy, but also in violation of the separation of powers as it would all but inevitably require agencies in deciding how to implement their statutory mandates to consider factors that Congress has not made legally relevant. The order is unlawful and should be overturned, if not voluntarily abandoned.⁵⁶

III. IMPROVING JUDICIAL REVIEW OF RULEMAKING

Judicial review of agency action helps ensure that the agency is responsibly implementing its governing statute. Although we do not advocate radical changes in current law, we believe certain reforms could provide useful clarification and correct some judicial missteps. Judicial review can either assist in the production of good regulation or serve as a source of delay, ill-advised second-guessing, or simply error. In this section, we discuss a number of technical issues that would cumulatively increase the benefits and diminish the drawbacks of judicial review.

A. ENHANCING REVIEWABILITY AND PROCEDURE

We propose reforms in this section to deal with four problems: (1) improper foot-dragging by agencies in implementing statutory mandates, (2) uncertainty in the judicial treatment of agency guidance, (3) delays and procedural problems in cases where initial review of a regulation is by a trial court rather than court of appeals, and (4) unnecessary nullifying of agency actions when flaws can be easily corrected on remand.

1. Clarifying the Standard of Review for Agency Inaction

Judicial review is routinely available when an agency acts, but what if the agency fails to take action? As we have seen under President Trump, refusal to implement the law can be a serious threat to public health and welfare.

The legal safeguard against agency inaction is found in section 706(1) of the APA, which provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." It is worth noting that the APA explicitly defines "agency action" to include "failure to act."⁵⁷ Courts have been reluctant to utilize this section, however, because agencies sometimes have legitimate reasons for inaction. In our view, rather than using formalistic distinctions between action and inaction in

⁵⁴ 82 Fed. Reg. 9339 (2017).

⁵⁵ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[N]o provision in the Constitution... authorizes the President to enact, to amend, or to repeal statutes.").

⁵⁶ Public interest groups have filed a lawsuit challenging the constitutionality of the executive order. The district court dismissed the case for lack of standing. *Public Citizen v. Trump*, 297 F. Supp. 3d 6 (2018). The plaintiffs have amended their complaint to add new allegations on standing.

⁵⁷ 5 U.S.C. § 551(13) (2018).

justifying either intervening or abstaining, courts should undertake a more pragmatic inquiry.

There are three legitimate reasons why an agency might decline to act or might delay acting: (a) rightly or wrongly, it may view the proposed action as legally unsupported; (b) it may view the action as undesirable on policy grounds (which is impermissible unless the statute permits consideration of the relevant policy); or (c) the agency may have higher priorities (and of course limited resources). The first two reasons are equally relevant whether a court is reviewing a regulation or a refusal to regulate, and should be subject to review on the same basis in either case. The third reason however, is unique to agency inaction.⁵⁸ The government's discretion to decide how to budget its resources is obviously very broad.

Nevertheless, priorities must be consistent with an agency's legal responsibilities and subject to congressional directives. For instance, the existence of a statutory deadline clearly communicates Congress's desire to prioritize an action and correspondingly reduces agency discretion. Likewise, a statutory mandate to take action upon a particular agency finding—for instance, whether a substance presents a serious risk of harm—may imply a duty to investigate further if there is genuine evidence of risk, a duty that should not be lightly set aside. Moreover, in an agency charged with safeguarding the public against risks, the agency should have a heavy burden in justifying a refusal to even consider regulating a risk when there is plausible evidence of its seriousness.

Under the APA, citizens can petition an agency to engage in a rulemaking, and the agency must give grounds for denying the petition. A key question is what grounds are permissible. The Supreme Court addressed this issue in *Massachusetts v. EPA*,⁵⁹ which involved a petition to the EPA under President George W. Bush to regulate greenhouse gases. Under the applicable statute, the EPA must regulate pollutants if it finds that they endanger human health or welfare.⁶⁰ The EPA denied the rulemaking petition. Among other reasons, the EPA said that even if it had legal authority to regulate greenhouse gases, it would not do so because other approaches such as international negotiation were preferable.⁶¹ The Court ruled, however, that the EPA's decision about whether to regulate had to be based solely on its ability to make the required statutory finding.⁶² Thus, it could consider only whether the statutory requirements for regulation were met, not other discretionary factors.

Lower courts have read the *Massachusetts* decision narrowly,⁶³ as is illustrated by the Second Circuit's decision in *NRDC v. FDA*,⁶⁴ which involved a statute with close parallels to that in the Supreme Court case. Similarly, the D.C. Circuit has upheld denial of a rulemaking petition relating to protection of whales where "[t]he agency made a policy decision to focus its resources on a comprehensive strategy, which in light of the information before the agency at the time, was reasoned and adequately

⁵⁸ See Eric Biber, *Two Sides of Same Coin: Judicial Review of Administrative Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008).

⁵⁹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁶⁰ *Id.* at 505.

⁶¹ *Id.* at 513.

⁶² *Id.*

⁶³ See Sunstein and Vermeule, *infra* note 86, at 160 n.10.

⁶⁴ 760 F.3d 151 (2d Cir. 2014).

supported by the record.”⁶⁵ Although an agency cannot be expected to pursue every rulemaking within its legal authority, we fear that the lower courts have too readily accepted agencies’ invocation of resource constraints and “comprehensive strategies” as reasons justifying inaction; resource constraints are pervasive, and comprehensive strategies can take a lifetime to achieve. The problem is to strike a balance between the agency’s need to allocate its resources to greatest effect and the public’s right to the implementation of congressional policies. It is difficult to provide cut-and-dried rules in this setting, but it would be helpful to clarify the relationship between review of action and inaction. One option would be to amend § 706(1) to read: “compel agency action unlawfully withheld or unreasonably delayed, under the same standards of review applied to an agency action under subsection (2).” This statutory amendment would make clear that agency inaction must meet the same requirement as agency action: there must be a nonarbitrary, reasoned explanation.

2. Resolving When Reviewability of Agency Guidance Documents is Proper

There are currently few areas of public law doctrine as confusing as the rules surrounding so-called administrative “guidance.” As usefully defined by OMB, guidance refers to “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.” In APA terms, the category of guidance thus comprises two subcategories of rules, which the statute refers to as “interpretative rules” and “general statements of policy.”⁶⁶ The fundamental feature of both forms of guidance that distinguishes them from substantive rulemaking is that they do not change anyone’s legal rights or duties. Policy statements are pronouncements as to how an agency intends to use its resources to implement the law. Interpretive rules aim to clarify what an agency takes a statute or substantive rule to mean.

There are manifest benefits to guidance documents. They increase transparency about an agency’s views and intentions, to the benefit of regulated parties, the general public, Congress, and the White House. They also help to ensure that lower-level agency officials will follow a uniform approach, promoting consistency and fairness. Judicial review could discourage the beneficial use of informal guidance by threatening the agency with additional litigation. On the other hand, guidance is often thought to have the same impact on the public as substantive rulemaking. Regulated parties may interpret agency guidance as implicitly creating “safe harbors” for their behavior, thus effectively coercing compliance. Completely insulating guidance from judicial review thus seems inappropriate.

The classification of a rule as either an interpretive rule or policy statement currently has two important legal consequences. The first is that, under the APA, agencies may promulgate such rules without following notice-and-comment

⁶⁵ *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913,921 (D.C. Cir. 2008). See also *WildEarth Guardians v. EPA*, 751 F.3d 649,655 (D.C. Cir. 2014) (upholding an agency’s resource allocation decision because “the statute affords agency officials discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency’s regulatory agenda.”) To similar effect, see *id.* at 653-656 (D.C. Cir. 2014). The EPA more recently relied on this argument in rejecting a petition to list concentrated animal feedlots as sources of air pollutants, based on measurement difficulties and the diversity of the operations within this category. See *EPA Denies Petition to Regulate CAFOs Under CAA*, ENVIRO.BLR.coM (Dec. 29, 2017), <https://enviro.blr.com/environmental-news/water/agricultural-waste/EPAdenies-petition-to-regulate-CAFOsunder-CAA>.

⁶⁶ 5 U.S.C. § 553 (2016).

procedures. Hence, there is no mandated public participation in the formulation of guidance. The second is that, because the APA provides for judicial review only of “final agency action,” guidance may be deemed unreviewable precisely because it creates no new legal obligations.⁶⁷

We believe the law surrounding agency guidance practice could be significantly improved if the issues regarding notice-and-comment and “final agency actions” were disentangled. With regard to policy statements that genuinely bind no one, including the agency itself, the policies underlying the APA finality requirement—respect for agency autonomy and the conservation of judicial resources for concrete disputes—counsel against judicial review in all but exceptional cases. Agencies nonetheless should recognize that certain policies, while reserving administrative discretion in case-by-case application, may still raise genuine public concerns or have important foreseeable impacts that warrant inviting public participation in their formulation. We thus would encourage an agency to engage in notice-and-comment rulemaking for policy statements deemed significant on economic or other grounds.

On the other hand, we think that interpretive rules should categorically be treated as “final agency action,” and thus be reviewable as such, even if exempt from the APA’s notice-and-comment requirements. Under current law, courts faced with what they regard as an unsound interpretive rule may find it tempting to characterize the rule as substantive in order to induce the agency to rethink its approach within a notice-and-comment rubric. It would be more sensible, when an agency announces an authoritative interpretation in the form of a rule, to straightforwardly treat the interpretation as reviewable, subject to the same deference regime as would apply if it were a substantive rule.

3. Determining the Proper Venue for Review

There has been considerable confusion in some recent cases about whether regulations are subject to review in the court of appeals or district court. Review in district court can have the undesirable consequence of allowing a single judge to decide on the validity of an important regulation having nationwide significance. The main practical reason for review to be in a district court would be the need to allow the plaintiffs to provide more evidence in situations where they have not had the opportunity to enter evidence in the record previously.

As a general matter, this need does not apply when an action is based on an administrative record that affected parties were able to contribute to. For that reason, we recommend that judicial review be placed in the court of appeals in the case of any administrative action taken after public notice and comment, in any case involving a colorable claim that notice and comment should have been used, or in any case involving a regulation of nationwide applicability.

Admittedly, there are cases in which additional evidence is necessary, as when there is preliminary evidence of administrative bad faith. In those cases, the court of appeals should appoint a special master to oversee discovery, conduct a hearing if necessary, and report to the court.

4. Legitimizing Remands Without Vacatur

A special remedial issue is presented when a court is engaged in judicial review of rulemaking and finds a flaw in the agency’s justification for the rule. Must the court vacate the rule, or may it leave the rule in place pending a response from the agency?

⁶⁷ 5 U.S.C. § 704 (2018).

The vacatur issue has been controversial.⁶⁸ The issue was first aired in a prominent D.C. Circuit case, *Checkovsky v. SEC*.⁶⁹ Two judges, Judge Silberman⁷⁰ and Judge Reynolds (sitting by designation) argued for a remand without vacating the agency decision.⁷¹ The “remand without vacatur” practice has become firmly ensconced in the D.C. Circuit and has now been adopted by several other circuits.⁷² The standard test is found in *Allied-Signal, Inc. v. NRC*,⁷³ which focuses on the seriousness of the defects in the rule and the disruptive consequences of vacating (and possibly later reinstating) the rule.⁷⁴

Vacating an agency regulation seems like a particularly perverse remedy when the party challenging an order argues that it should have been more stringent but is rewarded by an order taking away even the less stringent order. On the other side, advocates of vacatur argue that if rules remain in effect pending adequate justification, the agency has no incentive to give an adequate justification in the first place. Notably, however, even those who oppose “remand without vacatur” are open to alternative routes to achieving the same result such as allowing the court to stay the mandate in the case, leaving the order vacating the agency action hanging in limbo.⁷⁵

We recommend that the APA be amended to formally recognize the legitimacy of remand without vacatur. It may also be worth considering inclusion of the *Allied-Signal* test in the statute in order to clarify the circumstances when this remedy is appropriate.

B. CLARIFYING AND LEGITIMATING JUDICIAL DEFERENCE

There are sound reasons for courts to defer to agencies, but if deference goes too far, it becomes a license for administrative abuses. In this section, we propose reforms to (1) clarify and legitimate judicial deference to an agency’s interpretations of its governing statute, (2) provide similar guidance on an agency’s interpretations of its own regulations, (3) make clear that a change of administration is not an adequate basis standing alone for changing policies, and (4) require courts to invalidate regulations when the public explanation is a pretext for a decision based on improper considerations.

⁶⁸ For a more recent review of the case law and scholarship, see Benjamin W. Tettlebaum, “Vacation” at the Farm: Why Courts Should Not Extend “Remand Without Vacation” to Environmental Deregulation, 97 CORNELL L. REV. 406, 410-417 (2012).

⁶⁹ *Checkovsky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994).

⁷⁰ *Id.* at 454.

⁷¹ *Id.* at 496.

⁷² For a sampling of cases, see *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 493 (D.C. Cir. 2014); *Nazareth Hosp. v. Sec’y U.S. Dep’t of Health & Human Serv’s*, 747 F.3d 172, 185 (3d Cir. 2014) (“general remedy for failure to adequately respond to rulemaking comments is not complete vacatur of an agency rule, but rather remand for additional consideration”).

⁷³ *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1992).

⁷⁴ *Id.* at 150-151. The test was first announced in *International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration*, 920 F.2d 960, 966-967 (D.C. Cir. 1990).

⁷⁵ For instance, in the opinion where he protests vehemently against remand without vacatur, Judge Randolph opined that the SEC could apply for a stay of the court’s mandate, which he considered the “usual and appropriate method of handling such matters.” *Checkovsky*, 23 F.3d at 493.

1. Embracing Chevron for Questions of Statutory Interpretation

In *Chevron, U.S.A., Inc. v. NRDC*,⁷⁶ the Court held that the agency's interpretation of the statute was entitled to deference because it was reasonable and because "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."⁷⁷ The Court emphasized that "Congress intended to accommodate both interests [implicated by its mandate], but did not do so itself on the level of specificity presented by these cases."⁷⁸ *Chevron* was limited by *United States v. Mead Corp.*⁷⁹ The *Mead* Court held that *Chevron* deference should apply only where "Congress delegated authority to the agency generally to make rules carrying the force of law, and... the agency interpretation claiming deference was promulgated in the exercise of that authority."⁸⁰

After *Mead*, the *Chevron* test now has at least three steps:

Step Zero. Does the agency have authority to issue rules or make adjudicative decisions that have the force of law? If the answer is "no," *Chevron* does not apply, but the agency may still receive some lesser degree of deference because of its expertise⁸¹ under the older *Skidmore* test.⁸² If the answer is "yes," the analysis moves to Step One.

Step One. Is the statute legally ambiguous? If not, the Court simply decides the interpretation of the statute by itself. Otherwise, the analysis moves to Step Two.

Step Two. Is the agency's interpretation reasonable (even if the court itself would have chosen a different interpretation)?⁸³

Step One of *Chevron* enables reviewing courts to preserve their traditional authority over determining statutory meaning. When the court finds the meaning of the statute clear, it need not defer to an agency's contrary view. If the court

⁷⁶ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Regarding the complexities of implementing *Chevron*, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 188 *YALE L.J.* 64 (2008). There seems to be considerable uncertainty in the lower courts about how to implement *Chevron*.

⁷⁷ *Id.* at 865.

⁷⁸ *Id.*

⁷⁹ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁸⁰ *Id.* at 226–27.

⁸¹ When *Chevron* does not apply, the agency receives the lower level of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1940), based primarily on the agency's expertise and experience.

⁸² See Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187 (2006) (arguing that *Chevron* should be applied more broadly than it was even before *Mead*, to allow decisions to be made by institutions more expert and more politically accountable than the courts).

⁸³ The reader may notice that we said "at least" three steps, because later decisions are hard to classify between the steps and have arguably added at least one and perhaps two more steps.

See *King v. Burwell*, 576 U.S. ____ (2015) (declining to apply *Chevron* test in major Obamacare case); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("enormous and transformative expansion in EPA's regulatory authority" would be required by agency interpretation).

proceeds to step two, the agency's interpretation has typically been upheld unless it is clearly unreasonable.

The *Chevron* doctrine has become increasingly complex over time, and many issues relating to its application remain mired in confusion. We recommend simplifying and clarifying *Chevron*. The Court has sometimes declined to apply *Chevron* to issues of great societal importance.⁸⁴ We recommend eliminating this "major questions" exception to *Chevron* deference, which simply gives courts an excuse to appropriate for themselves policy questions that Congress gave to the agency. Moreover, as many courts have done, we would suggest that Step Two analysis generally be conducted under the arbitrary-and-capricious test (taking into account any canons of interpretation or statutory presumptions that might apply at this stage).⁸⁵ Judges are familiar with this test, and it encompasses the crucial requirement of reasoned explanation. Because some conservatives are calling for severely curtailing judicial deference, it would be desirable to amend the APA to eliminate any doubt about the legitimacy of *Chevron*.

2. Granting Deference to Interpretation of Agency Regulations

An agency's interpretation of its own regulation also receives judicial deference under what is known as the *Auer* doctrine.⁸⁶ Like *Chevron*, *Auer* has also been under recent attack from conservatives, who claim without empirical evidence that agencies deliberately issue ambiguous rules so they will have a free hand to fix their meanings later. In our view, the argument for deference is at least as strong here, since the agency itself best understands its own regulations. There is also a strong need for uniformity in the application of regulations. For that reason, provided an interpretation is publicly available, we think it should be entitled to judicial deference, as current law recognizes.

3. Requiring Reasoned Analysis for Policy Reversals

The Trump administration's assaults on Obama-era regulations highlights a recurring issue: to what extent should courts defer to policy reversals stemming from political shifts?

The issue first surfaced in *Motor Vehicle Manufacturers Association v. State Farm*,⁸⁷ which overturned the Reagan administration's decision to rescind an earlier regulation requiring air bags or passive restraints in new cars. The Court's reasoning is encapsulated in the closing section of Justice White's majority opinion: "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis."⁸⁸ In contrast, the dissenters argued that a "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and

⁸⁴ A notable example is the Obamacare case cited in the preceding note.

⁸⁵ See Kent Bartlett and Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. (forthcoming 2018); Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018).

⁸⁶ *Auer v. Robbins*, 519 U.S. 452 (1997). Cass Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017), provides a full explanation of the doctrine and its critics while offering a compelling argument for *Auer*.

⁸⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983).

⁸⁸ *Id.* at 57.

regulations.”⁸⁹ More recently, in *FCC v. Fox Television Stations, Inc.*,⁹⁰ the Court upheld the decision of the FCC to abandon a previous policy regarding “fleeting obscenity” by broadcasters. Justice Scalia’s opinion for the Court held that the FCC’s change in stance was not arbitrary or capricious. In parts of the opinion, Scalia embraced Chief Justice Rehnquist’s dissenting opinion in *State Farm* wherein Rehnquist accepted the legitimacy of “political” considerations in regulatory decisions. But those portions of the *Fox Television* opinion represented only a plurality of justices.

In our view, it is inevitable that changes in presidential administrations or agency personnel will lead to differing policy views. We do not see such changes as relevant, however, in determining whether an agency has reasonably interpreted a statute or whether its policy decisions are adequately supported by the record. We suggest that the APA be amended to incorporate the *State Farm* approach explicitly and exclude the Scalia/Rehnquist approach.

4. *Assessing White House Intervention into Agency Decision-making*

The issue of policy reversals relates to the issue of White House interventions on agency decisions. In the leading case, the D.C. Circuit refused to consider evidence that the EPA had shifted its position because of White House pressure.⁹¹ There has been a vigorous debate among legal scholars over this issue.⁹² On the one hand, presidential involvement in important policy decisions seems inevitable and healthy in a democracy. Moreover, fishing expeditions into the behind-the-scenes decision-making process can easily turn into harassment. On the other hand, to the extent that the real decisions are made in the White House for reasons unrelated to the agency’s statutory mandate and public explanations, the agency rulemaking process seems like a charade.⁹³

Review based on the administrative record and the agency’s public explanation do at least serve to ensure that a decision is not legally or scientifically unsupportable, even if the agency was under White House pressure to take one side or another of a disputable question. When the outside pressure is severe, the agency has less ownership of the decision, and in principle, courts should be less willing to apply deference doctrines based on agency expertise or on congressional delegation to the agency.

White House involvement is most questionable when it is based on impermissible factors. For instance, the White House might direct the agency to take a proposed action on the basis of cost, when the statute requires a decision based purely on public health. The Supreme Court has made it clear that this is a basis for invalidating an agency decision. In *Whitman v. American Trucking Associations*,⁹⁴ after first

⁸⁹ *Id.* at 59.

⁹⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

⁹¹ *Sierra Club v. Castle*, 657 F.2d 298 (D.C. Cir. 1981).

⁹² Some of the important contributions to the literature on this issue include Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Sidney A. Shapiro and Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 U.C. DAVIS L. REV. 1457 (2015); Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 64 (2014); Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 691 (2014); Mark Seidenfeld, *The Irrelevance of Politics to Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012); Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 19 FORDHAM L. REV. 2487 (2011).

⁹³ One example is the incident discussed in Lisa Heinzerling, *The FDA’s Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014).

⁹⁴ *Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001).

holding that cost was not a factor that the EPA could consider in setting National Ambient Air Quality Standards (NAAQS), Justice Scalia went on to say:

Respondents' speculation that the EPA is secretly considering the costs of attainment without telling anyone is irrelevant to our interpretive inquiry. If such an allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.⁹⁵

Courts should not inquire into the decision-making process without a strong showing based on publicly available information. But in some cases, this barrier might be overcome. For instance, a president might announce his views in a tweet or public statement, or the transparency rules proposed in Part II might require public disclosure of OIRA communications to the agency. When further inquiry confirms that the agency's decision was based on legally irrelevant factors, the court should send the rule back to the agency for reconsideration.

The case for deference is also weakened when a decision is not truly made by the expert agency selected by Congress. *Chevron* deference is primarily based on the presumption that Congress intends the agency to have primary responsibility for resolving ambiguities. This rationale does not apply when the record reveals that the White House has vetoed an agency's interpretation that would have been deference-worthy and at least as sound (in the court's view) as the White House view now being offered as the agency's own. In such cases, the court should consider remanding to the agency for further consideration.⁹⁶

IV. REPEALING THE CONGRESSIONAL REVIEW ACT

The latitude with which Congress frequently delegates authority to administrative agencies has been a major source of strength for the modern regulatory state, but also a source of anxiety. On one hand, the model of conferring broad, but limited, authority to expert agencies that are controlled by presidential appointees, yet subject to judicial review, has produced a regulatory system that is highly deliberative and accountable, while still being appropriately politically responsive. On the other hand, as the membership of Congress changes, groups of legislators may become dissatisfied with how agencies are exercising the discretion that earlier Congresses conferred—measures which, even if lawful under the original statutory delegation, may be at odds with policy sentiment in the more recent Congress. Each Congress retains the legislative authority to amend earlier statutes and thus to narrow the scope of administrative authority they confer. Congress may even revoke specific regulations, as they did in amending the Motor Vehicle Traffic and Safety Act of 1976 to prohibit passenger restraint regulations that would rely on so-called “interlock devices,” which prevent a vehicle from starting or result in a persistent alarm noise until seat belts are fastened.

The process of statutory enactment is, however, cumbersome given the number of “vetogates” entailed in the ordinary legislative process. Moreover, even legislators successful at placing a regulatory issue on their colleagues' agenda and obtaining passage of an amendment to an earlier Act will still need the president's signature or a two-thirds majority in both Houses in order to formally limit through new law

⁹⁵ *Id.* at 471.

⁹⁶ See Shane, *supra* note 92, at 702.

the agency's policy making discretion. This explains Congress's frequent move before the 1980s to incorporate into administrative statutes so-called "legislative veto" provisions, which purported to enable Congress to nullify certain agency regulations without traversing the full process of statutory enactment and presentation to the president. The Supreme Court held such legislative vetoes unconstitutional in the 1983 case of *INS v. Chadha*.⁹⁷

Congress's eventual response to *Chadha* was the enactment in 1996 of the Congressional Review Act (CRA).⁹⁸ Recognizing it could not end-run the presidential signature requirement, Congress attempted to ensure at least that significant rule-makings would get legislative attention and, further, that the process of overturning regulations by statute could be streamlined.

The strategy might seem straightforward enough. Agencies promulgating rules are required to report them to Congress and to the Government Accountability Office (GAO). The GAO, within 15 days, reports to Congress whether the agency complied with a variety of analytic and procedural requirements. With regard to "major" rules, Congress gives itself authority to fast-track in each house a joint resolution that might be introduced to overturn the regulation.⁹⁹ Should any such resolution be enacted and signed, the disapproved rule:

may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.¹⁰⁰

Presumably, this limit on reissuance is to give the resolutions of disapproval the effect of *pro tanto* amendments to the underlying regulatory statutes, although the scope of the limitation on future regulations is unclear.

Despite what may have been good intentions on the part of the drafters, the results of the CRA have been mischievous. Congress can use the fast-track period only for a specified period of time.¹⁰¹ Should the review period for a particular rule expire during the administration of the same president who oversaw the issuing agency, there is virtually no chance that the president would sign a resolution of disapproval or that a two-thirds majority could be assembled in each house to overturn a presidential veto. Unsurprisingly, the only occasions on which the CRA has been used have occurred when a president from one of the major parties is succeeded by a president from the other major party, and the new president's party also controls

⁹⁷ *INS v. Chadha*, 462 U.S. 919 (1983).

⁹⁸ 5 U.S.C. § 801 *et seq.* (2018).

⁹⁹ Defined by the Small Business Regulator Enforcement Fairness Act, the term "major rules" means "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in: (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 U.S.C. § 804(2) (2018).

¹⁰⁰ *Id.* § 801(b)(2) (2018).

¹⁰¹ The period is not, however, insubstantial. The sixty days that the CRA confers is expressed in terms of Senate "session days" or House "legislative days." Given the legislative calendar, sixty "session" or "legislative" days can easily extend over more than half a year.

both houses of Congress. Prior to the election of Donald Trump, the only regulation actually overturned under the CRA was a regulation that became final toward the very end of the Clinton administration, which concerned the ergonomics of workplace equipment and processes. A Republican-controlled Congress disapproved the rule, with George W. Bush's signature, shortly after President Clinton left office.

The 2016 election of Donald Trump and the persistence of Republican majorities in both Houses, however, made the CRA a powerful weapon against regulatory initiatives by the Obama administration. As of February 2018, fifteen such rules have been overturned.¹⁰² Although Republicans portrayed these efforts as democratically healthy responses to last-minute regulations by an outgoing administration, they were no such thing. A perfect example was the Stream Protection Rule, designed to keep runoff from surface mining out of America's waterways. Although it took effect as a final rule on President Obama's last day in office, it emerged from a process of analysis, public comment, and deliberation that started almost as soon as Obama took office eight years earlier.¹⁰³

In November 2009, the Department of the Interior published an "advance notice of proposed rulemaking," which described ten plausible alternative approaches "to significantly reduce the harmful environmental consequences of surface coal mining operations in six Appalachian states."¹⁰⁴ The Department then took over five years to analyze nearly 33,000 public comments and analyze the environmental and regulatory impact of the alternatives. The final rule didn't emerge until December 2016, intended to take effect a month later. Yet using its fast-track process, Congress voided eight years of work in just three days, January 31 through February 2, 2017, without any hearings or committee deliberation whatsoever. The disapproval was debated for an hour in the House and for portions of two days' business in the Senate.

The CRA looks yet more troublesome when one considers a handful of critical problems posed by its text. First, it is not completely clear whether the "rules" covered by the CRA are only the legislative rules adopted pursuant to notice-and-comment rulemaking, or also policy statements and interpretive rules. If the latter, the CRA's impact is completely unclear. Because policy statements and interpretive rules, by definition, cannot change the underlying law, it is somewhat puzzling what it would mean to veto them. Nevertheless, the GAO has concluded that a nonbinding general statement of policy is a rule subject to the CRA,¹⁰⁵ and Congress has for the first time issued a resolution of disapproval for a guidance document, the Consumer Financial Protection Bureau's guidance on discrimination in auto lending.

A second problem arises because, as it turns out, the Clinton, George W. Bush and Obama administrations were less than perfect in reporting new rules to Congress, as the CRA requires.¹⁰⁶ It has been proposed that Congress should thus be able to use

¹⁰² Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AMERICAN PROSPECT (Feb. 6, 2018), <http://prospect.org/article/congressional-review-act-damage-assessment>.

¹⁰³ Peter Shane, *The GOP's Radical Assault on Regulations Has Already Begun*, WASH. MONTHLY (Feb. 27, 2017), <https://washingtonmonthly.com/2017/02/27/the-gops-radical-assault-on-regulations-has-already-begun/>.

¹⁰⁴ Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS), 74 Fed. Reg. 228 (proposed Nov. 30, 2009), <https://www.gpo.gov/fdsys/pkg/FR-2009-11-30/html/E9-28513.htm>.

¹⁰⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, B-329129, BUREAU OF CONSUMER FINANCIAL PROTECTION: APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO BULLETIN ON INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT 1 (2017).

¹⁰⁶ CURTIS W. COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 46 (2014), https://www.eenews.net/assets/2017/02/22/document_pm_01.pdf.

the CRA indefinitely to revoke rules that should have been reported under the CRA, but which never were.¹⁰⁷ Of course, this could include rules of very long standing to which regulated parties have long adapted and on which the public now relies.

Finally, the ban on reissuing rules that are “substantially the same” as rules disapproved under the CRA is utterly mysterious. Consider, to take perhaps the most obvious example, a resolution disapproving a regulation that amended or revoked an earlier rule. If Rule B revoking Rule A is disapproved under the CRA, does that mean that Rule A can never be revoked by the agency in the future? That improbable result seems to follow directly from the statutory text.

Perhaps some of the uncertainties posed by the CRA could be cured by more careful drafting. We recommend instead its repeal.¹⁰⁸ The effort to short-circuit the ordinary legislative process in deciding how to treat recent regulatory or deregulatory activity is deeply misguided. The resolutions adopted early in the Trump administration laid waste to untold numbers of staff hours and agency expenditure over the course of the Obama administration. They did so without anything approaching real analysis or careful deliberation.

In sum, there is simply no good way of short-circuiting normal legislative procedures once Congress is confronted with the painstaking and often resource-intensive product of agency rulemaking activity. As the Supreme Court observed in *Chadha*, both the constitutional text and the debates that resulted in its drafting and ratification, reflect an “unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”¹⁰⁹ This is no less true when Congress is reacting to an agency’s implementation of a statutory mandate already enacted than when Congress is enacting a new delegation of administrative authority in the first place.

CONCLUSION

No human institution is perfect, including administrative agencies. In its wisdom, however, Congress over a period of many decades has created a network of administrative bodies and a sound process for regulatory policymaking that have produced rules of incalculable value to American families, consumers, workers, patients, students—everyone. To the extent the process can be made yet more inclusive, transparent, accountable, and evidence-based, regulatory reformers should pursue those goals. We believe that the measures we have described to improve agency rulemaking processes, discipline White House review of rules, clarify the law governing judicial review of agency action, and repeal the Congressional Review Act represent a starting agenda for regulatory reform that progressives can and should embrace.

¹⁰⁷ Lydia Wheeler, *Window Closing for Congress to Roll Back Obama-Era Regulations*, HILL (Apr. 1, 2017), <http://thehill.com/regulation/326812-window-closing-for-congress-to-roll-back-obama-era-regulations>; Philip A. Wallach and Nicholas W. Zeppos, *Is the Congressional Review Act About to Supercharge Deregulation?*, BROOKINGS (Apr. 4, 2017), <https://www.brookings.edu/blog/fixgov/2017/04/04/will-congressional-review-act-supercharge-deregulation/>.

¹⁰⁸ A recent report by the Center for Progressive Reform discusses in detail the arguments for repeal of the CRA. THOMAS O. MCGARITY ET AL., CENTER FOR PROGRESSIVE REFORM, *THE CONGRESSIONAL REVIEW ACT: THE CASE FOR REPEAL* (2018), http://progressivereform.org/articles/CRA_Repeal1_Case_050218.pdf.

¹⁰⁹ *INS v. Chadha*, 402 U.S. at 959.

ABOUT THE AUTHORS

Daniel Farber is the Sho Sato Professor of Law at the University of California, Berkeley. He is also the Faculty Director of the Center for Law, Energy, and the Environment. Farber serves on the editorial board of Foundation Press. He is a member of the American Academy of Arts and Sciences and a Life Member of the American Law Institute. He is the editor of *Issues in Legal Scholarship* and the author of eighteen books. Farber is a graduate of the University of Illinois, where he earned his B.A., M.A., and J.D. degrees. After graduation from law school, he was a law clerk for Judge Philip W. Tone of the U. S. Court of Appeals for the Seventh Circuit and then for Justice John Paul Stevens of the Supreme Court. Farber practiced law with Sidley & Austin, where he primarily worked on energy issues, before joining the University of Illinois College of Law faculty in 1978. He was a member of the University of Minnesota Law School faculty from 1981 to 2002. He also has been a Visiting Professor at the Stanford Law School, Harvard Law School, and the University of Chicago Law School.

Lisa Heinzerling is the Justice William J. Brennan, Jr., Professor of Law at Georgetown University. Her specialties include environmental law, administrative law, and food law. Heinzerling has been a visiting professor at Harvard Law School, Vermont Law School, and Yale Law School. She has published several books, including a widely cited critique of the use of cost-benefit analysis in environmental policy (*Priceless: On Knowing the Price of Everything and the Value of Nothing*, with Frank Ackerman). Peer environmental law professors have four times voted her work among the top ten articles of the year. From January 2009 to December 2010, Heinzerling served as a political appointee in the EPA Administrator's office, first as Senior Climate Policy Counsel and then as Associate Administrator of the Office of Policy. In 2008, she served as a member of President Obama's EPA transition team. After finishing law school, Heinzerling clerked for Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit and Justice William J. Brennan, Jr., of the U.S. Supreme Court. She was a Skadden Fellow at Business & Professional People for the Public Interest in Chicago, and for three years practiced environmental law in the Massachusetts Attorney General's office. Heinzerling is a graduate of Princeton University and the University of Chicago Law School.

Peter M. Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law at The Ohio State University Moritz College of Law. Shane teaches constitutional law, administrative law, legislation and regulation, and law and the presidency. Named a Distinguished University Scholar in 2011, he has written numerous law review articles and book chapters, and is author, co-author or editor of eight books. His 2009 book, *Madison's Nightmare: How Executive Power Threatens American Democracy*, was republished in 2016 by the University of Chicago Press. Shane's op-eds have appeared in *The Atlantic Online*, *The New York Times*, *The Washington Post*, *Washington Monthly*, and *Bloomberg BNA*. A graduate of Harvard College and Yale Law School, he served as an Office of Legal Counsel attorney-adviser and as an Assistant General Counsel in the Office of Management and Budget before entering full-time teaching in 1981. Shane was Dean of the University of Pittsburgh School of Law from 1994 to 1998 and is a Public Member of the Administrative Conference of the United States.

Truth is Truth: U.S. Abortion Law in the Global Context*

Martha F. Davis & Risa E. Kaufman**

Justice Anthony Kennedy's retirement from the U.S. Supreme Court, and the effort to fill his seat, have brought the fate of reproductive rights to the fore. During Justice Kennedy's tenure, the Court repeatedly affirmed the constitutional right to abortion established in *Roe v. Wade*,¹ including most recently in *Whole Woman's Health v. Hellerstedt*.² But abortion opponents have actively prepared for the moment when a new Justice will join the Court and an altered judicial line-up may have an opportunity to revisit the fundamental right to abortion and the robust constitutional framework protecting core personal liberty interests.³

Indeed, anti-abortion state legislators around the country have been busy. In 2017 alone, state legislatures enacted 63 laws restricting women's access to reproductive health care.⁴ In recent years, several states have enacted laws outlawing the standard procedure for abortions performed after approximately 15 weeks of pregnancy.⁵ Others have enacted more general pre-viability bans on abortion,⁶ including a ban on abortions performed at as early as six weeks of pregnancy.⁷ And many have enacted and expanded regulations targeting abortion providers and other barriers

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

³ CENTER FOR REPRODUCTIVE RIGHTS, *ROE AND INTERSECTIONAL LIBERTY DOCTRINE* (Apr. 20, 2018), <https://www.reproductiverights.org/document/report-roe-and-intersectional-liberty-doctrine>.

⁴ Elizabeth Nash et al., *Policy Trends in the States, 2017*, GUTTMACHER INSTITUTE (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

⁵ Alabama, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Texas, and West Virginia have all passed laws prohibiting the most common second trimester abortion procedure, dilation & evacuation (D&E). See *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INSTITUTE (July 1, 2018), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>.

⁶ Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin all ban abortion pre-viability at 20 weeks or earlier with limited exceptions. See *An Overview of Abortion Laws*, GUTTMACHER INSTITUTE (July 1, 2018), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

⁷ Iowa and North Dakota. See Kristine Phillips, *Iowa Governor Signs 'Heartbeat' Bill Banning Abortion After Six Weeks*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/05/02/iowa-lawmakers-just-passed-one-of-the-most-restrictive-abortion-bills-in-the-u-s/?utm_term=.ab664da112ed; Press Release, Center for Reproductive Rights, Federal Judge in ND Blocks the Nation's Earliest and Most Extreme Abortion Ban (July 22, 2013), <https://www.reproductiverights.org/press-room/federal-judge-in-nd-blocks-the-nations-earliest-and-most-extreme-abortion-ban>.

making abortion increasingly inaccessible.⁸ The result is a patchwork of access to abortion care across the United States,⁹ with restrictions on abortion access particularly impacting marginalized communities, including immigrants, low-income women, and women of color.¹⁰

Despite this reality, as part of the effort to enact new abortion restrictions, abortion opponents increasingly characterize laws regarding abortion access in the United States as being far more permissive than the rest of the world. To support this argument, they point to a rudimentary global tally of national laws on abortion and urge policymakers to enact bans and further restrictions on abortion access in order to bring the United States more in step with “international norms” on abortion access.¹¹

This message is gaining traction both with the media and lawmakers looking for bite-sized memes to support further abortion restrictions. But international norms on abortion access cannot be portrayed through a “yes-no” tally, and uncritical reliance on a simplified scorecard is misleading, inaccurate, and ignores important protections for women’s health. This Issue Brief examines access to abortion care in light of both global practice and international human rights law and provides analysis for a more accurate and reliable comparison between the U.S. and its international counterparts.

I. ABORTION OPPONENTS’ EMBRACE OF FOREIGN LAW

The crux of abortion opponents’ comparative law argument is that the legal and policy framework regarding abortion access in the United States is far more permissive than in the vast majority of other countries and thus runs counter to international norms on abortion.

As support for this argument, abortion opponents frequently cite a report by the conservative Charlotte Lozier Institute, published in 2014, that compares U.S. gestational limits on abortion to gestational limits in the abortion laws of other countries in order to determine “where the United States stands in comparison to international

⁸ These include restrictive clinic licensing systems; requirements that women delay obtaining an abortion after receiving state-mandated information; and requirements that a woman make two separate trips to and from the clinic before she can obtain an abortion. For an overview of barriers to access and their impact, see *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INSTITUTE (Feb. 2018), <https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws>; *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE (July 1, 2018), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>; Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences For Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSP. ON SEXUAL AND REPRODUCTIVE HEALTH 95 (2017).

⁹ Six states have only one abortion provider, and many of those providers are at risk of closing due to additional restrictions. Linley Sanders, *Inside the States with One Abortion Clinic: Kentucky Fights for its Last Provider in 2018*, NEWSWEEK (Jan. 8, 2018, 8:00 AM), <http://www.newsweek.com/state-without-abortion-clinic-kentucky-772692>. A recent study found that there are over 27 cities in the United States where the lack of abortion facilities may force people to travel over 100 miles to get abortion services. Alice Cartwright et al., *Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search*, 20 J. MED. INTERNET RES. 186 (2018).

¹⁰ Indeed, as the U.N. Special Rapporteur on Poverty recently recognized, numerous legal and practical limitations on abortion access in the United States, such as mandatory waiting periods and long driving distances to clinics, have a particular impact on people who are poor and trap them in poverty. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 56, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

¹¹ See notes 12-24, and accompanying text, *infra*.

norms.”¹² The report asserts that the U.S. is one of seven nations that permits elective abortion after twenty weeks.¹³ Characterizing the United States as on the “fringe, ultra-permissive end of the spectrum,”¹⁴ the report states that the United States “is within the top 4% of most permissive abortion policies in the world (7 out of 198) when analyzing restrictions on elective abortion based on duration of pregnancy.”¹⁵ It concludes that legislative efforts to enact later-term abortion bans would move the United States closer “to international norms” on abortion.¹⁶

State lawmakers have seized on these conclusions and their underlying rationale. In 2018, the Mississippi legislature enacted a pre-viability abortion ban justified, in part, on this comparative analysis. The bill, H. B. No. 1510,¹⁷ bans abortion after 15 weeks with limited exceptions for “a medical emergency or in the case of a severe fetal abnormality.” The legislative findings underlying the law note that:

The United States is one (1) of only seven... nations in the world that permits nontherapeutic or elective abortion-on-demand after the twentieth week of gestation. In fact, fully seventy-five percent (75%) of all nations do not permit abortion after twelve weeks’ gestation, except (in most instances) to save the life and to preserve the physical health of the mother.¹⁸

The state of Texas similarly relied on the justification. In 2017, the state enacted S.B. 8, containing a number of abortion restrictions, including a law criminalizing performance of the standard dilation and evacuation (D&E) abortion procedure, the safest and most common abortion procedure available after approximately 15 weeks of pregnancy.¹⁹ In defending the constitutionality of the law, the state asserted that its interest in instituting the ban is “reinforced by considering the context of the State’s abortion law among the international community.”²⁰ The state draws on a comparative analysis performed by University of Notre Dame law professor Carter Snead to assert that “92% of the world’s countries—the overwhelming international consensus—ban abortion outright after the first trimester (12 weeks), with some exceptions,” and that Texas’s abortion law is “more permissive than 95% of other countries in terms of gestational limits.”²¹

Some federal lawmakers have embraced the rationale, as well. During U.S. Senate debates on the Pain-Capable Unborn Child Protection Act of 2015,²² which would

¹² ANGELINA BAGLINI, *GESTATIONAL LIMITS ON ABORTION IN THE UNITED STATES COMPARED TO INTERNATIONAL NORMS* 3, CHARLOTTE LOZIER INSTITUTE (2014), <https://s27589.pcdn.co/wp-content/uploads/2014/02/American-Reports-Series-INTERNATIONAL-ABORTION-NORMS.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 8.

¹⁷ H.B. No. 1510, Reg. Sess. (Miss. 2018) (The Gestational Age Act).

¹⁸ *Id.* at § 1(2)(a).

¹⁹ S.B. No. 8, 85th Leg. Sess. (Tex. 2017).

²⁰ Brief for Appellants at 23, *Whole Woman’s Health v. Paxton* (5th Cir. 2018) (No. 17-51060).

²¹ *Id.*

²² 162 CONG. REC. S6,822-47 (daily ed. Sept. 21, 2015), <https://www.congress.gov/crec/2015/09/21/CREC-2015-09-21-pt1-PgS6822-2.pdf> (statements on the Pain-Capable Unborn Child Protection Act—Motion to Proceed).

have banned abortions at or after 20 weeks' gestation, with very limited exceptions,²³ numerous U.S. Senators cited to the "one of seven" statistic. A spokesman for at least one Senator confirmed that the Charlotte Lozier Institute report was the source for the Senator's argument.²⁴

Comparative abortion statistics are also increasingly cited in the media. In 2017, *The Washington Post* published an article purportedly "fact-checking" the claim that the U.S. was one of seven nations that allow elective abortions after twenty weeks of pregnancy,²⁵ concluding that the "one of seven" statistic, sourced to the 2014 Charlotte Lozier Institute report, was "surprisingly true."²⁶ The conservative *National Review* praised the *Post's* article.²⁷ Boston NPR station WBUR published an op-ed by a conservative commentator that relied upon the one of seven statistic to argue "that the rest of the world is not so ardent" about unrestricted abortion access.²⁸

Anti-abortion activists' embrace of a comparative law approach may seem to spring from their own inventiveness. In fact, the tactic was foreshadowed, and perhaps inspired, by Justice Scalia's critique of U.S. courts' consideration of foreign law in domestic constitutional cases. Dissenting in *Roper v. Simmons*, Justice Scalia criticized the Court's citation to international and foreign law in support of its holding that the juvenile death penalty violates the Eighth Amendment's prohibition on cruel and inhuman treatment.²⁹ Justice Scalia expressed particular concern with what he characterized as the Court's effort to conform American law to the laws of the rest of the world. Asserting that the United States is "one of only six countries that allow abortion on demand until the point of viability,"³⁰ he urged the Court to "either profess its willingness to reconsider matters in light of the views of foreigners, or else cease putting forth foreigners' views as part of the *reasoned basis* of its decision."³¹ He further asserted that, "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."³²

²³ *Id.* The bill has passed the House and is in the Senate Committee on the Judiciary. See H.R. 36, 115th Cong. (2018).

²⁴ W. Gardner Selby, *Is U.S. Nearly Alone in Allowing Late-Term Abortions? Not Exactly*, POLITIFACT (Nov. 5, 2015, 11:07 AM), <http://www.politifact.com/texas/article/2015/nov/05/us-nearly-alone-allowing-late-term-abortions-not-e/>.

²⁵ Michelle Ye Hee Lee, *Is the United States One of Seven Countries That 'Allow Elective Abortions After 20 Weeks of Pregnancy?'*, WASHINGTON POST (Oct. 9, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy/?noredirect=on&utm_term=.35a47a714787.

²⁶ *Id.*

²⁷ Jonah Goldberg, *'That's Barbaric,' NAT'L REV.* (Oct. 10, 2017, 8:44 PM), <https://www.nationalreview.com/corner/abortion-washington-post-fact-check-international-limits/>. See also Dexter Dugen, *Media Technology Advances... But Newsrooms Live 45 Years in The Past On Knowing Abortion Law*, THE WANDERER (Oct. 24, 2017), <http://thewandererpress.com/catholic/news/frontpage/media-technology-advances-but-newsrooms-live-45-years-in-the-past-on-knowing-abortion-law/>.

²⁸ Rich Barlow, *It's OK To Be Conflicted About Abortion — You're Not Alone*, WBUR (Apr. 18, 2018), <http://www.wbur.org/cognoscenti/2018/04/18/pro-life-pro-choice-rich-barlow>.

²⁹ *Roper v. Simmons*, 543 U.S. 551, 607–30 (2005) (Scalia, J., dissenting).

³⁰ *Id.* at 625.

³¹ *Id.* at 628.

³² *Id.* Justice Scalia again brought up comparative abortion law in a 2005 published conversation with Justice Breyer, examining U.S. judges' consideration of international and foreign law. Justice Scalia argued that justices utilize foreign law only when it supports "what the justices would like the case to say," and as an example stated that the U.S. is "one of only six countries in the world that allows abortion on demand any time prior to viability." Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. OF CONST. L. 519 (2005).

Abortion opponents have picked up the mantel, undergirding legal and policy justifications for abortion restrictions with reference to foreign law. In this Issue Brief, we demonstrate that a deeper analysis of facts and context, as well as international human rights law, discredits both their approach and their conclusions.

II. DEBUNKING THE MYTH

There is nothing inherently troubling about looking beyond U.S. borders to inform legal and policy approaches. Both foreign law (the domestic laws of countries other than the United States) and international human rights law (derived from international and regional human rights treaties and the conclusions and analyses of international and regional human rights bodies and experts) can provide a useful perspective for U.S. courts as well as policymakers as they assess legal questions, policy, and practice.³³ As Justice Breyer has stated, the experience of respected international bodies and courts can “cast an empirical light on the consequences of different solutions to a common legal problem.”³⁴ However, to be useful, comparative analysis must be based upon careful accounts and relevant comparisons. In this section, we discuss the ways in which the global tally cited by abortion opponents rests on both a flawed methodology and an inaccurate portrayal of international norms around abortion.

First, to truly provide insight into the existence of an international norm or consensus, a global comparative approach must give an accurate account of the laws that are being compared. As we demonstrate below, the descriptions that underlie the global abortion tally fail to meet this threshold standard.

Second, even when relevant laws are accurately described, a valid comparative analysis requires more than just nose-counting. As set out succinctly by Edward Eberle in his article *The Methodology of Comparative Law*, “[i]t is not enough simply to compare words on the page. Law sits within a culture.”³⁵ Scholars Mark Van Hoecke and Mark Warrington concur, stating that it is not words alone, but “social practice which is determining the actual meaning of the rules and concepts, their weight,

³³ For example, in *Graham v. Florida*, a case challenging the practice of sentencing juveniles to life in prison without the possibility of parole, the Supreme Court continued its “longstanding practice” of looking “beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.” *Graham v. Florida*, 560 U.S. 48, 80 (2010). See also *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision and a special committee report to the British Parliament in holding that Texas law criminalizing consensual sexual conduct between same-sex partners was at odds with norms of Western civilization); Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME 127 (Cynthia Soohoo et al. eds., 2008); BARBARA M. OOMEN, MARTHA F. DAVIS & MICHELE GRIGOLO, *GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES* (2016).

³⁴ *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (supporting Justice Stevens’ dissent by arguing that looking to the federalist systems of other countries might provide insight into the question of whether U.S. Constitutional law permits Congress to impose an obligation on state governments). See also Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 11–88 (2006) (cataloging the ways in which the Supreme Court has drawn on foreign and international law in cases throughout its history).

³⁵ Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WMS. U. L. REV. 51, 65 (2011).

their implementation, and their role in society.”³⁶ In the case of abortion regulation, that social practice is captured in the wider set of laws concerning women’s reproductive health, a context which abortion opponents’ global tally completely ignores.

A. THE MISLEADING NATURE OF THE STATISTICS

When used irresponsibly, statistics can as easily mislead as inform. In this instance, they are misleading: the “one of seven” and “92%” statistics rest on inaccurate descriptions of the surveyed laws, cherry-picking portions of the abortion regulations under examination and ignoring their full scope.

For example, the global tally cites legislative limitations in isolation, without reading the full law and noting the exceptions to these limits, painting a misleading picture of the global reality. Many countries’ laws impose gestation limits on abortion access while simultaneously allowing for broad exceptions after the gestational limit has expired, thus permitting abortion access later in pregnancy. Exceptions for social or economic circumstances allow women in many countries to access abortion later than the gestation period identified in a blindered reading of the law’s text.³⁷ Similarly, exceptions for health, including mental health, allow women to access abortion care in many countries (including the vast majority of European countries), despite nominal gestation limits.³⁸

The global tally also fails to examine the broader context of overall access to reproductive care, including (i) contraception, (ii) maternal health care, (iii) access to medical information, and (iv) availability of early abortions (both in terms of cost and access to providers). This contextual information is critical to understand the rationales animating the comparative legislative schemes and the true impacts of legislative provisions on abortion access globally.³⁹

For example, the global tally relies on isolated provisions of German abortion law to count Germany as more restrictive than the U.S., yet Germany’s reproductive health laws provide significantly more support for women seeking to avoid and end unintended pregnancies. Unlike the U.S., Germany offers citizens and permanent residents universal health insurance, and provides health care for refugees and undocumented immigrants who are acutely ill, in pain, or pregnant.⁴⁰ Germany also subsidizes

³⁶ Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L AND COMP. L. Q. 495, 496 (1998). See also Mark Van Hoecke, *Methodology of Comparative Legal Research at 1*, LAW AND METHOD (Dec. 2015) (“In all cases, however, comparison should never stop at the level of legislation, and even not at the level of case law, as the social reality may be more different than similar rules suggest (and sometimes more similar than different rules would suggest).”).

³⁷ LOVITIDENDE FOR KONGERIGET DANMARK, Part A, no. 32, 993–95 (July 6, 1973) (Den.), translation at <https://cyber.harvard.edu/population/abortion/Denmark.abo.htm>; Penal Law, 5737-1977 § 316(a), 5 LSI 98 (2005) (Isr.); Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

³⁸ See, e.g., CODE DE LA SANTÉ PUBLIQUE [PUBLIC HEALTH CODE] art. L2213-1 (Fr.); SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] art. 119 (Switz.); Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1993), vol. 33 (Ind.); Termination of Pregnancy Act, Cap. 304 (1994) § 3(1) (a)(ii) (Zam.).

³⁹ See generally Vicki Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 217–18 (2013) (“In social welfare states that provide support, as a matter of right, for the health care needs of pregnant women and their children... the effects of more restrictive time periods, or of limited reasons for abortion, might be less harmful to women’s equality.”).

⁴⁰ BUNDESMINISTERIUM FÜR GESUNDHEIT, HEALTH GUIDE FOR ASYLUM SEEKERS IN GERMANY 3 (2016), https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/5_Publikationen/Gesundheit/Broschueren/Ratgeber_Asylsuchende_EN_web.pdf.

contraception for women under 20 years of age.⁴¹ For many women, that health insurance covers abortion care as well; abortion is publicly funded for low-income women, when medically indicated, and in cases of rape.⁴² In addition, German laws ease the financial burdens of parenting, providing mothers with vocational training and entitlement to supported daycare for children, starting at 12 months of age.⁴³

In comparison, restrictive abortion laws adopted by U.S. states are typically part of a larger web of obstructions to reproductive health care access. For example, the state of Texas has made a concerted effort to reduce access to abortions. Texas has attempted to ban a common abortion procedure, dilation and evacuation (D&E), something that no country in the world has done.⁴⁴ With narrow exceptions, public health insurance through Texas Medicaid does not cover abortions, and the state recently passed a law preventing private insurers from covering abortion care unless it is offered under a separate premium and signed for separately.⁴⁵ Burdensome and medically unnecessary regulations targeting abortion care providers have also rendered abortion care difficult to access, preventing providers from making abortion care available.⁴⁶ This reduced access has forced some women to obtain abortions later in pregnancy than they would otherwise choose.⁴⁷ Yet at the same time, one-quarter of Texas public schools do not include sex education in their curricula,⁴⁸ and access to contraception has been further curtailed by Texas's exclusion of Planned

⁴¹ SOZIALGESETZBUCH V GESETZLICHE KRANKENVERSICHERUNG [SGB V] [SOCIAL HEALTH INSURANCE CODE], § 24a(2) (Ger.) (under universal health insurance in Germany, all insured persons are entitled to prescription contraceptives up to the age of twenty, including emergency contraception).

⁴² Daniel Grossman et al., *Public Funding for Abortion Where Broadly Legal*, 94 *CONTRACEPTION* 453, 458 (2016).

⁴³ *Id.* at 153. See also Friederike Heine, *Birth Rate Boon? Germany Promises Daycare for All*, *DER SPIEGEL* (Aug. 1, 2013, 10:07 PM), <http://www.spiegel.de/international/germany/law-goes-into-effect-requiring-child-care-for-most-german-children-a-914320.html>; Caitlyn Collins, *In Germany, Parents Can Sue the Government for Failing to Provide Child Care*, *THE ATLANTIC* (Jan. 10, 2017), <https://www.theatlantic.com/business/archive/2017/01/german-childcare/512612/>.

⁴⁴ Texas is not alone in this effort. D&E procedures have also been targeted in other U.S. states, including Mississippi and West Virginia. See *Bans on Specific Abortion Methods Used After the First Trimester*, *GUTTMACHER INSTITUTE* (July 1, 2018), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>. Yet the World Health Organization recommends that abortion providers employ this very procedure as a method of safe abortion for pregnancies over 12 to 14 weeks in gestation age. *WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 4, 31–32 (2012), http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf.

⁴⁵ *TEX. HUM. RES. CODE ANN.* § 32.024(c-1) (West 2017); *TEX. INS. CODE ANN.* § 1218.004–06 (West 2017). Texas Medicaid will cover only abortions that result from rape or incest, or that threaten the life of the mother. *TEXAS MEDICAID & HEALTHCARE PARTNERSHIP, TEXAS MEDICAID PROVIDER PROCEDURES MANUAL* 30 (2018), http://www.tmhp.com/Manuals_PDF/TMPPM/TMPPM_Living_Manual_Current/2_Gyne_and_Repro_Health_Srvs.pdf.

⁴⁶ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); Alexa Ura et al., *Here Are the Texas Abortion Clinics That Have Closed Since 2013*, *TEXAS TRIBUNE* (June 28, 2016, 6:00 AM), <https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013/>.

⁴⁷ Daniel Grossman et al., *Change in Abortion Services After Implementation of a Restrictive Law in Texas*, 90 *CONTRACEPTION* 496, 498–99 & tbl. 1 (2014) (finding a decrease in provision of early-term medical abortions and an increase in the proportion of abortions performed in the second trimester after Texas's restrictive H.B.2 abortion law went into effect).

⁴⁸ Cassandra Pollock, *Study: A Quarter of Texas Public Schools No Longer Teach Sex Ed*, *TEXAS TRIBUNE* (Feb. 14, 2017, 3:00 PM), <https://www.texastribune.org/2017/02/14/texas-public-schools-largely-teach-abstinence-only-sex-education-repor/>.

Parenthood centers from receiving public funds for family planning services.⁴⁹ Texas is just one example; 19 states enacted new abortion restrictions in 2017.⁵⁰

Given the larger contexts in which these laws are enacted, it is clear that a superficial comparison of different jurisdictions' gestational limits on abortion—encapsulated in the “one of seven” and “92%” statistics—paints a misleading picture of where U.S. policies lie in the universe of worldwide reproductive health laws.

B. ERRONEOUS ASSUMPTIONS UNDERLYING THE TALLY

Abortion opponents' comparative tally of international abortion laws also rests on the erroneous assumption that nose-counting, an assessment conducted purely by numbers, can substitute for a valid comparative methodology or can evince an “international norm” on abortion. As succinctly explained by Harvard Law Professor Mark Tushnet, a leading scholar in comparative constitutional law, such nose-counting “has been rejected.”⁵¹ One concern is that under this approach, “each jurisdiction, no matter what its size or global importance, counts equally— rather than weighted by population or in some other way.”⁵² Further, avers Tushnet, “[n]ose-counting also is entirely insensitive to differences in constitutional language, and, more broadly, to differences in constitutional traditions,” as well as “the institutional arrangements by which constitutional doctrine is implemented.”⁵³

Violating accepted comparative methodology, the tally treats all countries' abortion laws as relevant for both comparing United States' law and practice and also for identifying an international consensus, even though many of the countries listed do not share a legal tradition or other commonalities. Notably, many of the countries that inform the statistic have dramatically different legal traditions concerning gender equality and the role of religion in the law.

For example, many countries restrict abortion entirely on religious grounds, a legal approach that is fundamentally inconsistent with the American constitutional imperative against the entanglement of church and state. One of the countries included in the tally, Somalia, operates under a mix of civil law, Shari'ah, and traditional law (Xeer), and its Provisional Constitution enshrines Islam as the state religion.⁵⁴ Based on a conservative interpretation of Shari'ah law, Somalia bans abortion (subject to a “necessity” exception that only explicitly permits abortion to save the woman's life).⁵⁵ Similar religiously-based bans to abortion are followed in Saudi

⁴⁹ Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 *NEW ENG. J. MED.* 853 (2016). For information on restrictions in other states, see GUTTMACHER INSTITUTE, *State Policy Updates: Major Developments in Sexual & Reproductive Health*, <https://www.guttmacher.org/state-policy/explore>.

⁵⁰ Elizabeth Nash et al., *Policy Trends in the States, 2017*, GUTTMACHER INSTITUTE (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

⁵¹ Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 *ST. LOUIS U. L.J.* 671, 674 (2005).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *The World Factbook: Somalia*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>; SOMALIA (PROVISIONAL) CONST., art. 2 (2012), translation at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_233457.pdf (banning laws that are “not compliant with the general principles and objectives of Shari'ah”).

⁵⁵ SOMALIA (PROVISIONAL) CONST., art. 15 (2012).

Arabia, Yemen, Afghanistan, El Salvador, and Malaysia, among others.⁵⁶ These examples highlight the perils of assuming the existence of a worldwide normative consensus based on a simple tally that obscures countries' dramatically different, and often antithetical, legal traditions.

In contrast, more relevant comparators—that is, the many countries with which the U.S. shares legal traditions—typically ensure their citizens have access to reproductive health care that includes abortion care. For instance, women in Great Britain may obtain abortions until 24 weeks.⁵⁷ This is offered as part of the National Health Service's broader reproductive health care coverage, which also provides comprehensive contraceptive access.⁵⁸ In Canada, with a legal tradition very similar to the U.S., abortion has been decriminalized since 1988.⁵⁹ Moreover, abortion care is largely covered under Canada's publicly financed and administered health care system.⁶⁰ A comparative law analysis truly intended to illuminate the approach of U.S. law among its peer nations, would give particular weight to the laws and practices of these systems.

C. THE INTERNATIONAL TREND IS IN FACT TOWARDS LIBERALIZATION

The inaccurate and misleading “one of seven” and “92%” statistics also mask the dynamic nature of law. In fact, abortion laws are not static and, nation by nation, global trends in abortion are moving toward liberalization.

According to the United Nations agency responsible for collecting and analyzing data, since 1996, “legal grounds for abortion have expanded in a growing number of countries in both developing and developed regions,” and “between 1996 and 2013, 56 countries... increased the number of legal grounds for abortion,” while only

⁵⁶ *Abortion Policies: A Global Review*, U.N. POPULATION DIVISION, <http://www.un.org/esa/population/publications/abortion/profiles.htm>; Penal Code, art. 402–06 (Afg.); MALAYSIAN CONST. art. 3, *translation at* [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf); Código Penal [Criminal Code], art. 133–37 (El Sal.).

⁵⁷ Abortion Act 1967, 1(1)(a) (Eng.), <https://www.legislation.gov.uk/ukpga/1967/87/contents>. In Great Britain, women may obtain abortions until 24 weeks of pregnancy if continuation of the pregnancy “would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant women or any existing children of her family.” *Id.* The overwhelming majority of these abortions are performed on the basis of a risk to the woman's mental health. U.K. DEPT. OF HEALTH, ABORTION STATISTICS, ENGLAND AND WALES: 2016 8 (2018), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679028/Abortions_stats_England_Wales_2016.pdf. Abortion is legal later in pregnancy including in situations of risk to life or to prevent grave injury to physical or mental health. Abortion Act 1967, 1(1)(b-d) (Eng.).

⁵⁸ National Health Service Act 1977, § 5(1)(b) (Eng.), <https://www.legislation.gov.uk/ukpga/1977/49/contents>.

⁵⁹ *R v. Morgantaler*, [1988] 1 S.C.R. 30 (Can.); VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 211 (2013).

⁶⁰ Canada Health Care Act, R.S.C.z 1985, c C-6 (Can.); HEALTH CANADA, *CANADA HEALTH ACT ANNUAL REPORT 2016–17* 22 (2018), <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/health-system-services/canada-health-act-annual-report-2016-2017/canada-health-act-annual-report-2016-2017-eng.pdf>. *See also* LAG OM ABORT [ABORTLAGEN] (Svensk Författningssamling [SFS] 1974:595) (Swed.) (allowing abortion regardless of reason through 18 weeks' gestation, and for special reasons until viability).

eight reduced the number of legal grounds.⁶¹ This trend toward liberalization is apparent across the globe, among different cultural traditions and on multiple continents—in Australia, Colombia, and Spain, to name a few.⁶² The trend has been particularly pronounced in Europe, where the vast majority of countries now permit abortion without regard to reason during the first trimester, and under a broad range of circumstances thereafter.⁶³

The recent repeal of the Eighth Amendment in Ireland is consistent with this global trend. On May 25, 2018, the citizens of the Republic of Ireland voted overwhelmingly to repeal the constitutional provision limiting abortion to circumstances when the life of the woman is at risk.⁶⁴ This repeal initiates the process for the Irish Parliament (Dáil) to create policies permitting and regulating abortion.⁶⁵

III. INTERNATIONAL HUMAN RIGHTS LAW RECOGNIZES AND PROTECTS ACCESS TO SAFE AND LEGAL ABORTION

In addition to liberalization of national laws on abortion, international human rights law, too, increasingly recognizes and protects access to safe and legal abortion as central to women's autonomy and reproductive health. This trend in international human rights law, derived from international declarations, resolutions, and treaties, as well as decisions, findings, and recommendations of U.N. human rights treaty monitoring bodies and U.N. mandated experts, belies the argument that the U.S. is "out of step" with international norms. In fact, an international human rights analysis—completely ignored by abortion opponents' global tally of abortion laws—paints a very different picture of the international norms pertaining to abortion access.

International human rights law has increasingly identified access to safe and legal abortion as essential to protect women's human rights and achieve gender

⁶¹ U.N. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS POPULATION DIVISION, ABORTION POLICIES AND REPRODUCTIVE HEALTH AROUND THE WORLD 1 (2014), <http://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf>; see also CENTER FOR REPRODUCTIVE RIGHTS, ABORTION WORLDWIDE: 20 YEARS OF REFORM (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/20Years_Reform_Report.pdf (describing how, since 1994, more than 30 countries expanded the grounds under which women can access abortion services legally); Louise Finer & Johanna Fine, *Abortion Law Around the World: Progress and Pushback*, 103 AM. J. PUB. HEALTH 585 (2013).

⁶² See, e.g., *Crimes (Abolition of Offence of Abortion) Act 2002 (ACT)* (Austl.) (removing abortion from the criminal code in the Australian Capital Territory); Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.) (finding, by Colombia's Constitutional Court, that the country's absolute prohibition on abortion is unconstitutional); Ley Orgánica 2/2010 de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo (B.O.E. 2010, 3514) (Spain) (amending Spain's prior abortion ban to a law permitting abortion within the first 14 weeks of gestation regardless of reason, and later in the case of fetal anomaly or risk to the mother's health or life).

⁶³ See generally Mark Levels et al., *A Review of Abortion Laws in Western-European Countries. A Cross-National Comparison of Legal Developments Between 1960 and 2010*, 118 HEALTH POLICY 95 (2014).

⁶⁴ *Irish Abortion Referendum: Ireland Overturns Abortion Ban*, BBC (May 26, 2018), <https://www.bbc.com/news/world-europe-44256152>.

⁶⁵ *Id.*

equality.⁶⁶ Drawing upon earlier U.N. consensus documents connecting international human rights to reproductive freedom,⁶⁷ in 2018, the U.N. Human Rights Council reaffirmed the global consensus that ensuring reproductive health and safety, including access to abortion, is of the utmost importance under international law. Specifically, the Council reaffirmed that “the full enjoyment of all human rights by women includes their right to have control over and to decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health.”⁶⁸ It urged states to

promote and protect sexual and reproductive health and reproductive rights . . . and to respect, protect and fulfil the right of every woman to have full control over and decide freely and responsibly on all matters relating to their sexuality and sexual and reproductive health, free from discrimination, coercion and violence, including through the removal of legal barriers and the development and enforcement of policies, good practices and legal frameworks that respect bodily autonomy and guarantee universal access to sexual and reproductive health, services, evidence-based information and education, including for . . . safe abortion in accordance with international human rights law and where not against national law . . .⁶⁹

The international consensus around the norm of abortion access and recognition of abortion as an aspect of women’s autonomy is also evident from statements and

⁶⁶ See Rachel Rebouché, *Abortion Rights as Human Rights*, 25 SOC. & LEGAL STUD. 765, 766 (2016) (“Various international human rights bodies have supported the legalization of abortion as essential to the protection of women’s rights to equality, nondiscrimination, health, autonomy, and freedom from violence.”). See also International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, ¶¶ 7.5–7.6, 8.25, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter *Cairo Report*] (recognizing importance of assuring access to safe abortion care); Committee on the Elimination of All Forms of Discrimination against Women, Communication No. 22/2009, ¶ 9(b), U.N. Doc. CEDAW/C/50/D/22/2009 (2011) (urging that abortion must be legal and accessible where pregnancy poses a risk to the women’s physical and mental health and in cases of rape).

⁶⁷ In 1995, the international community, in adopting the Platform for Action of the Fourth World Conference on Women (the “Beijing Platform”), defined “reproductive health” as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.” The Beijing Platform stated that,

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. *It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence*, as expressed in human rights documents.

Fourth World Conference on Women, *Report of the Fourth World Conference on Women, Beijing, 4-15 Sept. 1995*, ¶ 95, U.N. Doc. A/CONF.177/20, annex II (Oct. 17, 1995) (emphasis added).

⁶⁸ Human Rights Council Res. on the Elimination of All Forms of Discrimination against Women and Girls, U.N. Doc. A/HRC/38/L.1/Rev.1, at 3 (July 3, 2018).

⁶⁹ *Id.* at ¶ 7.

recommendations by the U.N. human rights treaty bodies.⁷⁰ Most recently, the U.N. Committee on Economic, Cultural and Social Rights (“CECSR”) explained:

The right to sexual and reproductive health is... indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.⁷¹

Drawing on this analysis of international human rights law as it relates to sexual and reproductive health, the Committee has called upon countries to “liberalize restrictive abortion laws.”⁷²

Indeed, U.N. bodies charged with interpreting and monitoring implementation of human rights treaties have emphasized that access to abortion is often necessary to preserve not just the life or physical health of women but also their mental health, and that abortion laws that stand in the way of such protection may violate international human rights obligations. For example, in 2016, the U.N. Human Rights Committee found that Ireland’s strict abortion ban violated, among other provisions, the International Covenant on Civil and Political Right’s prohibition against cruel, inhuman, or degrading treatment.⁷³

International human rights norms also require that, where abortion is legal, the state must ensure that it is genuinely available and accessible *in practice*. In *L.M.R. v. Argentina*, the U.N. Human Rights Committee determined that the ICCPR was violated when a woman was denied access to a legal abortion—and was forced to arrange a clandestine abortion—due to the refusal of hospital staff to perform the procedure.⁷⁴ Treaty bodies have condemned procedural barriers to abortion services, including mandatory waiting periods, biased counseling, and requirements that a

⁷⁰ See G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. A/34/180, art. 12 (Dec. 18, 1979) (signed by the U.S. on July 11, 1980) (requiring that women receive the “appropriate services in conn[ec]tion with pregnancy” and calling on states to modify or abolish laws that constitute “discrimination against women”).

⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (under article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 10, U.N. Doc. E/C.12/GC/22 (May 2, 2016) [hereinafter General Comment No. 22].

⁷² *Id.* at ¶ 28 (emphasis added).

⁷³ Human Rights Committee, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013, ¶¶ 7.5–7.8, U.N. Doc. CCPR/C/116/D/2324 (Nov. 17, 2016).

⁷⁴ Human Rights Committee, Communication No. 1608/2007, ¶¶ 9.2–9.4, U.N. Doc. CCPR/C/101/D/1608/2007 (2011). Similarly, the European Court of Human Rights has condemned Poland for erecting “significant barriers” to reproductive health services “in practice.” *P. and S. v. Poland*, No. 57375/08, Eur. Ct. H.R. (2012).

third party, such as a male guardian or a parent, authorize the abortion.⁷⁵ These same treaty bodies have encouraged states to provide financial support for abortion services.⁷⁶ The legal principles that these treaty-monitoring bodies have articulated were echoed by the U.N. Special Rapporteur on the right to health, who noted that laws criminalizing and restricting access to abortion result in increased rates of maternal mortality and morbidity, while “infring[ing upon] women’s dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.”⁷⁷

These determinations stem from international recognition that where abortion is legal, it is important to assure access to safe abortion care to safeguard women’s health and lives.⁷⁸ The 1994 Cairo Conference committed the global community to preventing unsafe abortions.⁷⁹ Similarly, the African Commission on Human and Peoples’ Rights has recognized that violations to the rights to privacy, confidentiality, freedom from discrimination, and freedom from cruel, inhuman, or degrading treatment can result where the accessibility of safe abortion and post-abortion care is inadequate.⁸⁰

Contrary to the misleading global tally cited to by abortion opponents, these international treaties, agreements, and decisions clearly outline that states must liberalize restrictive abortion laws and guarantee access to safe abortion care in practice.

CONCLUSION

There is no doubt that foreign and international law and global practices can be a relevant touchstone for domestic policy-making and adjudication. A majority of the U.S. Supreme Court has recognized the relevance of these sources on multiple occasions.⁸¹ Federal, state, and local governments can learn from comparative and international models and trends as they craft domestic policies in a wide range of areas, and judges and policymakers recognize that their work can benefit from engaging in a global dialogue with others facing similar questions or challenges.

⁷⁵ Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations on Kuwait, ¶ 43(b), U.N. Doc. CEDAW/C/KWT/CO/3-2 (Nov. 8, 2011); Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations on Hungary, ¶¶ 30–31, U.N. Doc. CEDAW/C/HUN/CO/7-8 (Mar. 26, 2013); General Comment No. 22, ¶ 41.

⁷⁶ Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations on Austria, ¶¶ 38–39, U.N. Doc. CEDAW/C/AUT/CO/7-8 (Mar. 1, 2013). States are further encouraged by international treaty bodies to guarantee that skilled healthcare providers are available to offer safe abortion procedures. Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations on Slovakia, ¶¶ 30–31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (Nov. 25, 2015); General Comment No. 22, ¶¶ 13, 21, 28.

⁷⁷ Anand Grover (Special Rapporteur of the Human Rights Council), *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (2011).

⁷⁸ See, e.g., *Cairo Report*, ¶¶ 7.5–7.6, 8.25. See also National Academies of Sciences, Engineering and Medicine, *The Safety and Quality of Abortion Care in the United States* 10 (March 2018) (concluding that “legal abortions in the United States—whether by medication, aspiration, D&E, or induction—are safe and effective”), <http://nationalacademies.org/hmd/Reports/2018/the-safety-and-quality-of-abortion-care-in-the-united-states.aspx>.

⁷⁹ The Cairo Report, adopted by 184 U.N. Member States including the U.S., stressed that “where abortion is not against the law, such abortion should be safe.” *Id.* at ¶ 8.25.

⁸⁰ See generally AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, GENERAL COMMENT NO. 2 ON ARTICLE 14.1 (A), (B), (C) AND (F) AND ARTICLE 14. 2 (A) AND (C) OF THE MAPUTO PROTOCOL (2014), http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf.

⁸¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–79 (2005); *Graham v. Florida*, 560 U.S. 48, 80–81 (2010).

But international comparisons are not as simple as checking a box. In an environment where false statements are increasingly pawned off as truth, abortion opponents in the United States are seeking to use misleading comparative data to undermine women's fundamental rights and erode the robust constitutional framework that protects abortion access in the United States. As many states ramp up their efforts to enact restrictive abortion laws and as the U.S. Senate considers the pending nomination to the U.S. Supreme Court, accurate information and nuanced analysis could not be more critical.

ABOUT THE AUTHORS

Martha F. Davis is a Professor Law and Associate Dean for Experiential Education at Northeastern University School of Law. She teaches Constitutional Law, U.S. Human Rights Advocacy and Professional Responsibility and is a faculty director for the law school's Program on Human Rights and the Global Economy. Prior to joining the law faculty, Davis was vice president and legal director for the NOW Legal Defense and Education Fund. Davis has also served as a fellow at the Bunting Institute, the Kate Stoneman Visiting Professor of Law and Democracy at Albany Law School, a Soros Reproductive Rights Fellow, a fellow at the Human Rights Program at Harvard Law School and fellow of the Women and Public Policy Program at Harvard's Kennedy School of Government. She is an affiliated scholar with the Raoul Wallenberg Institute of Human Rights in Lund, Sweden. Davis earned her J.D. from University of Chicago Law School.

Risa E. Kaufman is the Director of U.S. Human Rights at the Center for Reproductive Rights, where she is responsible for developing and implementing the Center's U.S.-based human rights advocacy strategies to advance the full spectrum of reproductive rights. From 2008–2017, she was the Executive Director of the Columbia Law School Human Rights Institute. She is the co-author of *Human Rights Advocacy in the United States* (with Martha F. Davis and Johanna Kalb) and a lecturer-in-law at Columbia Law School, where she teaches a seminar on U.S. human rights advocacy. Kaufman holds a J.D. from New York University School of Law, where she was a Root-Tilden-Snow scholar. She clerked for Judge Ira DeMent in the U.S. District Court in Montgomery, Alabama.

The Special Counsel, *Morrison v. Olson*, and the Dangerous Implications of the Unitary Executive Theory*

Victoria Nourse

Only in an authoritarian regime is the president above the law. Recently, Congress debated a proposal to prevent President Trump from putting himself above the law by firing Special Counsel Mueller. During debate on the bipartisan Special Counsel Independence and Integrity Act (the Integrity Act)¹, some senators argued that Congress had no power to limit a president's authority to fire his own prosecutor, despite binding Supreme Court precedent to the contrary. Shockingly, those senators supporting the president's absolute power to dismiss Mueller declared themselves bound by the case's *dissent*, yes, a *dissent*.

Congress has the power to pass the Integrity Act and to prevent the president from acting contrary to the law. In *Morrison v. Olson*, Chief Justice Rehnquist writing for himself and six other justices affirmed Congress's power to prevent the president from firing an independent counsel without cause.² As will be explained below, *Morrison* validates the constitutionality of the bipartisan Integrity Act. The lone dissenter in *Morrison* was the late Justice Antonin Scalia. Cloaking themselves in Scalia's lonely and incorrect dissenting opinion, senators opposing the Integrity Act are attempting to upend the Constitution by embracing a dangerous constitutional argument contrived to render the president immune from scrutiny. One senator stated that "most" believe that *Morrison* is incorrect³ and that there is "widespread" agreement that Scalia's *Morrison* dissent should control.⁴ Another senator even said he was "bound" by Scalia's dissent.⁵

This disdain for established law is absurd: senators take an oath of office to uphold the Constitution, not to uphold the views of a single dissenting justice. Despite widespread criticism of controversial decisions such as *District of Columbia v. Heller*

* This Issue Brief was initially published in June 2018.

¹ S. 2644, 115th Cong. (2d Sess. 2018). The legislation was introduced by a bipartisan coalition led by Senator Graham (R-NC), Senator Tillis (R-NC), Senator Coons (D-Del), and Senator Booker (D-NJ). *Id.*

² *Morrison v. Olson*, 487 U.S. 654 (1988) (voting with Chief Justice Rehnquist were Justice O'Connor, Justice White, Justice Blackmun, Justice Stevens, Justice Brennan, and Justice Marshall; Justice Kennedy took no part in the case).

³ *Hearing on Judicial Nominations of Mark Bennett, et al. Before the S. Comm. on the Judiciary*, 115th Cong. (2018), <https://www.judiciary.senate.gov/meetings/04/26/2018/executive-business-meeting>; *id.* (statement of Sen. Lee) (stating that "most lawyers" do not believe that *Morrison* is "good law").

⁴ *Id.* (statement of Sen. Hatch) (stating that there is "widespread agreement" that Scalia's dissent was right); *id.* (statement of Sen. Cornyn) (stating that the separation of powers as provided by Justice Scalia renders a good cause limitation unconstitutional).

⁵ *Id.* (statement of Sen. Sasse) (urging that Scalia's *Morrison* dissent is binding).

or *Citizens United v. FEC*,⁶ no one claims that Supreme Court dissents are binding law. More importantly, this particular dissenting opinion is especially troubling. Justice Scalia's *Morrison* dissent embraces a radical theory of presidential power suggesting to presidents that they *are* above the law.

This Issue Brief first addresses the background that led to the Integrity Act and its strange, lawless opposition. It goes on to consider constitutionally permissible limits on the president's powers. It demonstrates that *Morrison* is good law and Congress may limit the president's power to remove the special counsel so that the president complies with law. The Issue Brief goes on to debunk the "unitary executive" theory announced in the *Morrison* dissent as embracing a radical theory of the president's power inconsistent with the Constitution's text. It then considers the related critique that the special counsel must be named by the president and confirmed by the Senate under the Appointments Clause.

I. BACKGROUND TO THE SPECIAL COUNSEL AND THE PROPOSED INTEGRITY LEGISLATION

After revelations of Russian interference in the 2016 presidential election and following statements by President Trump that he fired FBI Director James Comey because of "this Russia thing,"⁷ the Justice Department named a Special Counsel—former FBI Director Robert Mueller—to investigate Russian attempts to manipulate the election. Justice Department regulations provide for appointing a Special Counsel in cases that "present a conflict of interest for the Department or other extraordinary circumstances."⁸ Because Attorney General Jeff Sessions had recused himself in the matter given his own involvement in the Trump campaign, Deputy Attorney General Rod Rosenstein issued the letter of referral. The Special Counsel's jurisdiction is limited by the referral's "specific factual" statement of the matters to be investigated and any related matters involving "perjury" and "obstruction of justice" arising therefrom.⁹ As of June 2018, several plea agreements have been reached and indictments have been issued against four former Trump campaign associates, including the president's former campaign manager Paul Manafort, along with charges against several Russian citizens.

⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (affirming an individual right to bear arms); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (ruling unconstitutional certain campaign finance regulations). For the discussion surrounding amending the Constitution to overrule *Citizens United* and *Heller*, see Press Release, Senator Tom Udall, Udall Introduces Constitutional Amendment to Overturn *Citizens United* and Get Big Money Out of Politics (Jan. 24, 2017), <https://www.tomudall.senate.gov/news/press-releases/udall-introduces-constitutional-amendment-to-overturn-citizens-united-and-get-big-money-out-of-politics>; Rio Tazewell, *Amendment to Overturn Citizens United Reaches New Milestone*, PEOPLE FOR THE AMERICAN WAY (May 26, 2017), <http://www.pfaw.org/blog-posts/amendment-to-overturn-citizens-united-reaches-new-milestone/>; Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' With Constitutional Amendment*, THE CENTER FOR PUBLIC INTEGRITY (May 10, 2018, 5:00 AM), <http://www.pfaw.org/blog-posts/amendment-to-overturn-citizens-united-reaches-new-milestone/>; and Adam Winkler, *The Court After Scalia: Would a Liberal Supreme Court Overturn Heller?*, SCOTUSBLOG (Sept. 6, 2016, 2:56 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-would-a-liberal-supreme-court-overturn-heller/>.

⁷ Interview by Lester Holt with President Donald J. Trump (May 11, 2017). See also James Griffiths, *Trump Says He Considered 'this Russia thing' Before Firing FBI Director Comey*, CNN (May 12, 2017, 9:11 AM), <https://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html>.

⁸ 28 C.F.R. § 600.1. These regulations were promulgated in 1999 by Attorney General Janet Reno, after the original Watergate era law authorizing appointment of independent counsels lapsed.

⁹ *Id.* § 600.4(a).

Because of the president's public statements dismissing the investigation as a "witch hunt,"¹⁰ a bipartisan group of senators introduced legislation to strengthen the Justice Department's regulations permitting the naming of a special counsel. The Integrity Act would authorize the naming of a special counsel and provide that the attorney general may remove the special counsel "only for misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause..."¹¹ The Senate Judiciary Committee debated the bill on April 26, 2018 and ultimately, it received a favorable Committee vote, but only after sustained opposition decrying the bill as unconstitutional and contentions that senators were bound by Justice Scalia's dissent in *Morrison*.

To the contrary, *Morrison* constitutionally validates the Judiciary Committee's bipartisan actions. Congress has the constitutional power to prevent the president from acting above the law by removing his own special counsel. Let us be clear: Justice Scalia's dissent in *Morrison* is a lonely dissent. More importantly, the Scalia dissent embraces a theory of executive power that the Supreme Court has never accepted and is contrary to the Constitution's text. To quote Justice Scalia:

To repeat, Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.'
As I described at the outset of this opinion, this does not mean *some* of the executive power, but *all* of the executive power.¹²

Of course, the Constitution does not grant the president *all* executive power. Justice Scalia has added text to the Constitution, a small but very significant "*all*."¹³ If our Constitution did say "*all*" executive power, it would delight tyrants. And, yet, this is what the Scalia dissent says, and it has become celebrated because its textual claim has become enshrined in an academic theory known as the "unitary executive."¹⁴ Modern history tells us to be wary of presidents claiming power under the unitary executive theory. President George W. Bush was advised to prosecute the "war on terror" based on that theory. After 9/11, it "led to a number of exceptionally dangerous policies, culminating in the so-called 'torture memorandum'."¹⁵ In *Hamdan v. Rumsfeld*, the Supreme Court denied President Bush's claims of absolute power, writing that he could not "disregard limitations that Congress has... placed upon his powers."¹⁶

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2017, 7:54 AM), <https://twitter.com/realdonaldtrump/status/865173176854204416>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2018, 6:44 PM), <https://twitter.com/realdonaldtrump/status/967545724362739712>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 27, 2018, 7:49 AM), <https://twitter.com/realdonaldtrump/status/968468176639004672>.

¹¹ S. 2644, 115th Cong. (2d Sess. 2018).

¹² *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

¹³ Justice Scalia was known for his textualism, but that method adds and subtracts constitutional text, see Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1 (2018).

¹⁴ The unitary executive theory's advocates will insist that their argument is limited to control over independent agencies, but that is not how the theory is expressed in Justice Scalia's *Morrison* dissent, nor does it describe its influence in political circles or its history during the George W. Bush presidency.

¹⁵ See Neal Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 (2006).

¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n. 23 (2006) (citing *Youngstown*).

The Supreme Court has consistently rejected claims that the president has “all” executive power. In *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, the Court rejected President Truman’s claims of absolute power to seize the steel mills to support the Korean war effort.¹⁷ In *Humphrey’s Executor v. United States*, the Court rejected President Franklin Roosevelt’s claims to absolute power to remove an inferior officer from the Federal Trade Commission.¹⁸ In *Wiener v. United States*, the Court rejected President Eisenhower’s attempt to remove an inferior officer without “good cause.”¹⁹ In *Morrison*, the Court rejected President Reagan’s claims to absolute power to fire a special prosecutor investigating a senior Justice Department official.²⁰ In *Clinton v. Jones*, the Court rejected President Clinton’s claim to immunity from suit during his tenure in office.²¹ The case law uniformly shuns the idea that the president may be the “Judge in his Own Cause.”²²

II. CONSTITUTIONAL LIMITS ON THE PRESIDENT’S POWER

The principles governing the president’s power are laid out in the Constitution’s text: the president must faithfully execute the laws.²³ Article II does not provide the president all power. Had the mere vesting of executive power within a single person been enough to give the president “all” executive power, our democracy would depend upon the meaning of the term “executive,” a term vague enough to invite grand and dangerous schemes. In his famous *Steel Seizure* opinion, Justice Jackson replied to the solicitor general’s argument that the vesting clause granted the executive “all” power, calling it “totalitarian.”²⁴ To be sure, the president has important enumerated powers, such as the commander-in-chief power, but even that power has not been sufficient in a variety of cases to allow the president to pose naked resistance to Congress.²⁵ One cannot pull the word “executive” out of the Constitution, add the term “all” to it, and isolate it as if there were “only” executive power. It is obvious, but should not be forgotten, that if there were only executive power, and no Congress, democracy as we know it would expire.

Important constitutional provisions support Congress’s power to limit the president’s conduct. For example, Article II’s appointments clause provides *Congress*, not the president, with the power to structure the executive branch. “[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁸ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

¹⁹ *Wiener v. United States*, 357 U.S. 349 (1958).

²⁰ *Morrison v. Olson*, 487 U.S. 654 (1988).

²¹ *Clinton v. Jones*, 520 U.S. 681 (1997).

²² *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 876 (2009). This principle gave succor to the American revolution. British Whig critics invoked it to describe the need for what we call today the “separation of powers.” “What shall be don,” John Trenchard (co-author of Cato’s letters) asked, “when the Criminal becomes the Judge, and the Malefactors are left to try themselves?” How may the Commons redress the grievances “occasion’d by the Executive Part of the Government . . . if they should happen to be the same Persons, unless they would be public spirited enough to hang or drown themselves?” JOHN TRENCHARD, *A SHORT HISTORY OF STANDING ARMIES IN ENGLAND* 5, 6 (London, A. Baldwin 3d ed. 1698).

²³ U.S. CONST. art. II, § 3 (“he shall take Care that the Laws be faithfully executed”).

²⁴ *Youngstown*, 343 U.S. at 640-41 (Jackson, J. concurring).

²⁵ *See id.* at 644 (Jackson, J. concurring) (“That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history”).

in the President alone, in the Courts of Law, or in the Heads of Departments.”²⁶ That clause directly refutes the idea that the Constitution grants the president “all” power to control the executive branch. Since the Founding, Congress has assumed the power to define and limit the ways in which executive employees and officers conduct their offices; if that were not true, then the entire civil service would be created unconstitutionally. Similarly, Congress has its own textually specified power to limit the president’s execution of the law. Under Article I, Congress has the power to “make *all* Laws which shall be necessary and proper for carrying” into effect not only Congress’s own powers, but the powers that the Constitution vests “in the Government of the United States, or *in any Department or Officer thereof*.”²⁷ That means Congress has powers to create laws that are necessary and proper for carrying into effect the president’s powers of appointment and removal of inferior officers. Limiting naked partisanship or corruption are surely “necessary and proper” limits on how the president exercises his power involving an investigation into his own wrongdoing.²⁸

Nothing in the Supreme Court’s cases refutes this analysis. *Steel Seizure*²⁹ illustrates the limited nature of the President’s power in domestic affairs. Without Congress’s consent, President Truman seized domestic steel mills during a labor dispute. Truman claimed power under the Commander-in-Chief clause to protect the nation during the Korean conflict by ensuring the continued and uninterrupted production of steel, which he argued was necessary to the ongoing war effort. The Supreme Court rejected that claim, concluding that the president had refused to follow Congress’s seizure procedures. Justice Black, writing for the majority, argued that the president had acted in ways committed to the legislature, not the executive.³⁰ In his now-celebrated concurrence, Justice Jackson rejected Justice Black’s argument, which was based on

²⁶ The full appointments clause reads:

“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*”

U.S. CONST. art. II, § 2 (emphasis added).

²⁷ The entire clause reads: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18. Given that the unitary executive theory, *infra* Part IV, depends upon inferences from the lack of text “herein granted” in Article II, not to mention Justice Scalia’s addition of the word “all” to Article II, it should be significant that the Necessary and Proper Clause actually uses the word “all” with respect to the Congress’s powers which clearly include the power to structure the executive branch.

²⁸ For an analysis of the three different parts of the Necessary and Proper Clause, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1092-1094 (2015); see *id.* at 1094 (stating that the “‘other powers’ to which this part of the clause applied ‘refers . . . most plausibly . . . to include all of the shared powers given to more than one department or officer of the government, such as the treaty and appointment powers of Article II, which are jointly delegated to the President and the Senate.’”); see also John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014).

²⁹ *Youngstown*, 343 U.S. 579.

³⁰ *Id.* at 587 (“the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).

functional terms.³¹ Jackson's opinion is well-known for a tripartite test which depends upon the *relationship* of the branches to each other: whether the president is acting on his own enumerated powers (e.g. as commander-in-chief), whether he is acting on powers shared with Congress, or within Congress's own domain.³²

Justice Jackson emphatically rejected the position of today's unitary executives.³³ In fact, he expressed incredulity that the solicitor general would make the argument that the vesting clause of Article II "constitutes a grant of *all the executive powers* of which the Government is capable."³⁴ History showed this to be power asserted by "totalitarians," to use Justice Jackson's words:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as *totalitarian*. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power.³⁵

The Supreme Court has never wavered from *Steel Seizure's* lessons. In a series of cases at the beginning of the 21st century, the Supreme Court rebuked presidential claims to absolute executive power. During the George W. Bush Administration, the Justice Department's Office of Legal Counsel issued a memo ignoring *Steel Seizure* (the so-called torture memo),³⁶ arguing that the president had "unfettered executive power, based on extraordinarily broad interpretations of the Article II Commander in Chief Clause."³⁷ Public outrage and academic criticism led to the withdrawal of the original memo. Ultimately, when President Bush's actions at Guantanamo Bay reached the Supreme Court, the Court rejected claims that the president had unfettered power to create lawless zones, violate the Geneva Convention, or create separate military tribunals. As Dean Harold Koh has described one of the Supreme Court opinions, *Hamdan v. Rumsfeld*,³⁸ "the Court... rejected the administration's extreme constitutional theory of executive power." All the *Hamdan* Justices addressing the merits placed the case within the tripartite framework of shared institutional powers set forth in Justice Jackson's concurrence in *Steel Seizure*.³⁹

³¹ Justice Black argued that the power to seize steel mills was part of the "legislative power." As most academic commentators have acknowledged, modern states allow executive agencies to exercise "legislative" functions, as the administrative state issues rules and regulations with the force of law. For this reason, Black's opinion has been viewed with skepticism.

³² *Youngstown*, 343 U.S. at 635 (Jackson, J. concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

³³ *Id.* at 641.

³⁴ *Id.* at 640 (emphasis added).

³⁵ *Id.* at 641 (emphasis added).

³⁶ Memorandum for William J. Haynes II, Counsel to the Department of Defense from John Yoo (Jan. 2002).

³⁷ Harold Hongju Koh, *Setting the World Right*, 115 YALE L. J. 2350, 2355 (2006).

³⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n. 23 (2006).

³⁹ See Koh, *supra* note 37 at 2361-62.

III. *MORRISON V. OLSON* IS GOOD LAW

Morrison, like *Steel Seizure*, rejects the idea that the president has absolute power. In *Morrison*, the contention was that the president had absolute power to fire an independent counsel. At the time, an independent counsel law authorized the investigation of the president and a variety of other executive officials.⁴⁰ The law was written to answer the question posed in Watergate: Could President Nixon fire an independent counsel investigating the president? The obvious problem was a conflict of interest. Surely, every criminal defendant would love to have the power to dismiss his prosecutor until he found one that would drop the prosecution. To solve that problem, Congress protected the independent counsel from firing by a “good cause” provision. Critics at the time argued, as they do now, that such a limit is unconstitutional because the president must have “all power” to control his administration. In *Morrison*, the Supreme Court rejected that position, with Chief Justice Rehnquist writing that the Constitution specifically contemplates that Congress may protect inferior officers by requiring that the president specify a nonpartisan and noncorrupt reason for the firing.⁴¹ To quote the Court: “we cannot say that the imposition of a ‘good cause’ standard for removal by itself unduly trammels on executive authority . . . we simply do not see how [that limit] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”⁴²

This proposition drew ire from the decision’s lone dissenter, Justice Scalia. “Power.” Justice Scalia used that one-word sentence to grab attention to his fiery but lonely *Morrison* dissent.⁴³ Special counsels do raise questions of “power,” but not “all” power, as Justice Scalia wrote. Article II of the Constitution limits the power of the presidency, providing that the president “shall take Care that the Laws be faithfully executed.”⁴⁴ This means that the president has an affirmative duty to follow the laws of the nation. Every time Congress legislates, its laws govern the president. When Congress provided, as it did in the *Steel Seizure* case,⁴⁵ that President Truman could not seize the steel mills without following congressional procedures, the Supreme Court enforced those procedures. And, if that were not enough, when President Clinton claimed the power to insulate himself from the law while in office, the Supreme Court resoundingly held that no president is above the law.⁴⁶

Good cause limitations are common sense protections against naked politics and self-serving corruption. In the special counsel case, the “good cause” limitation asks that the president be transparent about his reasons so that the public may judge his actions. This is a minor burden; its constitutionality is only questioned when presidents aim to exercise completely unfettered discretion. Presidents of all political stripes have made such assertions, from Franklin Roosevelt to Bill Clinton to George W. Bush, and the Supreme Court has just as uniformly rejected their claims of

⁴⁰ Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (1978).

⁴¹ *Morrison v. Olson*, 487 U.S. 654, 660 (1988).

⁴² *Id.* at 691–92.

⁴³ *Id.* at 699 (Scalia, J., dissenting) (“Power. That is what this suit is about.”)

⁴⁴ U.S. CONST. art II, § 3.

⁴⁵ *Youngstown v. Olson*, 343 U.S. 579 (1952).

⁴⁶ *Clinton v. Jones*, 520 U.S. 681, 704 (1997) (“neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”) (quoting *United States v. Nixon*).

unfettered power.⁴⁷ Congress has the power under the Necessary and Proper Clause⁴⁸ to limit any governmental department it creates or funds for the general welfare. Preventing the president from dismissing a prosecutor investigating the president and close associates is both necessary to protect the rule of law against an obvious conflict of interest and proper because it provides public transparency.

The current debate about the Integrity Act has arisen because the Watergate era independent counsel law upheld in *Morrison* lapsed. The original law was much criticized following the Kenneth Starr investigation and that criticism cast a shadow on *Morrison*.⁴⁹ Today, there is no special counsel law, but a set of very limited Justice Department regulations promulgated in 1999 governing special counsels named by the attorney general under extraordinary circumstances. These regulations reflect long-established Justice Department practice. Since the 19th century, the Justice Department has named special counsels to avoid the appearance of a conflict of interest when the president or his close associates are allegedly involved in putatively criminal behavior.⁵⁰ Today's regulations clarify the appointment process and Justice Department control of the counsel.⁵¹ The regulations provide that the special counsel may be removed for "good cause."⁵² The Integrity Act seeks to enforce those regulations, backing them up with congressional legislation and allowing for a judicial hearing to determine whether the special counsel, if dismissed, was properly dismissed for "good cause."⁵³ The Act aims to forestall any argument by the president that the regulations, as creatures of the executive, can be overridden by the president.⁵⁴

⁴⁷ See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (rejecting President Roosevelt's claim to fire an inferior officer for no reason); *Clinton v. Jones*, 520 U.S. 681 (1997) (rejecting President Clinton's claim that he should be immune from civil suit during his Presidency).

⁴⁸ U.S. Const. art. I, § 8, cl. 18.

⁴⁹ The original independent counsel law suffered from a variety of problems, the most insistent claim being that it gave too much authority to independent counsels to wage lengthy overzealous prosecutions against presidents and lower level executive branch employees. These policy problems reflected deeper flaws. First, the law gave too much power to Congress and committees of Congress to effectively charge their political enemies with crimes because the attorney general had virtually no power to deny a request for a special counsel. Democracies do not allow their legislatures to punish political enemies for partisan reasons. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996) [hereinafter *Federalist Papers*]. Second, the mandatory impeachment referral provisions allowed Congress to delegate one of the most important electoral powers in the Constitution to an unelected official. See also Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L. J. 2193, 2195 (1998). These problems do not exist under the current, far more limited bipartisan legislation or in the Justice Department's regulations.

⁵⁰ For example, a special counsel was named in 1875 to investigate President Grant's personal secretary in the "Whiskey Ring" scandal. Prior to Watergate, special counsels were named in the administrations of Republican and Democratic presidents, including Presidents Garfield, Coolidge, Theodore Roosevelt, and Truman. GERALD GREENBERG, *HISTORICAL ENCYCLOPEDIA OF U.S. INDEPENDENT COUNSEL INVESTIGATIONS* (2000); see also ANDREW COAN, *PROSECUTING THE PRESIDENT: HOW SPECIAL PROSECUTORS PROTECT THE RULE OF LAW AND HOLD PRESIDENTS ACCOUNTABLE* (forthcoming 2019).

⁵¹ 28 C.F.R. §§ 600.1-600.10 (2018) (providing for the appointment of a special counsel in "extraordinary circumstances").

⁵² *Id.* § 600.7(d) (2018) ("The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.").

⁵³ Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2d Sess. 2018).

⁵⁴ See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Post-*Morrison* cases do not put those regulations in legal question. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁵⁵ the Supreme Court invalidated a peculiar double-layer removal procedure governing an independent agency, the Securities and Exchange Commission (SEC).⁵⁶ The Sarbanes-Oxley law created an independent accounting board to ensure that companies followed sound accounting practices. The SEC appointed that five-member board. The SEC's members were subject to "good cause" removal,⁵⁷ so, too, were the members of the accounting board. If the president sought to fire a single member of the accounting board, he would have to obtain an order from the full Commission, which was then subject to judicial review.⁵⁸ Presumably, if the president could not obtain such an order, and still wanted to fire a member of the accounting board, the president would have to find a "good reason" to fire each member of the Commission, and then replace the Commission with members who would order dismissal of a single member of the subordinate accounting board.⁵⁹ In a 5-4 decision, the Supreme Court rejected this double layer of review as an unconstitutional infringement on the separation of powers.

Although interesting, *Free Enterprise* is irrelevant to the question whether the Integrity Act is constitutional. First, nothing in the Integrity Act poses a "double" layer of review as was at issue in *Free Enterprise*.⁶⁰ More importantly, *Free Enterprise* did not involve a personal, presidential conflict of interest such as the one the Integrity Act is trying to address with President Trump and alleged Russian interference in our 2016 election. Some critics point to *Free Enterprise*, arguing it is controlling authority when evaluating the Integrity Act because it questioned the legality of independent agencies.⁶¹ This is a distraction. In legal terms, an agency is considered an "independent" agency when the head of the agency is protected by a "good cause" removal clause,⁶² like the one protecting the special counsel, and cannot

⁵⁵ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

⁵⁶ *Id.* at 496 ("A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does.").

⁵⁷ The parties in *Free Enterprise* agreed that the Commissioners could only be removed for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487; see *SEC v. Blinder*, 855 F.2d 677, 681 (10th Cir. 1988) ("The [Securities] Act does not expressly give to the President the power to remove a commissioner. However, for the purposes of this case, we accept appellants' assertions in their brief, that it is commonly understood that the President may remove a commissioner only for "inefficiency, neglect of duty or malfeasance in office.").

⁵⁸ *Free Enterprise*, 561 U.S. at 486.

⁵⁹ See *Blinder*, 855 F.2d at 681 ("The commission consists of five members who are appointed by the President with the advice and consent of the Senate. The terms of the commissioners are staggered and the basic length of each term is five years. No more than three of the commissioners may be members of the same political party.").

⁶⁰ Should the president seek to remove the special counsel, he may do so by instructing a single person in the Justice Department.

⁶¹ *Dicta* in *Free Enterprise* provides fodder for such a battle, but it is *dicta*. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1173 (2013) ("We might even see the PCAOB majority as laying down a cache of ammunition for future battles, in the form of dictum that may be quoted to support more aggressive future rulings against the constitutionality of independent agencies. For now, however, the constitutional doctrine remains broadly favorable to congressional power to grant for-cause tenure.").

⁶² *Id.* at 1168 ("Commentators broadly agree that for-cause tenure protection is the *sine qua non* of agency independence."). Agency heads subject to such provisions include the heads of the Nuclear Regulatory Commission and the Federal Trade Commission.

merely be fired at will because they serve at the pleasure of the president, like the attorney general or secretary of state. Some critics question the legality of independent agencies.⁶³ Even if independent agencies went away tomorrow, that would not answer the peculiar conundrum of a president who claims absolute power to fire his own prosecutor. The special counsel bill pending in the Senate protects against a particular danger—the president’s conflict of interest when it comes to criminal prosecution of himself or his personal associates.

IV. THE UNITARY EXECUTIVE DEBUNKED

Upending well-established law, unitary executives have asserted strained textual claims to support extraordinary presidential power. Long ago, Professor Stephen Calabresi and Kevin Rhodes argued that the Constitution’s text supports a “unitary executive.”⁶⁴ They based their argument on a structural inference from two words. They compared the Constitution’s three “vesting” clauses. Because the vesting clause in Article I governing legislative power applies to powers “herein granted,” and there is no parallel “herein granted” modifying “executive power,” the resulting inference, they argued, is that the president’s power extends to anything that one might call “executive.”⁶⁵ That two-word textual inference rests on a false premise. The vesting clauses are not power grants.⁶⁶ If they were, there would be no reason to provide specific powers, as Justice Jackson explained in *Steel Seizure*. The vesting clauses are titles added by a Committee on Style, late in the Constitutional Convention, to designate the three great departments.⁶⁷ But even if they were power grants, the Constitution’s text limits the power of the president to “faithfully execute the laws.” That express textual limitation surely trumps an inference based on the absence of two words (“herein granted”) in Article II. Not surprisingly, no Supreme Court majority has ever accepted the unitary executive theory.

⁶³ But see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (discussing the “truly insignificant structural and procedural differences between the ‘independent regulatory commissions’ and other agencies.”).

⁶⁴ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-66 (1992).

⁶⁵ The vesting clauses are: U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States...”); *id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁶⁶ See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004) (contending that viewing the Vesting Clause as a broad power grant “cannot explain some of Article II’s specific grants of foreign affairs authority, and . . . sits uneasily with the Constitution’s enumerated powers structure”); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 Nw. U. L. REV. 1346, 1363 (1994) (arguing that the Vesting Clauses of Articles II and III are “‘empty vessels’ that the remainder of those articles then fill”); see also M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608-26 (2001) (arguing that “no well-accepted doctrine or theory . . . offers a way to identify the differences among the governmental functions in contested cases.”). For the contrary position, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 Nw. U. L. REV. 1377, 1378-1400 (1994).

⁶⁷ See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48-49 (1994). It would be an odd procedure in which a committee delegated with stylistic duties could grant large powers to the president not previously agreed to by the drafters. We can infer from this procedure that the stylistic agents were not empowered to substantially change the document.

A. FALSE TEXTUAL ASSUMPTIONS

The “unitary executive” argument depends upon a false assumption about the Constitution’s text: that it creates three “kinds” of power and then uniformly assigns these “kinds of power” to unique places. Neither the Constitution, nor our constitutional history, holds that all “executive” power—where executive power means a “type” of power—resides in the president. For example, if the president has “all” executive power, then he should be able to create his own departments to help him execute the law. But that is Congress’s job, and Congress has done so from its early days, creating the first Departments of War, Foreign Affairs, and Treasury.⁶⁸ The Founders had no uniform functional definition of the “executive,” much less one corresponding to today’s realities. For example, John Locke’s works, which influenced many Founders, did not distinguish between the judicial and executive power.⁶⁹ No one today, however, believes that the president has the power to regulate inferior Article III courts because courts, like presidents, execute the law.

The Constitution’s text rejects the idea that there is a unique type of executive power given to the president under Article II and that type of power is the only power a president may exercise. The president’s power is not completely or uniquely described in Article II. Article I, the “legislative” article, grants the president veto power⁷⁰, giving the president what appear to be legislative-type powers. Similarly, Congress’s powers are not uniquely identified in Article I. Congress is granted powers in Article II to control the president’s election and in Article III to define treason.⁷¹ Moreover, as was affirmed in the *Steel Seizure* case, power sharing between the departments is common under our Constitution. Take legislation—it must pass Congress and be signed by the president.⁷² If there were no sharing provisions, the departments would operate on parallel tracks, never checking each other. It is only because they share power that the departments have the power to stop actions which require agreement between departments.

If one were to take seriously the idea that there is a unique “type” of power known as executive (a term that is notoriously vague) and the president has absolute control over all and only that kind of power, then one would have to make major changes to our government and our constitutional understandings. Executive purity would require the president to eliminate any “judicial” or “legislative” functions in the executive branch and take over all executive functions carried out by other departments. Executive agencies are full of adjudicators—in immigration and social security and veteran’s affairs. Agencies also act like legislators when promulgating binding regulations with the force of law. Ridding the president of these powers would make many of Congress’s most beloved statutes, like the Social Security Act, entirely unadministrable. Meanwhile, if the president is to exercise “all” executive power, then he must take over all existing congressional and judicial agencies, such as the General Accounting Office, the Congressional Budget Office, the Congressional

⁶⁸ *Id.* at 25.

⁶⁹ Locke was one of the political philosophers on which the Founders relied, albeit nonexclusively. “Locke does not distinguish the executive from the judicial power but uses the terms interchangeably when speaking of the process that applies the force of the community in particular cases according to the general rule.” RUTH W. GRANT, JOHN LOCKE’S LIBERALISM 74-75 (1987).

⁷⁰ U.S. CONST. art. I, § 7.

⁷¹ U.S. CONST. art. II, § 1, cl. 4. (“The Congress may determine the Time of chusing the Electors” for the President); *id.* art. III, § 1 (“The Congress shall have the Power to declare the Punishment of Treason.”)

⁷² U.S. CONST. art. I, § 7.

Research Service, the Capitol Police, and the Administrative Office of the Courts. All of this follows from the idea of functional purity. The truth is that the term “executive” in the Constitution presupposes *that there is something to execute*. In cases where the president has no independent enumerated power, he can only execute the “laws” passed by Congress.⁷³

Ironically, those who claim that the president must have complete control over the executive branch invoke the Take Care Clause on the theory that the president cannot “Take Care” that the laws be faithfully executed without that control.⁷⁴ This elides something very important. The Take Care Clause provides that the president’s powers depend upon “*laws*.” If that text means anything, it means that the president cannot base his actions on some vague notion of executive power. Congress has extensive power to structure the executive branch by creating agencies that allow the president to perform his duties. Tenure and removal limitations are perfectly “necessary and proper” means to further Congress’s duty to legislate for the general welfare.⁷⁵ In the case of the special counsel, they are necessary because the president has a conflict of interest in the investigation, and they are perfectly proper since they serve the purpose of public transparency.

B. MISAPPROPRIATED UNDERSTANDINGS OF PRECEDENT

Some who support the unitary executive theory invoke precedent, including Chief Justice Taft’s mammoth opinion in *Myers v. United States*.⁷⁶ Critics tend to pull a quote or two out of this opinion, forgetting that the case had nothing to do with “good cause” restrictions. At issue in *Myers* was the kind of removal restriction that does raise serious constitutional concerns: when Congress asserts the power to “approve” of the president’s decision to remove. The statute in *Myers* provided that the president could only remove a postmaster with the approval of the Senate. That kind of removal limitation raises legitimate constitutional concerns. If the Senate or Congress has the power to “approve” the removal, this is a serious burden on the president’s ability to control the administration. After all, each time he seeks to remove an inferior officer, the president must gain the votes of vast numbers of members of Congress. More importantly, in such a situation, the president’s men will have two masters. To avoid dismissal, they will look to both Congress and the president. By contrast, “good cause” limitations do not require the president to seek approval of another governmental body, but require the decidedly minimal burden of articulating a “good” reason for removal.

Critics also argue that the New Deal case *Humphrey’s Executor*⁷⁷ supports the unitary executive, a claim that turns *Humphrey’s* on its head. President Roosevelt argued that he could fire a commissioner from the Federal Trade Commission (FTC) at will, without asserting a reason. The Supreme Court said “no” because Congress’s

⁷³ Some academics have traditionally favored a view of the “separation of powers” that they call “functionalist.” The argument is that courts should exercise flexibility and pragmatism in assessing new structural arrangements. Many years ago, I argued that scholars, liberal and conservative, should reconsider the idea of “function” and consider the consequences to the people, of “who decides,” when one shifts power. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 774-75 (1999) [hereinafter *Vertical Separation*]. I am not alone in questioning focus on functions. See Magill, *supra* note 66; Bradley & Flaherty, *supra* note 66.

⁷⁴ U.S. CONST. art. II, § 3.

⁷⁵ U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

⁷⁶ *Myers v. United States*, 272 U.S. 52 (1926).

⁷⁷ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

law required good cause. The Supreme Court struck down President Roosevelt's claim of absolute power to remove, but based its ruling on the "kinds" of power exercised by the FTC, which it called "legislative" and "judicial." Today, critics argue that the president may be required to state a good cause for removal, but only if the agency is exercising judicial or legislative functions. *Morrison* rejected that part of *Humphrey's Executor*; upholding a good cause provision in a case involving dismissal of a prosecutor exercising what the court described as "executive" functions. *Humphrey's Executor* is no different from *Morrison*. In both cases, the Supreme Court told the president that he did not have unlimited power to dismiss inferior officers. In both cases, the Court required the president to follow the law.

Some have wrongfully claimed that James Madison supported the "unitary executive." Madison recognized the very distinction between the kind of statute struck down in *Myers* and that upheld in *Humphrey's*. In 1789, Madison opposed those who sought a role for the Senate in removing executive branch officers, similar to the statute in *Myers*, warning Edmund Randolph that if the Senate were given a voice in the removal of individual officers, "the Ex[ecutive] power would slide into one branch of the Legislature."⁷⁸ But he also explained that the legislature creates executive departments and official positions: "[it] creates the office, defines the powers, limits its duration, and annexes a compensation."⁷⁹ Consistent with that, Madison supported a statutorily fixed tenure for the comptroller of the currency, something that comes quite easily within his discussion of Congress's ability to set the "terms" of offices.⁸⁰

C. FALSE ASSUMPTIONS ABOUT THE HISTORY OF EXECUTIVE POWER

Some unitary executives have insisted that the president must have control over all "core executive" functions. Of course, the Constitution says nothing about "core" functions or "functions"⁸¹ at all. The very idea of function is modern. The Founders favored relational concepts, such as independence and dependence.⁸² Critics assert that prosecution is a core executive function. Again, there is no settled historical basis for this claim. As Professors Cass Sunstein and Lawrence Lessig have explained, "[f]or the first eighty years of the Republic, there was no centralized and hierarchical department of legal affairs in the executive branch."⁸³ The power to "prosecute" a case—a term that covered civil and criminal proceedings at the time—first resided in the comptroller general of the United States, a member of the Treasury Department.⁸⁴ The comptroller was given authority to sue on behalf of the United States to obtain monies owed to the United States. The attorney general remained a weak office for the first 70 years of the country's existence, limited to advising the president and arguing in the Supreme Court.⁸⁵ Prosecution was often a private matter and in some

⁷⁸ Letter from James Madison to Edmund Randolph (June 17, 1789), in 12 PAPERS OF MADISON 230 (Charles F. Hobson & Robert A. Rutland eds., 1979).

⁷⁹ *Id.* at 255.

⁸⁰ *Id.* at 265 ("[T]here may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government.").

⁸¹ A Google n-gram of uses of the term "function" shows the term to be virtually nonexistent in 1800.

⁸² Nourse, *Federalist Papers*, *supra* note 49.

⁸³ Lessig & Sunstein, *supra* note 67, at 16.

⁸⁴ *Id.* at 17.

⁸⁵ Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561, 582.

states associated with the judiciary, the prosecutor putatively performing what we would today call “judicial” functions.⁸⁶

Even if we were to conclude that the special counsel was exercising “executive” power, that would do nothing to undermine legislation requiring a president offer a good reason to fire a special counsel investigating the president or his close associates. Let us assume that prosecution is a core executive function today. This alone does not make the Integrity Act unconstitutional. “No man is a judge in his own cause.”⁸⁷ This was the great cry of the British Whigs against the king that inspired our American Revolution. This was the origin of our separation of powers.⁸⁸ Even if, in other cases, the president might claim he had absolute control over core executive functions, in cases where the president or his close associates are subject to criminal investigation, this power must yield to a larger principle: no president is above the law.⁸⁹

There is nothing in the history or modern understanding of the separation of powers that demands rejection of “good cause” restrictions. Justice Scalia was right to emphasize the importance of the separation of powers. But Justice Scalia’s idea of the separation of powers is both unfaithful to the constitutional text and dependent upon an entirely modern idea of “functional” separation. The one thing we know about the separation of powers at the Founding was that the Founders explicitly rejected putting a special “separation of powers” clause into the text of the Constitution. Justice Scalia cites to the Massachusetts Constitution for this principle,⁹⁰ but a separation of powers clause was intentionally left out of our Constitution for a reason. Such provisions in state constitutions did not work to separate the departments in practice—they were mere parchment barriers. Madison describes the problems at length in the *Federalist Papers*.⁹¹ To cite just one example, St. George Tucker described the situation in Virginia, where the executive possessed “not a single feature of Independence” because “in Virginia, [it] is chosen, paid, directed, and removed by the legislature.”⁹²

Our separation of powers emerges out of a vast number of constitutional provisions, most prominently those structuring the incentives of those who head the departments. The Founders were very clear that the heads of the departments were to be “independent.” The president was not to be elected by the House, and members of the executive could not sit in Congress. At the same time, the Founders gave

⁸⁶ See Jed Shugerman, *Stare Scalia*, SLATE (Apr. 27, 2018, 6:37 PM), <https://slate.com/news-and-politics/2018/04/republican-senators-obsession-with-antonin-scalia-is-leading-them-to-make-sloppy-mistakes.html>.

⁸⁷ Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 n. 1 (2012).

⁸⁸ Nourse, *Federalist Papers*, *supra* note 49.

⁸⁹ *Clinton v. Jones*, 520 U.S. 681 (1997).

⁹⁰ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J. dissenting) (opening the dissent by citing the Massachusetts Constitution).

⁹¹ THE FEDERALIST NOS. 47, 48 (James Madison).

⁹² CHARLES S. SYDNOR, AMERICAN REVOLUTIONARIES IN THE MAKING: POLITICAL PRACTICES IN WASHINGTON’S VIRGINIA 87 (1965) (quoting St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 119 (1803)).

separate persons incentives to align themselves with the “place.”⁹³ This alignment was sealed by the power of the people arranged in different geographic constituencies. As Hannah Arendt wrote long ago, when we say of someone that they are “in power,” we actually refer to his being empowered by a certain number of people to act in their name.⁹⁴ The Constitution’s most important clauses—the ones that do the work in keeping the departments separate—are the “representational” clauses.⁹⁵ When given the choice between representing the state of Alaska versus the nation, the president will choose the nation because it is in his self-interest to appeal to the nation for affirmation and reelection. If Alaska’s interests align with other states, the president will be rebuffed in the Senate, not because anyone is performing a “legislative function,” but because the senators are voting their self-interested duty to represent their constituents. Had the separation of powers not been in the electoral self-interest of the “men” who run what Madison called the “places,” our government would long ago have disappeared. Functional overlap does not define or undermine such a system. Harvard, Yale, and Georgetown law schools all perform the same function, but they are independent institutions because they have different leaders, teach different students, and cultivate different alumni. So, too, our government: Even if the departments share certain functions, they have different leaders, different personnel, and different constituencies.

Nothing in the Integrity Act undermines that self-enforcing system. Indeed, it furthers that system because it requires the president to tell the nation’s voters his reasons for firing a special counsel. The Act remains faithful to the core principle of the rule of law that no man may be a judge in his own cause.

V. THE SPECIAL COUNSEL IS NOT A SUPERIOR OFFICER REQUIRING SENATE CONFIRMATION

In debate over the Integrity Act, some senators raised an ancillary argument that the special counsel is a principal officer who, under the Appointments Clause of the U.S. Constitution, must be nominated by the president and confirmed by the Senate.⁹⁶ In support of that claim, others have recently asserted that the special counsel has violated the holding in *Morrison* by extending the investigation and, in effect, becoming a principal officer.⁹⁷ History tells us that special counsels have been named

⁹³ One of Madison’s most famous lines in Federalist No. 51 is the claim that the government had to be structured to align the “interest of the man” with the constitutional rights of the place. One important part of that structure were provisions that secured salary and tenure provisions to avoid problems that had arisen in the states when one branch sought to manipulate the other by raising or lowering salaries or through removal. See FEDERALIST No. 51 (James Madison) (“[t]he interest of the man must be connected with the constitutional rights of the place.”).

⁹⁴ HANNAH ARENDT, ON VIOLENCE 44 (1970).

⁹⁵ See U.S. CONST. art. I, §§ 2-3 (establishing the process by which members of the House of Representatives and the Senate are elected); *id.* art. II, § 1, cls. 2-3 & amend. XII (creating the process by which Presidents are elected); *id.* amend. XVII (providing for the direct election of Senators). See *Clinton v. City of New York*, 524 U.S. 417, 452 (Kennedy, J. concurring) (stating that the “[s]eparation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised.”).

⁹⁶ U.S. CONST. art. II, § 2, cl. 2.

⁹⁷ Steven G. Calabresi, *Mueller’s Investigation Crosses the Legal Line*, WALL ST. J. (May 13, 2018, 1:49 PM), <https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750> (arguing that the Appointments Clause has been violated).

repeatedly over time without Senate confirmation and under the current Justice Department regulations.⁹⁸

Case law confirms the conclusion that Special Counsel Mueller is an inferior officer. *Morrison* upheld a much more powerful office as an “inferior” one. The Watergate-era Independent Counsel statute provided significant powers to Independent Counsel Alexia Morrison. And, yet, the Supreme Court explained that Morrison was an “inferior” officer because she was subject to Justice Department control. Justice Scalia himself explained as much in his opinion in *Edmond v. United States*.⁹⁹ Writing for the majority, he explained that the *Morrison* court had found the independent counsel to be an “inferior officer.” In reaching that conclusion, *Morrison* “relied on several factors: that the Independent Counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited.”¹⁰⁰

The *Morrison* factors show that special counsel Mueller is an “inferior officer.”¹⁰¹ As in the *Morrison* case, the special counsel is performing “limited duties” focusing on criminal prosecutions arising from the influence of Russia on the 2016 election.¹⁰² Unlike the head of the Criminal or Civil Divisions in the Justice Department—officials confirmed by the Senate—the special counsel is not managing hundreds or thousands of cases and making overarching policy decisions on litigating those cases, but is investigating a single set of allegations about the Trump campaign and its officials’ ties with Russia. The Rosenstein memorandum defining the scope of the investigation authorizes the special counsel to continue investigations underway at the time the memo was written, as well as “any matters that arose or may arise directly from the investigation.”¹⁰³ Again, unlike the confirmed heads of Justice Department divisions, the special counsel’s job ends when the investigation of the matters outlined in the referral from the deputy attorney general is completed. Finally, the special counsel can be removed for “good cause” by the attorney general and, given the recusal of attorney general Sessions, the deputy attorney general.¹⁰⁴

Critics of Special Counsel Mueller seek support from the Supreme Court’s decision in *Edmond*,¹⁰⁵ but the Court’s decision in that case supports the conclusion that Mueller is an inferior officer. *Edmond* involved the question whether members of the Coast Guard Court of Appeals had been properly appointed. The court-martialed defendants argued that the members of the court of appeals were “principal” officers. After listing the *Morrison* factors, Justice Scalia wrote: “we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and

⁹⁸ See GREENBERG, *supra* note 50. Under the current regulations, former Senator John Danforth was named as a Special Counsel to investigate allegations of excessive force in the Waco affair and US Attorney Patrick Fitzgerald was named as a Special Counsel to investigate the Plame affair, arising from allegations about the “outing” of a CIA agent by senior White House officials.

⁹⁹ *Edmond v. United States*, 520 U.S. 651 (1997).

¹⁰⁰ *Id.* at 661.

¹⁰¹ The current special counsel regulations are narrower than the original independent counsel law, further supporting the claim that Special Counsel Mueller is an inferior officer.

¹⁰² See *Read the DOJ Memo Authorizing Mueller to Investigate Potential Manafort Collusion*, CNN (Apr. 3, 2018, 9:17 AM), <https://www.cnn.com/2018/04/03/politics/read-rosenstein-aug-2-memo/index.html>.

¹⁰³ *Id.*

¹⁰⁴ 28 C.F.R. § 600.7(d) (2018).

¹⁰⁵ *Edmond*, 520 U.S. at 651.

consent of the Senate.”¹⁰⁶ That standard is easily met here. Under the existing regulations, “the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”¹⁰⁷ This veto power over the special counsel’s particular actions represents the kind of direct supervision that renders the special counsel an inferior officer. This also makes Special Counsel Mueller much less powerful and independent than prior Watergate-era independent counsels.¹⁰⁸

Some have suggested that the current special counsel has pushed the limits of his jurisdiction and is behaving as a principal officer.¹⁰⁹ There is nothing in the case law that suggests that the “inferior/superior officer” question depends upon the particular facts of a particular investigation, rather than the law controlling the officer.¹¹⁰ To the extent there is public information, it appears that the special counsel has been keen to maintain limits, referring matters that might stray from the core assignment to the Southern District of New York and seeking clarification or additional authorization from the deputy attorney general when necessary. Ultimately, the constitutional question cannot be determined by the acts of the special counsel but must be based on the law. Under the existing regulations, the attorney general has the authority to tell the special counsel to stand down because his actions are “unwarranted.”¹¹¹ That makes the special counsel an inferior officer.

CONCLUSION

Only in an authoritarian regime is the president above the law. Having prosecuted the atrocities of World War II, Justice Jackson dismissed as “totalitarian” the legal argument that the president had “all” executive power. The arcane legal particulars in this Issue Brief concerning presidential removal—a power which has been debated since 1789—should not obscure what is at stake today. The unitary executive theory is dangerous. Many legal academics thought it had died in the Bush war on terror, when it was used by the Office of Legal Counsel to justify torture. Once taken from the law journals and the legal societies and handed to political agents, the unitary executive idea appears to grant presidents license to dismiss the law, all based on a lonely dissent. No Supreme Court majority has ever held that the president is above the law, whether the case concerned removal or appointments or civil suits or the war on terror. The Senate’s attempt to require the president to state a good cause for the removal of a special counsel is a modest burden, necessary and proper to defend the rule of law.

¹⁰⁶ *Id.* at 663.

¹⁰⁷ 28 C.F.R. § 600.7(b) (2018).

¹⁰⁸ Once *Morrison* was decided, *Morrison*’s critics shifted their argument about “good cause” to the appointments clause. Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998). The academic argument was that, under *Edmond*, a special counsel is not “supervised” by a superior because he may only be removed for “good cause.” Nothing in *Edmond*’s supervision test, however, demands such a reading.

¹⁰⁹ Calabresi, *supra* note 97.

¹¹⁰ Should the President find that the Attorney General or Deputy Attorney General are not exercising appropriate authority over the Special Counsel, he may fire them at will. See Steve Vladeck, *How to Replace Jeff Sessions*, SLATE (July 25, 2017, 1:23 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/if_donald_trump_fires_jeff_sessions_here_s_how_he_ll_appoint_a_successor.html.

¹¹¹ 28 C.F.R. § 600.7(b) (2018).

ABOUT THE AUTHOR

Victoria Nourse is a Professor of Law at Georgetown University Law Center. She has previously held chairs at Emory University and the University of Wisconsin and has been a visiting law professor at Yale, NYU, and Northwestern schools of law. She has taught across the public law curriculum, from legislation to administrative law to constitutional law, writing her first article on the separation of powers in 1996. In 2015-16, she served as Chief Counsel to the Vice President of the United States, capping a career of public service that began at the Justice Department as an appellate litigator. In 2017, she was named a public member of the Administrative Conference of the United States. Her latest publications include: *Statutes, Regulation, and Interpretation* (with Eskridge and Gluck) (West 2014 & 2017 Supp.) and *Misreading Law, Misreading Democracy* (Harvard 2016).

What Starts in Texas Doesn't Always Stay in Texas: Why Texas's Systematic Elimination of Grassroots Voter Registration Drives Could Spread*

Mimi Marziani and Robert Landicho

In the last two years, millions of everyday Americans—totaling 20% of all adults—have taken to the streets, the airports, the courthouses, state capitals, and other public places to make their voices heard.¹ More have spoken out online.² And, activism has not been confined to urban centers—in Alpine Texas, for example, a small town with a population just shy of 6,000 people, nearly 100 protestors hiked across the desert (in a rare rain storm no less!) during the 2017 Women's March.³

"History doesn't repeat itself but it often rhymes."⁴ Throughout American history, state and federal governments have all too often met periods of social and political activism with backlash—restricting our First Amendment rights of expression, association, and petition. And indeed, there is evidence of growing hostility towards protesting, community organizing, efforts to turn out the vote, and other protected forms of civic engagement today. For instance, President Donald J. Trump has used Twitter to try to undermine grassroots activism and threaten protestors,⁵ tweeting

* This Issue Brief was initially published in May 2018.

¹ *One in Five Adults Have Attended a Political Protest, Rally or Speech*, WASH. POST (Apr. 21, 2018), https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2018/04/06/National-Politics/Polling/release_516.xml

² Tens of millions of people posted about #MeToo alone on social media in the days following the start of that movement. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

³ Lydia O'Connor, *Living in a Small Town Didn't Stop These People from Starting Women's Marches*, HUFFINGTON POST (Jan. 22, 2017, 5:39 PM), https://www.huffingtonpost.com/entry/small-town-womens-march_us_5884e049e4b0e3a73569abcc.

⁴ This quote is often attributed to Mark Twain but the actual origin appears unknown. See Jeff Sommer, *Funny, but I've Heard This Market Song Before*, N.Y. TIMES (June 18, 2011), <https://www.nytimes.com/2011/06/19/your-money/stocks-and-bonds/19stra.html>.

⁵ See, e.g., Daniella Silva, *Trump Calls for Investigation into Tax Day Protesters, Tweets 'Election Is Over!'*, NBC NEWS (Apr. 16, 2017, 10:34 AM), <https://www.nbcnews.com/politics/donald-trump/trump-calls-investigation-tax-day-protesters-tweets-election-over-n747101>.

specious arguments then recycled by media, politicians, and even celebrities.⁶ This started following the 2016 election when, infamously, Mr. Trump re-tweeted a photo of buses in Austin, Texas to support claims that post-election protests were run by “professional protestors, incited by the media.”⁷ (Those buses were used by a software company for conference attendees).

History teaches that blowback against activism can be particularly intense when grassroots movements become strong enough to threaten the balance of political power. Douglas McAdam, a Stanford sociology professor, has explained that “southern legislatures—especially in the Deep South—responded to the Montgomery Bus Boycott (and the Supreme Court’s decision in *Brown v. Board of Education*) with dozens [...] of new bills outlawing civil rights groups, limiting the rights of assembly, *etc.* all in an effort to make civil rights organizing more difficult,” invoking claims of “professional” agitators to undermine grassroots movements.⁸ In early 2017 alone, at least 18 states (including in Texas) introduced laws geared to curb protests and community organizing,⁹ including a string of laws decreasing or eliminating the liability of drivers who injure protestors who block roads.¹⁰ The spook of “professional protestors” is expressly evoked to justify the laws.¹¹

As of the date of publication, it is unknown how citizen activism like #MeToo, #NeverAgain, and the #Resistance might translate into new policies or new elected representatives. But, there’s little doubt that, like the 1960s, we are in a time of unusually high grassroots energy, particularly among persons of color, women, and young people that will likely gain speed as the midterm elections approach. As a result, we must expect—and be prepared to fight—efforts to restrict protesting, organizing, and voter activity under the guise of targeting “professional” agitators.

Cue Texas. Anyone looking for a blueprint to suppress grassroots power-building will look toward the Lone Star State. The possibility that grassroots energy of historically disenfranchised groups could shift political power in Texas has been on its legislature’s mind since at least 2011. Indeed, numerous courts have now agreed that the reality of changing demographics¹² motivated Texas to draw racially discriminatory

⁶ See, e.g., Steve Benen, *Trump and His Republican Allies Cling to the ‘Paid Protester’ Myth*, MSNBC, (Feb. 3, 2017, 10:46 AM), <http://www.msnbc.com/rachel-maddow-show/trump-and-his-republican-allies-cling-to-the-paid-protester-myth>; Callum Borchers, *Tucker Carlson’s Surprising, Much-Needed Takedown of a ‘Paid Protester’ Hoax*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/18/tucker-carlsons-surprising-much-needed-takedown-of-a-paid-protester-hoax/?utm_term=.b0f1079981ab.

⁷ Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html>.

⁸ Christopher Ingraham, *Republican Lawmakers Introduce Bills to Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.a091bfa40482.

⁹ *Id.*

¹⁰ Dakin Andone, *These States Have Introduced Bills to Protect Drivers Who Run over Protesters*, CNN (Aug. 19, 2017, 3:36 AM), <https://www.cnn.com/2017/08/18/us/legislation-protects-drivers-injure-protesters/index.html>.

¹¹ One Republican senator argued, in support of a bill that would allow racketeering charges against protestors, “you have full-time, quasi-professional agent-provocateurs that attempt to create public disorder.” See Ingraham, *supra* note 8.

¹² Following rapid growth in the early 2000s, Texas became “majority-minority.” The 2017 Census estimates that 42.6% of Texas’s 28.3 million population is non-Hispanic White or (as we say in Texas, “Anglo”). *QuickFacts: Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/TX/PST045217#viewtop>.

legislative districts¹³ and enact a racially discriminatory voter photo ID law.¹⁴ The associated court battles have been widely publicized and exhaustively analyzed.

But in 2011, Texas also introduced new rules (or fortified existing procedures) governing third-party voter registration activities (for simplicity, “voter registration drives”¹⁵). These rules make organizing voter registration drives wrought with legal (and sometimes felony) liability. As one community organizer put it, Texas law requires “a PhD in voter-obstacle-ology to navigate the system.”¹⁶ Even worse, in 2017, Texas passed new criminal penalties, further upping the stakes.

For the reasons that follow, the voter registration restrictions in Texas are, at bottom, equally as threatening to voter engagement as (for example) discriminatory redistricting maps or voter ID laws—but restrictions on voter registration activity have been largely overlooked, and not properly scrutinized by the courts. This paper seeks to correct this imbalance, at a critical time in our nation’s history. Just as those who seek to undermine grassroots expressive activity in 2018 and beyond might look to Texas, our experience in Texas also provides a roadmap to fight back.

In Part I, we provide an overview of existing Texas voter registration laws, situated in comparison with other states. No other state has enacted such a complex, punishing web of regulations on voter registration drives as Texas has.¹⁷ In Part II, we turn to the Fifth Circuit’s 2013 rejection of a facial challenge to the constitutionality of these laws, *Voting for America v. Steen*, a case that (we argue) departs from existing First Amendment jurisprudence and Election Clause preemption.¹⁸ In our view, the Fifth Circuit’s reasoning is stale and ripe for challenge. In Part III, we contemplate future claims that could be brought against Texas’s suffocating voter registration scheme.

¹³ Texas’s congressional and state legislative maps have been embroiled in litigation since original passage in 2011. Initially, Texas’s maps did not receive pre-clearance under Section 5 of the Voting Rights Act (VRA). See *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). In 2013, the legislature adopted interim maps drawn by a district court in Texas and the U.S. Supreme Court vacated and remanded the D.C. panel’s opinion, in light of *Shelby Cty. v. Holder*. See *Texas v. United States*, 133 S. Ct. 2885 (2013); see also *Texas v. United States*, 49 F. Supp. 3d 33 (D.D.C. 2014). Since then, the 2011 and 2013 maps have been litigated before a three-judge district court panel, including claims that the maps violate Section 2 of the VRA and the Equal Protection Clause. The decisions of the panel are now pending before the U.S. Supreme Court. See *Abbott v. Perez*, No. 17-586 (argued Apr. 24, 2018).

¹⁴ The Fifth Circuit (en banc) struck down the 2011 Texas voter ID law in July 2016, finding that it discriminated against Black and Latino Texans in violation of Section 2 of the VRA. See *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). More recently, the Fifth Circuit upheld a modified version of the ID law passed by the legislature in 2017. See *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

¹⁵ We use “voter registration drives” as shorthand for all third-party voter registration activity because the concept of a registration drive will be familiar to many readers. Know that we are also including registration with door-to-door canvassing, petition initiative drives that include voter registration, individual efforts to register friends and family, and many acts that stretch beyond the usual image of college students sitting at a folding table in the campus quad.

¹⁶ See Ari Berman, *Texas’s Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, NATION (Oct. 6, 2016), <https://www.thenation.com/article/texass-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/>.

¹⁷ See *Election 2012: Voting Laws Roundup*, BRENNAN CTR. FOR JUSTICE (Oct. 11, 2012) [hereinafter, “Brennan 2012 Roundup”], <https://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>.

¹⁸ *Voting for Am. v. Steen*, 732 F.3d 382 (5th Cir. 2013).

I. THE REGULATION OF VOTER REGISTRATION DRIVES IN TEXAS AND ELSEWHERE

A. THE UNIQUE ROLE OF VOTER REGISTRATION DRIVES

Voter registration drives are a key tool in boosting civic participation and building grassroots power. Since the 1960s, voter registration drives have played a central role in increasing registration and participation rates, particularly among under-represented communities of color and young voters.¹⁹ Indeed, Census data has long demonstrated that persons of color, young people, and low-income persons are much more likely to register to vote through a voter registration drive than are white, older, wealthier Americans.²⁰ This remains true today. In the November 2016 election, Black and Latino voters were nearly twice as likely as white voters to have registered through a voter registration drive than through other means.²¹ More than 10% of all young voters registered to vote at school, resulting almost certainly from voter registration drives at those schools.²²

Recognizing the importance of voter registration drives, Congress sought to provide support for such efforts in its 1993 National Voter Registration Act (NVRA).²³ The NVRA's stated purpose is to increase voter participation and remedy "discriminatory and unfair registration laws and procedures" that have "direct and damaging" effects on voter participation in federal elections, particularly registration laws that "disproportionately harm voter participation among racial minorities."²⁴ The NVRA removes barriers to voter registration on a number of fronts, including by requiring states to accept voter registration applications by mail through a standard federal registration form.²⁵ It specifically emphasizes making the federal form available "for organized voter registration programs,"²⁶ such as national and grassroots organizations conducting voter registration drives.

¹⁹ The VRA provided additional support for registration efforts in the South. Following the VRA's historic passage, community organizers, such as Congressman John Lewis, registered millions of Black voters, many of whom had been turned away by state election officials throughout their lives. Because of their efforts, the number of Black voter registrations in Alabama (for example) more than doubled in the ten months following the passage of the VRA, from 113,000 to 235,000. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA*, 37-45 (2015). In Selma alone, Black voter registration increased from 1,516 before the VRA to a whopping 10,186 just months later. *Id.* at 37.

²⁰ See Stephen Mortellaro & Michelle Kanter Cohen, *Restricting Voter Registration Drives*, PROJECT VOTE (Sept. 2014), <http://www.projectvote.org/wp-content/uploads/2015/06/RESTRICTING-VR-DRIVES-POLICY-PAPER-SEPT-2014.pdf>.

²¹ See *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. Note that while these counts include voter registration by other means, voter registration drives are viewed as an increasingly important source, "especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities." Wendy R. Weiser & Lawrence Norden, *Voting Law Changes In 2012*, BRENNAN CTR. FOR JUSTICE (Oct. 3, 2011), <https://www.brennancenter.org/publication/voting-law-changes-2012>.

²² See U.S. CENSUS BUREAU, *supra* note 21.

²³ The National Voter Registration Act of 1993, 52 U.S.C. § 20501 *et seq.* (1993).

²⁴ *Id.* § 20501.

²⁵ See 52 U.S.C. § 20505(a)(1) (1993).

²⁶ *Id.* § 20505(a)(b) (1993).

After the NVRA's passage, most states loosened their regulation of third-party voter registration activities.²⁷ But, in the last ten years, voter registration drives have been a repeated political target in two related ways. First, there has been an increase in fraud allegations directed at registration activity, particularly when run by progressive organizations. Relatedly, there have been efforts by legislatures to introduce bills or pass legislation to restrict such activities.²⁸

Allegedly motivated by claims of widespread fraud, newly empowered conservative state legislatures passed a wave of restrictive voting laws after the 2010 midterm elections. Public attention focused on new laws mandating photo ID or proof of citizenship at the polls, as well as roll-backs on early voting and absentee balloting.²⁹ But at least eight states introduced laws to restrict registration drives.³⁰ Like Texas, Florida passed regulations so onerous that the local League of Women Voters chapter suspended operations after more than 70 years of conducting drives in the state.³¹ Florida's law was enjoined by a federal court in 2012, while Texas's law persists.³²

Today, the laws of other states contain parts of Texas's law.³³ Notably, 22 states impose a deadline to return registrations prior to the end of the registration period; 19 of these 22 states attach criminal sanctions or fines for a failure to timely deliver voter registration applications.³⁴ Along with Texas, Colorado and New Mexico require training for all persons who wish to register voters.³⁵ But no other state combines so many restrictions with such harsh penalties for mistakes as Texas.³⁶ And, as described below, to our knowledge no other state has been so successful at chilling voter registration activity.

B. THE TEXAS SCHEME

1. Background

Amazingly, Texas's scheme started with good intentions. Originally, in the 1980s, Texas created the regime for Texans to become "volunteer deputy registrars" (VDRs)

²⁷ See Diana Kasdan, *State Restrictions on Voter Registration Drives*, BRENNAN CTR. FOR JUSTICE (2012), <http://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf>.

²⁸ See *id.*; see also Mortellaro & Cohen, *supra* note 20.

²⁹ See, e.g., Weiser & Norden, *supra* note 21.

³⁰ Illinois, Texas, and Florida passed restrictions on voter registration drives, while California, Mississippi, Nevada, New Mexico, and North Carolina proposed similar restrictions. *Id.*; Kasdan, *supra* note 27; Brennan 2012 Roundup, *supra* note 17; see also *Voter ID History*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

³¹ See Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunction, *League of Women Voters of Florida v. Browning*, No. 4:11-cv-00628-RH-WCS, 2011 WL 12585275 (N.D.Fla. Dec. 19, 2011). Similar challenges to proof of citizenship requirements for voter registration introduced in 2011 and 2012 in Kansas, Alabama, and Georgia are pending—although the DC Circuit enjoined such requirements for the 2016 election. See *League of Women Voters of United States v. Newby*, No. 16-5196, 2016 WL 5349779, at *2 (D.C. Cir. Sept. 26, 2016); see generally Merrit Kennedy, *Court Blocks Proof-of-Citizenship Requirement for Voters in 3 States*, NPR (Sept. 10, 2016, 12:48 PM), <http://www.npr.org/sections/thetwo-way/2016/09/10/493405211/court-blocks-proof-of-citizenship-requirement-for-voters-in-3-states>.

³² *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012). Marziani was plaintiff's counsel.

³³ For a detailed survey of state law in this area, see Kasdan, *supra* note 27.

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ See generally *id.*

through a state certification process. VDRs were intended to boost participation in elections by “encourag[ing] voter registration” for all eligible Texans.³⁷ As then-Governor of Texas Mark White explained, the VDR regime was created to “open the doors as wide as possible to every single, eligible qualified voter... and not exclude anybody under any circumstance.”³⁸

Over time, however, Texas voter registration laws became stale, failing to keep pace with technological advances and national efforts like the NVRA. Then, in 2011, the old VDR laws were significantly tightened in the name of preventing voter registration fraud, without any evidence of misconduct or any credible threat to Texas elections. That year, the Texas secretary of state dealt another blow, re-interpreting existing rules—declaring, for instance, that certification was county-specific so one county’s certification did not translate to another.³⁹ Even worse, in 2017, the Texas legislature went further still, passing a “Vote Harvesting Organizations”⁴⁰ law (a law that criminally sanctions civil society organizations that purportedly “harvest votes” in order to influence electoral outcomes) that makes it a state jail felony to act with three or more persons in running afoul of certain portions of the VDR law. Such violations, if prosecuted, are punishable by a mandatory minimum sentence of at least 180 days in jail.⁴¹

The result of Texas’s laws is evident. Since 2011, voter registration activity in Texas has frozen. “National groups that specialize in voter registration [were] forced to abandon Texas.”⁴² A small number of local groups persevered, standing their ground in the face of constant scrutiny and mounting hostility from state officials.⁴³

Texas voters have suffered. Voter registration rates in Texas rank 44th nationally, with only 68% of eligible voters on the rolls.⁴⁴ The Texas Civil Rights Project

³⁷ See Tex. S.B. 616, 69th Leg., R.S. (1985) (engrossed) § 13.031(a).

³⁸ Brief of Former Governor Mark White, Former Lieutenant Governor William P. Hobby, Jr. and Members of the 69th Texas Legislature as Amicus Curiae in Support of Appellee at 14-15, *Voting for Am. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (No. 12-40914), 2012 WL 5996185. Governor White explained that the 1985 election code specifically “sought to encourage full participation in voter registration and voting with an eye toward curbing malicious behavior not by voters or voter registration drives, but by local registrars who sought to limit voter participation of disfavored groups.” *Id.* at 14.

³⁹ See *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 845 (S.D. Tex. Aug. 2, 2012). The Texas Secretary of State’s Director of Elections, Ann McGeehan, interpreted the law in a letter to *Voting for America*, a national non-partisan voter registration organization requesting clarification of Texas’s County limitation in May 2011. See *id.* at 824.

⁴⁰ See TEX. ELEC. CODE ANN. § 276.011 (West 2017); see also Tex. H.B. 1735, 85th Leg., R.S. (2017) § 62, amending TEX. ELEC. CODE ANN. § 276.011.

⁴¹ See TEX. ELEC. CODE ANN. §§ 13.006, 13.008(a)(1)-(3), 13.145 (West 2017) (VDR provisions for Class A misdemeanors); *id.* at § 276.011(b) (elevating Class A misdemeanors to state jail felonies); and TEX. PENAL CODE § 12.35 (West 1996) (penalties for state jail felonies). Texas Attorney General, Ken Paxton, encouraged this law, and tweeted on October 6, 2016 that he was investigating “the largest voter fraud in Texas history” (without providing any evidence). Tellingly, Direct Action Texas, a conservative political advocacy group in Dallas/Fort Worth, then published an article emphasizing that vote harvesters “are stealing votes” and are typically “first or second generation Americans who speak fluent Spanish and are sent into Spanish speaking neighborhoods. They are African-American women, including well-known members of the largest local churches.” In other words, they expressly advocated targeting community organizers and grassroots activists in predominantly minority neighborhoods. Christine Welborn, *The Fort Worth Way: Election Fraud Is Taking Place and It Must Be Stopped*, DIRECT ACTION TEX. (Oct. 19, 2016), <http://directactiontx.com/fort-worth-election-fraud/>.

⁴² Berman, *supra* note 16.

⁴³ *Id.*

⁴⁴ JAY JENNINGS & EMILY EINSOHN BHANDARI, UNIVERSITY OF TEXAS AT AUSTIN, ANNETTE STRAUSS INSTITUTE FOR CIVIC LIFE, 2018 TEXAS CIVIC HEALTH INDEX 4-5 (2018), https://moody.utexas.edu/sites/default/files/2018-Texas_Civic_Health_Index.pdf.

estimates that well over 4.4 million eligible Texans are unable to vote because they are either unregistered or their registration data is inaccurate or outdated.⁴⁵ Moreover, there are troubling disparities among the electorate. Asian-American and Latino voters are significantly less likely to be registered than are their white peers,⁴⁶ and young voters are woefully underrepresented,⁴⁷ translating to an electorate that is older and whiter than is Texas's citizen voting-age population.⁴⁸

2. How the Volunteer Deputy Registrar Law Works

Anyone who handles a completed voter registration form must be deputized as a "VDR" in every county where he or she wishes to conduct voter registration.⁴⁹ VDR eligibility is limited to persons who are 18 years of age or old, U.S. citizens, and Texas residents.⁵⁰ This excludes young Texans (including most high school students), non-citizens (including those with legal status), and non-residents of Texas (the "Non-Resident Prohibition") from engaging in voter registration drives.

VDRs may only collect forms from residents of Texas counties where they have been deputized (the "County Limitation").⁵¹ Anyone who mistakenly collects a form from a voter who resides in another county, where she has not been deputized, "purports to act as a [VDR]" without "effective appointment" and commits a misdemeanor crime⁵² punishable by a \$500 fine.⁵³

To become a VDR, one must attend a mandatory training session run at the county level—but counties are required to host only one training a month and many do so in the middle of the work day.⁵⁴ Each of Texas's 254 counties has its own distinct procedures, meaning that anyone conducting large-scale registration efforts must navigate a web of certification requirements specific to each county. In counties where training is limited, this can take months.

⁴⁵ Beth Stevens, *There Are 4.4 million Texas Votes Missing*, TEX. CIV. RTS. PROJECT (Feb. 8, 2017), <http://texascivilrightsproject.org/4-million-texas-votes-missing/>.

⁴⁶ See *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU, tbl. 4b (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. According to this recent census data released in May 2017, nationwide, nearly 73.9% of non-Hispanic white citizens are registered to vote, as compared to 69.4% of Black citizens, 56.3% of Asian-American citizens, and 57.3% of Hispanic citizens. *Id.* In Texas, Black citizens are registered at a 73.1% rate and white non-Hispanic citizens are registered at a 72.7% rate—but Asian-American citizens are registered at only a 58.5% rate, and Hispanic-American citizens have an even lower rate of registration at 55.5%. *Id.* Notably, these statistics do not speak to whether current registration records are accurate. In Texas, as nationwide, frequent movers, including poorer persons and young people, are much more likely to have out-of-date registration records. See *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU, tbl. 7 (Nov. 2016), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

⁴⁷ JENNINGS & BHANDARI, *supra* note 44, at 5.

⁴⁸ See U.S. CENSUS BUREAU, *supra* note 46 at tbl. 4c, Column H (indicating that, in Texas, 78.3% of eligible voters of 65 years of age or older are registered, as compared with 47.6% of eligible voters from 18-24 years old.).

⁴⁹ See TEX. ELEC. CODE ANN. § 13.031 (West 2017). There is a narrow exception for a voter's spouse, child, or parent. *Id.*

⁵⁰ See *id.*

⁵¹ See TEX. ELEC. CODE ANN. § 13.038 (West 2017).

⁵² See TEX. ELEC. CODE ANN. § 13.044 (West 2017).

⁵³ TEX. PENAL CODE ANN. § 12.23 (West 2017).

⁵⁴ See Zachary Roth, *With New Year Comes New Obstacle to Voting in Texas*, MSNBC (Dec. 31, 2014, 8:06 AM), <http://www.msnbc.com/msnbc/new-year-comes-new-obstacle-voting-texas>.

As explained in an article by voting rights expert Ari Berman on the experiences of a VDR named “Tunde,” the County Limitation makes statewide drives practically impossible:

If Tunde led a registration drive outside a San Antonio Spurs basketball game, for example, he could collect forms only from people who live in Bexar County, where he’s deputized, and wouldn’t be able to register anyone attending the game from Austin, Dallas, or Houston. This is a huge problem in Texas, where many cities sprawl over multiple counties. A voter-registration drive in the state’s 13th Congressional District, which encompasses most of the Panhandle, would require deputizing workers in 41 counties.⁵⁵

Once appointed, Texas also heavily regulates the *conduct* of VDRs and thus, of voter registration drives themselves.⁵⁶ For instance, under the law:

- VDRs must personally deliver every registration form collected to the respective county registrar within five days of collection or face criminal penalties, prohibiting the mailing of forms (the “Mail Prohibition”).⁵⁷
- VDRs must carry signed certificates of appointment with their name and address, and must present these certificates to anyone who requests it.⁵⁸ All VDR certifications expire at the end of every even-numbered year.⁵⁹
- VDRs must provide a receipt with every registration form collected,⁶⁰ and receipt obligations vary significantly from county to county. In practice, this means that the standard federal form mandated by the NVRA is not permitted for use by VDRs in many counties because the federal form lacks a built-in receipt.
- Texas prohibits VDRs from photocopying collected forms, a common practice to stay in contact with new voters and encourage them to vote, even though registration records are available for public inspection as soon as they are submitted to the county registrar (the “Photocopying Prohibition”).⁶¹

The 2011 amendments to the VDR law also included a Class-A misdemeanor ban on “engaging in [...] practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person facilitates” (the “Compensation Prohibition”). While “pay-by-form” or quota prohibitions on compensation registration workers is common in other states, Texas’s version fails to explain whether Texas bans organizations from making *any* employment-based disciplinary actions or promotions based on

⁵⁵ See Berman, *supra* note 16.

⁵⁶ See generally TEXAS VOLUNTEER DEPUTY REGISTRAR GUIDE, OFFICE OF THE SEC. OF STATE, [HTTPS://WWW.SOS.TEXAS.GOV/ELECTIONS/PAMPHLETS/DEPUTY.SHTML](https://www.sos.texas.gov/elections/pamphlets/deputy.shtml).

⁵⁷ TEX. ELEC. CODE ANN. § 13.043(a)-(b) (West 2017).

⁵⁸ TEX. ELEC. CODE ANN. § 13.033(d) (West 2017).

⁵⁹ See TEX. ELEC. CODE ANN. § 13.033(b)(5) (West 2017).

⁶⁰ TEX. ELEC. CODE ANN. § 13.040 (West 2017); see also TEXAS VOLUNTEER DEPUTY REGISTRAR GUIDE, *supra* note 56 (noting that “[t]he voter registrar will issue you a certificate of appointment and give you a receipt book or voter registration applications with a tear off receipt” and suggesting that, despite the lack of express law, that county registrars may proscribe procedures for how long receipts must be retained).

⁶¹ See TEX. ELEC. CODE ANN. § 13.038 (West 2017).

productivity,⁶² and can hold an organization’s officers, directors, and agents *individually* liable for the offense.⁶³

As noted above, in 2017, the Texas legislature’s criminalization of grassroots activity went further still, passing the “Vote Harvesting Organizations”⁶⁴ law making it a state jail felony to act with three or more persons to violate certain provisions of the VDR laws. This raises criminal penalties in the VDR law “one category higher” than stated in the VDR law itself, if the violation is committed by way of a “conspir[acy]” through a “vote harvesting organization” (defined as “three or more persons who collaborate”). This makes certain violations of the VDR scheme—including the County Limitation, Compensation Prohibition, or the Mail Prohibition—a felony with a mandatory minimum sentence of not less than 180 days in jail.⁶⁵ In other words, if Tunde and two other grassroots volunteers accidentally collected completed registration forms from out-of-town Spurs fans, they could face a minimum six months of jail time.

Unfortunately, Texas’s sustained attack on grassroots activism and community organizing has been, to date, quite successful. As noted, the 2011 version of the VDR law has significantly chilled voter registration activity. Now, with the stakes raised even higher, it seems increasingly likely that Texas’s laws, if not challenged, could freeze voter registration drives into extinction.

II. THE FIFTH CIRCUIT WRONGLY UPHELD TEXAS’S VDR REGIME IN *VOTING FOR AMERICA V. STEEN*

To date, every federal court—with the notable exception of the Fifth Circuit in *Steen*—has viewed voter registration activity as inextricably intertwined with protected speech, association, and political rights under the First and Fourteenth Amendments.⁶⁶ Federal courts have also relied heavily upon the NVRA to strike down certain restrictions on registration drives, including prohibitions on submitting forms by mail.⁶⁷

⁶² See TEX. ELEC. CODE ANN. § 13.008(a)(2)-(3) (West 2017) (the “Compensation Prohibition”). See also *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 851 (S.D. Tex. 2012) (“the language of sections 13.008(a)(2) and (3), even narrowly construed, bans Plaintiffs from taking many performance-based disciplinary actions. Like [...] broad based compensation bans [...] the Compensation Prohibition has ‘the inevitable effect of reducing the total quantum of speech’ in which the Organizational Plaintiffs may engage.”).

⁶³ *Andrade*, 888 F. Supp. 2d at 825 (citing TEX. ELEC. CODE ANN. § 13.008(c) (West 2017)).

⁶⁴ See TEX. ELEC. CODE ANN. § 276.011 (West 2017); see also Tex. H.B. 1735, 85th Leg., R.S. (2017) § 62 (amending § 276.011 of the Texas Election Code).

⁶⁵ See TEX. ELEC. CODE ANN. §§ 13.006, 13.008(a)(1)-(3), 13.145 (West 2017) (VDR provisions for Class A misdemeanors); TEX. ELEC. CODE ANN. § 276.011(b) (West 2017) (elevating Class A misdemeanors to state jail felonies); TEX. PENAL CODE § 12.35 (West 2017) (penalties for state jail felonies).

⁶⁶ See, e.g., *Smith v. Meese*, 821 F.2d 1484, 1490 (11th Cir. 1987) (“[W]e briefly note the importance of the rights allegedly being abused in this case—the constitutional rights to associate freely and, perhaps most important in our governmental structure, to vote [...] The constitutional protection for the right to vote encompasses protections about registering to vote.”); *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216-17 (D.N.M. 2010) (rejecting state’s argument that voter registration activity is “ministerial,” and holding that “efforts to register people to vote communicates a message that democratic participation is important”); *Project Vote v. Blackwell*, 455 F. Supp. 2d 695, 701 (N.D. Ohio 2006) (holding that interests impacted by third-party voter registration law subjecting voter registration workers to felony charges if registration forms were not submitted within ten days impacted “critical First Amendment rights”).

⁶⁷ See, e.g., *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d at 1162 (N.D. Fl. 2012) (observing that state election officials “routinely rely on the mails,” “distribute absentee ballots through the mails,” and “allow voters to send [absentee ballots] back using the mails”).

Following the 2011 changes to the VDR law, Court of Appeals Judge Gregg Costa (then a district court judge for the Southern District of Texas) struck down five VDR provisions upon a facial constitutional challenge brought by two grassroots organizations.⁶⁸ Specifically, he invalidated: (1) the Non-Resident Prohibition,⁶⁹ (2) the County Limitation,⁷⁰ (3) the Photocopying Prohibition,⁷¹ (4) the Mail Prohibition,⁷² and (5) the Compensation Prohibition.⁷³

Under the *Anderson-Burdick* balancing test, federal courts assess the state's asserted interests and balance those asserted interests against burdens on voting.⁷⁴ Judge Costa viewed the Compensation Prohibition as an "'outright ban' on speech 'backed by criminal sanctions' that has 'the inevitable effect of reducing the total quantum of speech.'"⁷⁵ Judge Costa similarly held that the Non-Resident Prohibition was "inherently discriminatory" because it prohibits political participation of an entire "identifiable political group whose members share a particular viewpoint"⁷⁶ and "excludes millions of Americans from serving as VDRs in Texas."⁷⁷ According to Judge Costa, the County Limitation likewise "imposes heavy administrative burdens on organizations that conduct voter registration [...] by forcing organizations engaged in large-scale registration efforts to have their canvassers and managerial staff appointed and trained as VDRs in multiple counties."⁷⁸ Judge Costa also held that Texas failed to show that these laws actually advanced the state's purported interest in preventing fraud. Regarding the Photocopying Prohibition and the Mail Prohibition, he held that the NVRA, given force by the Elections Clause of the U.S. Constitution,⁷⁹ preempted both provisions.⁸⁰

⁶⁸ *Andrade*, 888 F. Supp. 2d at 856.

⁶⁹ TEX. ELEC. CODE ANN. § 13.031(d)(3) (West 2017).

⁷⁰ TEX. ELEC. CODE ANN. § 13.038 (West 2017).

⁷¹ TEX. ELEC. CODE ANN. § 13.038 (West 2017).

⁷² TEX. ELEC. CODE ANN. § 13.042 (West 2017).

⁷³ See *Andrade*, 888 F. Supp. 2d at 847-52 (striking down the Compensation Provision for potentially criminalizing companies and individuals for any performance-based employment or compensation decisions). The plaintiffs in *Andrade* did not challenge the prohibition on paying canvassers per application collected. *Id.* at 847.

⁷⁴ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Judge Costa noted that the Non-Resident Prohibition and the Compensation Prohibition were "arguably subject to strict scrutiny," but applied the *Anderson-Burdick* balancing test because neither provision "survive[d] even under that less exacting scrutiny." See *Andrade*, 888 F. Supp. 2d at 843.

⁷⁵ See *id.* at 843 (citing *Citizens United v. FEC*, 558 U.S. 310, 337 (2010)).

⁷⁶ See *Andrade*, 888 F. Supp. 2d at 843.

⁷⁷ *Id.* at 842.

⁷⁸ *Id.* at 845-47.

⁷⁹ U.S. CONST. art. I, § 4, cl. 1.

⁸⁰ Judge Costa reasoned that, as the NVRA requires states to allow VDRs to make copies once the government has received it, 52 U.S.C. § 20507(i)(1), it was an "absurd result" to prohibit VDRs from photocopying records before they are submitted—especially in light of the NVRA's purpose to eliminate "administrative chicanery, oversights, and inefficiencies." *Andrade*, 888 F. Supp. 2d at 837 (citing *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012)). Judge Costa struck down the Mail Prohibition because the NVRA requires states to "accept and use" the federal mail voter registration form, and emphasizes the use of these forms "for organized voter registration programs." See 52 U.S.C. § 20505. Judge Costa held that the NVRA's mandate "makes no distinction between applications submitted directly by a voter and those submitted by a third party like a VDR." See *Andrade*, 888 F. Supp. 2d at 838 (citing *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005)).

A. OVERVIEW OF FIFTH CIRCUIT'S OPINION IN
VOTING FOR AMERICA V. STEEN

The Fifth Circuit reversed, in an opinion that departed from existing First Amendment jurisprudence and recognized preemption standards for state election laws.

To start, the Fifth Circuit's First Amendment analysis dissected the core components of voter registration drives into separable parts (*i.e.*, the act of setting up tables, urging people to register, handing out application forms, collecting completed forms, delivering forms to a registrar, *etc.*). After separating each component, the *Steen* court performed a *separate* First Amendment analysis on each activity.⁸¹ Through this unprecedented "dissecting" approach, the Fifth Circuit found that Texas mostly regulated conduct—the "collecting and delivering completed voter registration forms"—isolated ministerial acts distinct from expressive elements of a voter registration drive.⁸² This finding, reached without reference to the record, set into motion a crucial distinction between the district court and the Fifth Circuit's First Amendment analysis. The district court had held that the VDR provisions dealt with the "expressive activity" of conducting voter registration drives as a whole, whereas the Fifth Circuit held that collection and delivery of voter registration forms is not "expressive conduct," and was therefore subject to only "rational-basis" scrutiny.⁸³

The Fifth Circuit also failed to consider the associational activity of canvassers in organizing with each other and with new voters while engaging in voter registration activities. While the district court had described a voter registration drive as a "paradigmatic associational activity" protected by the First Amendment,⁸⁴ the Fifth Circuit ignored this aspect of the First Amendment entirely.

Similarly, the Fifth Circuit's narrow First Amendment analysis focused only on the speech of the voter, disregarding the speech of the canvasser or organizer. The Fifth Circuit held that the collection and submission of voter registration applications is *not* a protected form of expressive activity by community organizers, nonprofit organizations, or individual canvassers, but is *only* the speech of the voter seeking to be registered.⁸⁵ The Fifth Circuit's critical misstep ignores established First Amendment jurisprudence protecting the expressive activity of canvassers set forth by the Supreme Court in *Meyer* (striking down Colorado's ban on paying petition circulators) and *Buckley* (striking down Colorado's requirement that those collecting petition signatures wear a badge and be registered voters).⁸⁶ The Fifth Circuit's attempt to distinguish *Meyer* and *Buckley*, based on the assumption that a VDR's submission of a completed voter registration forms cannot be considered speech by the VDR herself, undermines settled First Amendment jurisprudence.⁸⁷

In the Fifth Circuit's crabbed view of the First Amendment, very few acts in a registration drive qualified for any protection, so it rejected the notion that the VDR

⁸¹ See *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013).

⁸² *Id.* at 392–93. The Fifth Circuit added that even if it was protected expressive activity, the regulations pass First Amendment scrutiny.

⁸³ Compare *id.* at 392–93, with *Andrade*, 888 F. Supp. 2d at 840–41.

⁸⁴ *Andrade*, 888 F. Supp. 2d at 840–41.

⁸⁵ *Steen*, 732 F.3d at 392 (declaring that "supporting voter registration is the canvasser's speech, while actually completing the forms is the voter's speech, and collecting and delivering the forms are merely conduct").

⁸⁶ See *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197, 200 (1999).

⁸⁷ See *Steen*, 732 F.3d at 390.

law “chilled” protected activity out of hand. This conclusory reasoning failed to grapple with the district court’s factual findings that the VDR laws “do not promote the exercise of the right to vote, but rather, *chill* the exercise of that right through an unusual and burdensome maze of laws and penalties related to a major step in the voting process—registration.”⁸⁸ The *Steen* court concluded, without any record evidence, that “[w]ith an appropriate division of labor and organizational forethought, no participant in the drive need suffer a detriment of the ability to urge, advocate, interact, or persuade.”⁸⁹

The Fifth Circuit’s assumptions also led it to hold (under the rational-basis test) that the state’s “legitimate interest in preventing voter fraud” justified the VDR-appointment requirements,⁹⁰ despite the failure of the state to present any evidence of electoral misconduct in Texas, let alone any evidence that the challenged provisions were at all related to increasing the security of voter registration. The Fifth Circuit further held that the state’s interest in “preventing fraud” was strong enough even under the more exacting *Anderson/Burdick* balancing test,⁹¹ again despite any record evidence of fraud,⁹² and likewise upheld Texas’s interpretation of the Compensation Prohibition based on the same fraud justification, rejecting the district court’s findings on vagueness and overbreadth.⁹³

On top of this, the Fifth Circuit applied a narrow reading of the Elections Clause, an interpretation which was (and still is) expressly inconsistent with U.S. Supreme Court precedent.⁹⁴ Months before, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court struck down an Arizona law that required registration officials to reject any voter registration application not accompanied by documentary evidence of citizenship, including rejecting the NVRA’s federal mail-in registration form. The Court reasoned that the NVRA requires states to “accept and use” the federal form, which requires only that an applicant aver, under penalty of perjury, that she is a citizen—not documentary proof of citizenship. Thus, the NVRA’s mandate preempted Arizona’s law, whose additional requirements eviscerated the purpose of the NVRA.⁹⁵ Moreover, the Supreme Court emphasized that the Elections Clause, unlike the Supremacy Clause, has no rule of construction prescribing a

⁸⁸ See *Andrade*, 888 F. Supp. 2d at 855 (quoting *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 708 (N.D. Ohio 2006)).

⁸⁹ *Steen*, 732 F.3d at 390, 392 (citing *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008)). The Fifth Circuit’s reliance on *Browning* is misplaced. There, while the Southern District of Florida stated that it did not think that the “collection and handling” of voter applications was “inherently expressive” activity, it nevertheless proceeded to evaluate the conduct under the *Anderson/Burdick* test. *Id.*

⁹⁰ *Id.* Of specific emphasis were the Non-Resident Prohibition and County Limitation. See discussion *supra*, note 74.

⁹¹ *Steen*, 732 F.3d at 395. Under the *Anderson/Burdick* balancing test, a court “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate,” and then “identify and evaluate the precise interest put forward by the State as justifications for the burden.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). State rules that impose a severe burden on First Amendment rights must be narrowly tailored to advance a compelling state interest, see *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), but lesser burdens trigger less exacting review, and a state’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory measures.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

⁹² *Steen*, 732 F.3d at 394–95.

⁹³ *Steen*, 732 F.3d at 398–99.

⁹⁴ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

⁹⁵ *Id.* at 11–12.

“presumption against preemption” because the Elections Clause confers on Congress the *express power to alter or supplant state laws* prescribing the time, place, and manner of conducting federal elections.⁹⁶ Furthermore, unlike a state’s historic “police powers” at play in the Supremacy Clause context, a state’s role in regulating congressional elections “has always existed subject to the express qualification that it terminates according to federal law.”⁹⁷

The Fifth Circuit disregarded the Supreme Court’s reasoning in *Inter Tribal* when it upheld Texas’s “Mail Prohibition,”⁹⁸ which criminally sanctions VDRs for mailing applications to the appropriate county registrar. Despite the NVRA’s mandate that states must accept and use the federal mail-in registration form, the Fifth Circuit held that so long as the state “accepts” forms that come through the mail, even if the VDR who sent it is later criminally sanctioned, there is no problem.⁹⁹ The Fifth Circuit’s decision thus bent over backwards to find no preemption.

The Fifth Circuit also upheld the Photocopying Prohibition, despite the NVRA’s provision requiring the state to make voter records available for photocopying.¹⁰⁰ In doing so, the Fifth Circuit drew an artificial distinction between “records *maintained* by the State”¹⁰¹ and those same records in a VDR’s possession *prior* to the State’s receipt. In its view, a VDR could request to photocopy records *after* turning completed records in to the county registrar, *but not before*, finding that there was an (unexplained) greater risk to private information while in the hands of a VDR.¹⁰² The Fifth Circuit was unconcerned that it promoted the very same “administrative chicanery, oversights, and inefficiencies” that the NVRA was created to eliminate.¹⁰³

B. CRITICISMS OF THE FIFTH CIRCUIT’S REASONING

IN *VOTING FOR AMERICA V. STEEN*

The Fifth Circuit’s reasoning is deeply flawed in many respects.

First, in refusing to consider the entire regulatory scheme, the Fifth Circuit misses the forest for the trees. Today in Texas, as in the South in the 1960s, voter registration drives “involve[] both the expression of a desire for political change and a discussion of the merits of the proposed change.”¹⁰⁴ The Supreme Court has found that such political speech is entitled to the highest degree of protection, and has struck down governmental regulations that “reduce the total quantum of speech on a public issue.”¹⁰⁵ Here, the VDR scheme deters voter registration activity and

⁹⁶ *Id.* at 13-15 (emphasis added).

⁹⁷ *Id.* at 14-15 (citing *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001) (internal quotations omitted)).

⁹⁸ The Mail Prohibition provides that “a volunteer deputy registrar shall deliver in person, or by personal delivery through another designated volunteer deputy, to the registrar each completed voter registration application submitted to the deputy....” TEX. ELEC. CODE ANN. § 13.042(a) (West 2017); see *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 837–38 (S.D. Tex 2012).

⁹⁹ *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 400 (5th Cir. 2013).

¹⁰⁰ See 52 U.S.C. § 20507(i)(1) (2018). The Public Disclosure requirement mandates that states “maintain... and make available for public and inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of eligible voters.” *Id.*

¹⁰¹ *I.e.*, the text found in the NVRA.

¹⁰² *Steen*, 732 F.3d at 399.

¹⁰³ *Andrade*, 888 F. Supp. 2d at 837 (citing *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012)).

¹⁰⁴ *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

¹⁰⁵ *Id.* at 423; see also *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

has reduced the overall amount of registration drives, warranting heightened scrutiny. Moreover, given the voter suppression laws in Texas and nationwide since 2011, a full evidentiary examination is likely to show that lawmakers intended to silence the speech of community organizers with such laws, which would be impermissible viewpoint discrimination.

Second, the Fifth Circuit failed to plausibly explain how the various activities that make up voter registration drives can be deemed “separable” for purposes of a First Amendment analysis, particularly given the lack of case law justifying this type of approach. In particular, this holding makes little sense in the context of First Amendment “expressive conduct” jurisprudence—the expressive act of a sit-in to protest segregation, for example, may have distinct component parts (organizing members, transporting members to the protest site, actually “sitting-in,” chanting, *etc.*), but is nonetheless protected.¹⁰⁶ The Fifth Circuit’s departure from established First Amendment jurisprudence is not explained and fails to consider that the Supreme Court has applied the Speech Clause to a myriad of types of expressive conduct that do not involve “pure speech,” yet convey a particularized message (including flag burning,¹⁰⁷ the wearing of armbands used to protest war,¹⁰⁸ sit-ins,¹⁰⁹ and nude dancing¹¹⁰—to name just a few).

The messages conveyed by participants in a voter registration drive are expressive acts protected by the First Amendment—which, among them, include the message that greater and more equal voter participation is critical to the functioning of our democracy and that the voices of all eligible voters deserve to be heard.¹¹¹ The Fifth Circuit’s application of the rational-basis test to voter registration activities is wrong.

Third, the Fifth Circuit took an exceedingly narrow view of Elections Clause preemption, holding that a state law regulating elections must “directly conflict” with federal legislation to be preempted. This is the wrong test, and ignores the manifest differences between Supremacy Clause and Elections Clause preemption made clear by the Supreme Court in *Inter Tribal*¹¹² four months prior to the *Steen* decision.

Fourth, the Fifth Circuit’s assumption that a canvasser’s submission of another’s voter registration application cannot be the canvasser’s speech (but only the voter’s speech) is wrong.¹¹³ The expressive activity of “supporting voter registration” does not stop once a canvasser helps a potential voter fill out an application; rather, a canvasser continues and furthers her message by submitting the applications. Nonpartisan grassroots and national voter registration organizations convey a clear message in *actually submitting* voter registration applications—including the message

¹⁰⁶ See *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

¹⁰⁷ See *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989).

¹⁰⁸ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

¹⁰⁹ See *Brown*, 383 U.S. at 141–42.

¹¹⁰ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991).

¹¹¹ *Steen* erroneously relies upon *Planned Parenthood v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012), for its novel holding that different steps within a voter registration drive are separable and governed by different legal standards. *Suehs* is inapposite—there, the Fifth Circuit vacated a preliminary injunction halting enforcement of state regulations that blocked Medicaid-like funding to any health care providers that perform abortions, or promote or affiliate with abortion providers. *Suehs*, 692 F.3d at 346. The Fifth Circuit criticized the district court for evaluating the Texas regulations as a whole rather than analyzing each restriction in Texas’s code separately. *Id.* at 349. *Suehs* therefore had nothing to do with slicing and dicing the various acts that may constitute protected speech (*e.g.*, voter registration drives), or holding that only some acts are entitled to First Amendment protection.

¹¹² *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14–15 (2013).

¹¹³ See *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013).

that “participation in the political process through voting is important to a democratic society.”¹¹⁴ Courts have held that seeking to increase voter participation is a message in it of itself,¹¹⁵ because that act “take[s] a position and express[es] a point of view in the ongoing debate whether to engage or disengage from the political process.”¹¹⁶

The Fifth Circuit’s failure to consider the associational rights of canvassers and organizations conducting voter registration drives is another fundamental weakness of the opinion. Voter registration drives are rarely organized without a shared point of view, whether that point of view is to promote voter registration and civic participation (e.g., The League of Women Voters), to support a political candidate or candidates (e.g., campus Republicans or Democrats), to empower a particular community (e.g., NAACP and Voto Latino) or to advocate for certain policies (e.g., the National Rifle Association and Planned Parenthood). Indeed, it is well-settled law that “interactive communication concerning political change”—of whatever nature—stands at the “zenith” of conduct entitled to First Amendment protection, including for nonprofit corporations like those that typically employ community organizers and use voter registration as part of a larger strategy.¹¹⁷ Discussing such issues, assisting with someone’s registration to vote, and following up with that individual and encouraging them to actually vote all implicate strong associational rights on behalf of canvassers, nonprofit organizations, and individuals.¹¹⁸ The Fifth Circuit’s opinion ignores the chilling effect that the VDR laws have on the ability to “associate with others for the common advancement of political beliefs and ideas, [which is] a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.”¹¹⁹

Fifth, in balancing interests under the *Anderson/Burdick* test, the Fifth Circuit wrongly gave the State *carte blanche* to regulate voter registration drives in the name of preventing “voter fraud” without requiring Texas to make any showing either that its laws actually prevent fraud, or that voter registration drive fraud in Texas is a legitimate concern. The only “evidence” identified in its opinion was “evidence of voter registration fraud committed by canvassers, including those who worked for... ACORN,” from sources outside of the Texas and outside of the record.¹²⁰ To justify any sort of burden on voting rights, the *Anderson/Burdick* test requires a state to establish a precise, “sufficiently weighty” justification, not just “a vague interest in the smooth functioning” of the electoral process.¹²¹ Close examination of the legislative record is particularly important here, given the evidence showing that

¹¹⁴ See *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700, 705-06 (N.D. Ohio 2006).

¹¹⁵ *Id.* at 706.

¹¹⁶ *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010).

¹¹⁷ *Buckley v. Am. Constitutional Law Faun., Inc.*, 525 U.S. 182, 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)); see also *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

¹¹⁸ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

¹¹⁹ See *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

¹²⁰ See *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 393-94 (5th Cir. 2013).

¹²¹ *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012); see also *id.* at 432-36 (closely scrutinizing and rejecting the two justifications offered by Ohio for eliminating certain early voting days for a sub-set of voters); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (“In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”) (emphasis added).

the prevention of “fraud” was a pretextual justification used by the 2011 legislature to support the Texas photo ID law.¹²²

Finally, the Fifth Circuit’s opinion in *Steen* was based on several assumptions not justified by the record, including: (1) assuming that non-residents or residents from outside the county are actually more likely to commit voter fraud than Texas residents or county residents, where the state presented no evidence to substantiate this;¹²³ (2) assuming that a VDR trained in one county would be automatically appointed as a VDR in other counties, where the law made no such provision;¹²⁴ and (3) inserting its own ideas for how individuals and organizations should run voter registration drives under the Texas scheme,¹²⁵ rather than upholding First Amendment protections allowing individuals and organizations to implement them in the manner they feel is most effective.¹²⁶

C. POTENTIAL FUTURE CHALLENGES TO TEXAS’S VDR LAW AND SIMILAR SCHEMES

Below are just two examples of how practitioners may frame future challenges to certain provisions of Texas’s VDR law and other similar schemes:¹²⁷

1. *Facial and As-Applied Challenges Under the First Amendment and Equal Protection Clause*

It is possible that a different panel of the Fifth Circuit (or the U.S. Supreme Court on appeal) would rule differently if it had a more developed record upon an “as applied” First Amendment challenge. Community organizers in Texas could present data at trial demonstrating the chilling effects the Texas VDR law has had on their protected expressive activity. Comparing the number of voter registration drives or actual voter registration applications submitted by voter registration organizations before and after Texas enacted its new VDR provisions in May 2011—or comparing jurisdictions in Texas with similarly situated jurisdictions in other states with less

¹²² The Fifth Circuit’s ruling in the Texas photo ID litigation was based on Section 2 of the VRA; other cases reviewing state photo ID laws have involved examining the state interests alleged to support such laws and further confirmed the heightened standard required by *Anderson/Burdick* test. See, e.g., *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 235-36 (4th Cir. 2016) (holding that the State failed to identify anyone charged with committing in-person voter fraud in North Carolina, and that the state failed to show that its voter ID law did anything to deter voter fraud).

¹²³ See *Steen*, 732 F.3d at 395.

¹²⁴ *Id.* at 389.

¹²⁵ *Id.* at 391–92.

¹²⁶ See, e.g., *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (“The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”).

¹²⁷ Other challenges may be possible. For instance, “void for vagueness” or “overbreadth” challenges to the criminal sanctions in the VDR law. Another challenge that may be considered is that voting and voter registration is a “fundamental right” as is stated in the NVRA, 52 U.S.C. § 20501(a) (1)—an argument with some early support in case law immediately after the passage of the VRA, see, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1968), before the Supreme Court departed from that view and held that there must be “substantial regulation of elections,” with restrictions on voting upheld unless they were “invidious[ly] discriminatory.” See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974). A plaintiff may also challenge certain portions of the VDR law based on a vote denial challenge under Section 2 of the VRA, but would need to establish that, by preventing third-party organizations from effectively carrying out voter registration drives in Texas’s communities of color, Texas’s VDR scheme has a substantial disparate impact on Black, Latino, or Asian-American registration rates, and that the disparity results in minority members of the electorate having less of an opportunity to participate in the political process.

onerous laws—could be persuasive evidence. Plaintiffs may also present evidence indicating that the VDR laws do not adequately advance the government’s interest in preventing voter fraud.

More specifically, the new Vote Harvesting law is seemingly ripe for a facial challenge for overbreadth and vagueness under the First and Fourteenth Amendments, because of the chilling effect on grassroots voter registration activity and internal inconsistencies. For instance, because of the increased criminalization of compensation and employment decisions based on productivity for workers engaged in voter registration and their organizations, or the punishment for unlawful delivery of completed voter registration applications (even for honest mistakes),¹²⁸ additional First Amendment challenges may have success based on the principle that such heightened criminal penalties are overly broad and gravely chilling.¹²⁹

2. NVRA Preemption Challenges Based on Supreme Court Precedent

As noted above, the *Steen* decision took an exceedingly narrow view of Elections Clause preemption inconsistent with Supreme Court precedent.¹³⁰ Because the Fifth Circuit’s analysis of the Mail Prohibition and Photocopying Prohibition is “inconsistent with the NVRA’s mandate[s],” these VDR provisions and others may be ripe for challenge under the Elections Clause. One final problem, not previously explored, is that most Texas counties do not in practice “accept and use” the federal form from VDRs, because they have created their own forms with built-in receipts. In a subsequent challenge, this may be an additional basis to claim NVRA preemption.

CONCLUSION

For better and worse, what starts in Texas does not always stay in Texas. As grassroots activism continues to swell across the country, people in power *will* feel threatened, and there *will* be backlash against those on the ground. Severe restrictions on voter registration drives, like laws in Texas, are particularly threatening to First Amendment freedoms—and, as our experience in Texas shows, can be particularly effective ways to dampen grassroots power-building if allowed to stand. We believe that the time is ripe to challenge Texas’s unconstitutional regulation of voter registration drives, and look forward to greater equality and justice in our home state. We also hope that the lessons from Texas can be useful elsewhere in guarding our First Amendment freedoms during legislative sessions in 2019 and beyond.

¹²⁸ See TEX. ELEC. CODE ANN. § 13.145 (West 2017).

¹²⁹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 337–40 (2010).

¹³⁰ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257 (2013).

ABOUT THE AUTHORS

Mimi Marziani is the President of the Texas Civil Rights Project, where she leads Texas lawyers for Texas communities, boldly serving the movement for equality and justice in and out of the courts. In addition, Marziani teaches “Election Law and Policy” at the University of Texas School of Law, serves on the NYU Board of Trustees, and chairs the Texas State Advisory Committee to the U.S. Commission on Civil Rights. Marziani has an extensive background in civil rights advocacy and nonprofit management, as well as expertise in election law. Before her current role, she directed voting rights programs for progressive campaigns and committees in Texas and was Counsel for the Democracy Program of the Brennan Center for Justice at NYU School of Law. In that role, she worked to promote voting rights and regulate money in politics through nationwide litigation, legislative counseling, academic research and communications strategies. Marziani has also served as a litigation associate of Sullivan & Cromwell LLP and as a clerk for Magistrate Judge James C. Francis, IV of the Southern District of New York. She graduated, *cum laude*, from NYU School of Law and received a B.A., *magna cum laude*, from Vanderbilt University.

Robert Reyes Landicho is an attorney in Vinson & Elkins LLP’s Houston office. Although his primary area of practice is in international dispute resolution (where he has experience representing foreign governments or companies in international arbitration or in U.S. courts), Landicho also has an active *pro bono* practice that includes voting rights, disability rights, family law, immigration, and criminal justice work. Landicho also currently serves on the board of the Houston Lawyer Chapter of the American Constitution Society. He graduated from the University of California, Berkeley School of Law and received a B.A., *with honors*, from the College of William and Mary.

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Restoring Objectivity to the Constitutional Law of Incarceration*

Margo Schlanger**

Our national self-interest and our best national aspirations—to be a humane democracy—compel the human rights imperative that jail and prison conditions should not damage our many neighbors who spend time behind bars. And yet, prisons and jails are very much underregulated. Out of sight, populated by poor and disempowered prisoners, with enormous over-concentration of people of color, and presenting difficult management challenges, prisons and jails cry out for special, and especially careful, oversight methods and approaches. Since the 1970s, lawsuits—which can allow even the disempowered to hold government officials to account—have played a crucial oversight role,¹ although many features of the political economy of jail and prison litigation strain that role. This Issue Brief makes a doctrinal argument, aimed at shoring up prison oversight-by-lawsuit, that courts should evaluate liability for both use-of-force and conditions-of-confinement litigation using an objective standard.

Protections against excessive force and harmful conditions of confinement for convicted prisoners housed in jails and prisons are governed by the Eighth Amendment’s Cruel and Unusual Punishments Clause. The Fourteenth and Fifth Amendments’ Due Process Clauses afford pre-trial detainees housed in jails analogous protection. For decades, however, a flawed understanding of the Eighth Amendment has drastically undermined prison officials’ constitutional accountability for tragedies behind bars. The Supreme Court’s 2015 opinion in *Kingsley v. Hendrickson*,² which addressed liability under the Due Process Clause for official force against pretrial detainees, calls into question that erroneous reading of the Eighth Amendment. *Kingsley* has created an opportunity to mold a more logical, consistent, and just constitutional law of incarceration through additional judicial oversight. Relying on 1970s precedent—rather than subsequent case law that placed undue emphasis on the subjective culpability of officials—the *Kingsley* Court held that constitutional liability attaches when the force used against a detainee is objectively unreasonable.

For several decades, Eighth Amendment doctrine has relied on an under-supported and idiosyncratic definition of “punishment” to justify a subjective liability

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¹ See generally, e.g. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) [hereinafter Schlanger, *Trends*].

² *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

standard. *Kingsley* collapses that definition. The considerations that remain—earlier precedent; developed jurisprudence establishing criteria for “punishment” in other contexts; the feasibility and administrability of an objective standard as described in *Kingsley*; the safeguard of *ex ante* perspective; and normative concerns—each point to implementation of *Kingsley*’s objective standard not just in pretrial detention Due Process Clause contexts but also in Eighth Amendment cases.

Courts have not yet recognized that *Kingsley*’s logic compels application of an objective standard under the Cruel and Unusual Punishments Clause. As this Issue Brief explains, however, lawyers representing inmates can rely on *Kingsley*, and the constitutional and policy considerations it reflects, to argue for governmental liability for objectively unreasonable harm caused to prisoners, whether pretrial or post-conviction.

I. EIGHTH AMENDMENT DOCTRINE PRE-KINGSLEY

Before the mid-1980s, the Supreme Court’s Eighth Amendment doctrine largely used an objective test, consistent with *Kingsley* and *Bell v. Wolfish*, on which *Kingsley* relied. Beginning in 1986, however, a trio of cases—*Whitley v. Albers*, *Wilson v. Seiter*, and *Farmer v. Brennan*—shifted the doctrine to embrace a subjective test. This part examines both pre-1986 and post-1986 precedents.

A. BEFORE THE MID-1980s

Prison/jail lawsuits became common only in the late 1960s and 1970s.³ The Eighth Amendment standard of liability in these constitutional tort cases first came before the Supreme Court in 1976 in *Estelle v. Gamble*,⁴ a lawsuit seeking damages for allegedly poor medical care in a Texas prison. In an opinion by Justice Marshall, the Court held, for the first time, that the Eighth Amendment requires the government to provide medical care to prisoners. The Court explained:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical “torture or a lingering death,” the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency....⁵

The Court was imprecise in its discussion of the liability standard. Invoking a phrase that had only recently entered Eighth Amendment jurisprudence, in a Second Circuit case,⁶ Justice Marshall wrote that what was actionable was “deliberate

³ The Supreme Court toppled numerous barriers to these lawsuits, one by one. See Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORN. L. REV. 357, 368 (2018).

⁴ See *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵ *Id.* at 103 (internal citations omitted).

⁶ See *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970).

indifference to serious medical needs of prisoners” because it “constitutes the ‘unnecessary and wanton infliction of pain.’”⁷

The *Estelle* Court relied on precedent rather than either first principles or textual/historical analysis. In 1947, the Supreme Court had held that the Eighth Amendment does not bar a “second effort to electrocute [a death-sentenced prisoner] after a mechanical malfunction had thwarted the first attempt.”⁸ The failure of the first attempt was inadvertent, the Court emphasized, and therefore not to be held against the second. In *Estelle*, the Court noted that,

[s]imilarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute “an unnecessary and wanton infliction of pain” or to be “repugnant to the conscience of mankind.” ...In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend “evolving standards of decency” in violation of the Eighth Amendment.⁹

The Court did not further elaborate on the meaning of “deliberate indifference,” or whether the liability standard was subjective or objective in situations not similarly “inadvertent.” The majority did not engage Justice Stevens’s dissent, which criticized the Court’s use of “ambiguous terms which incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution.”¹⁰

That ambiguity seemed to be resolved in favor of an objective standard just two years later, in the 1978 case, *Hutto v. Finney*. *Hutto*, whose majority opinion Justice Stevens wrote, held that challenged conditions of confinement “constituted cruel and unusual punishment” by emphasizing the objectively horrendous conditions.¹¹ The district court’s conclusion that imprisonment in Arkansas was “a dark and evil world completely alien to the free world” was, Justice Stevens wrote, “amply supported by the evidence.”¹² There was no discussion of deliberate indifference or any other kind of scienter. Perhaps this was because the case was injunctive and forward-looking—so at least once they received the complaint, the defendants were on notice of the conditions. But the opinion does not so much as hint that the remedial posture is the reason for its objective perspective. Similarly, in the 1981 case *Rhodes v. Chapman*, the Court upheld double celling based on the objective conclusion that overcrowding did not inflict “unnecessary and wanton pain.”¹³

B. THE MID-1980s TO KINGSLEY

It was in 1986, in *Whitley v. Albers*, that the Court took a wrong turn and committed itself to a subjective view of the Eighth Amendment. In a (bare) majority opinion by Justice O’Connor, *Whitley* cited *Estelle*’s “unnecessary and wanton infliction of

⁷ *Estelle*, 429 U.S. at 104.

⁸ *Id.* at 105.

⁹ *Id.* at 105–06.

¹⁰ *Id.* at 108–09 (Stevens, J., dissenting).

¹¹ *Hutto v. Finney*, 437 U.S. 678, 685–87 (1978).

¹² *Id.* at 681 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

¹³ See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

pain” standard as the essence of “cruel and unusual punishment forbidden by the Eighth Amendment,” but further explained:

Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”¹⁴

Whitley thus required that prisoners alleging constitutional violations based on use of excessive force during a riot demonstrate officials’ intent to harm. While the Court primarily relied on policy considerations relating to the difficulty and urgent need to quell prison riots to justify the requirement, Justice O’Connor also gestured towards a textual hook: a high bar to liability was appropriate because force in prison is “conduct that does not purport to be punishment at all.”¹⁵

Because the Court has sometimes decoupled use-of-force and conditions cases, the standard of liability for the latter remained unsettled after *Whitley*. In Justice Scalia’s (again bare) majority opinion in the 1991 prison conditions case *Wilson v. Seiter*, the court clarified that *Whitley*’s subjective standard applied. More fully than in *Whitley*, the *Wilson* Court attributed its approach to the text of the Eighth Amendment: “If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”¹⁶ This was, the Court said, a straightforward implementation of the plain meaning of the word punishment—“a deliberate act intended to chastise or deter.”¹⁷

Wilson’s analysis is unpersuasive on its merits. First, the argument proves far too much: taken seriously, its definition of punishment supports an even higher bar to liability than *Wilson* (or, later, *Farmer v. Brennan*) adopted. Notwithstanding the quotation, there was not a single vote for limiting liability in prison conditions cases to “deliberate act[s] intended to chastise or deter.” Indeed, no Supreme Court Justice has ever opined, even in dissent, that conditions of confinement violate the Eighth Amendment only if the relevant prison official intended to punish.¹⁸ Moreover, there

¹⁴ *Whitley v. Albers*, 475 U.S. 312, 319, 320–21 (1986) (quoting *Johnson v. Glick*, 481 F. 2d 1028, 1033 (2d Cir. 1973) (Friendly, J.), *cert. denied sub nom. John v. Johnson*, 414 U. S. 1033 (1973)).

¹⁵ *Id.* at 319.

¹⁶ *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).

¹⁷ *Id.* (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.)).

¹⁸ Justice Thomas has taken the position that prison conditions, including uses of force, are entirely outside the scope of Eighth Amendment regulation. See *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (“I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’”); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in judgment) (“Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.”).

are many competing, less intent-focused dictionary definitions of punishment.¹⁹ And of course there are normative reasons, canvassed in both *Farmer's* concurrences²⁰ and in prior cases' dissents and concurrences,²¹ why an intent-based standard is unsatisfying as constitutional regulation.

Justice Scalia's majority opinion in *Wilson* did not rebut these points, but rather suggested that they made no difference. The opinion described the Court's requirement of subjective culpability as linguistic and apolitical, not premised on any normative or policy claim:

The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. . . . An intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate.²²

The *Wilson* Court essentially read out of existence prior, conflicting precedent, offering the implausible interpretation that the Court had, without explaining itself, previously adopted *both* an objective test ("Was the deprivation sufficiently serious?") and subjective test ("Did the officials act with a sufficiently culpable state of mind?") as independent hurdles to Eighth Amendment liability.²³ The *Wilson* Court explained the absence of a subjective test in *Hutto* and *Rhodes* as indicating not that scienter didn't matter, but simply that it was not at issue: those cases had, *sub silentio*, been applying the objective half of a two-part standard.²⁴

Finally, in *Farmer v. Brennan*, the Court more carefully defined "deliberate indifference," rejecting an objective standard for liability under a textualist reading of the Eighth Amendment:

The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage [] But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.²⁵

¹⁹ See *Farmer v. Brennan*, 511 U.S. 825, 854–55 (1994) (Blackmun, J., concurring) ("A prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' see, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961), regardless of whether a state actor intended the cruel treatment to chastise or deter. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as '[a]ny pain, suffering, or loss inflicted on or suffered by a person because of a crime or evil-doing') (emphasis added by Justice Blackmun)).

²⁰ *Farmer*, 511 U.S. at 854–857 (Blackmun, J., concurring); *id.* at 858 (Stevens, J., concurring).

²¹ See *Estelle*, 429 U.S. at 108–09 (Stevens, J., dissenting); *Bell*, 441 U.S. at 584–589 (Stevens, J., dissenting); *Wilson*, 501 U.S. at 307–311 (White, J., concurring in the judgment).

²² *Wilson v. Seiter*, 501 U.S. 294, 300–02 (1991).

²³ *Id.* at 298.

²⁴ *Wilson*, 501 U.S. at 296–99, 301 n.2.

²⁵ *Farmer*, 511 U.S. at 837–38.

In sum, *Estelle* was ambiguous about whether an objective or subjective standard applied in Eighth Amendment conditions-of-confinement cases, but until 1986, the Court largely focused on the nature, severity, and justification of the challenged deprivation. The subsequent Supreme Court cases—*Whitley*, *Wilson*, and *Farmer*—changed course to endorse a subjective standard, on the purportedly plain English ground that the Eighth Amendment’s reference to “punishment” reaches only intentional or at least criminally reckless misconduct. Unreasonable force or conditions of confinement—even if imposed without any justification whatsoever and no matter how obviously dangerous—were deemed simply outside the reach of the Cruel and Unusual Punishments Clause. In the remainder of this Issue Brief I argue that, after *Kingsley*, this requirement of a subjectively culpable state of mind as a prerequisite to liability under the Cruel and Unusual Punishments Clause can no longer stand.

II. *KINGSLEY V. HENDRICKSON* AND THE DEFINITION OF PUNISHMENT

In 2010, Michael Kingsley was detained in a Wisconsin county jail awaiting trial on drug charges.²⁶ After Kingsley refused several times to remove some paper that covered the light fixture over his bed, jail officers handcuffed and forcibly removed him from his cell. He alleged that while he was handcuffed, the officer-defendants first slammed his head into a concrete bed and then stunned him with a Taser. The officers justified the Taser use by asserting that it was intended to encourage the plaintiff to stop resisting their attempts to remove his handcuffs; they denied the rest. A jury found for the officers on jury instructions endorsing a subjective recklessness standard; Kingsley’s appeal challenged the instructions as legally erroneous.²⁷

The Supreme Court held in *Kingsley v. Hendrickson* that when jail officials intentionally direct force against a detainee, that force is unconstitutional if it is objectively unreasonable. The opinion, by Justice Breyer (joined by Justices Ginsburg, Sotomayor, Kagan, and perhaps most crucially the “swing vote” of now-retired Justice Kennedy), explained that the use of force at issue in *Kingsley* was “deliberate—*i.e.*, purposeful or knowing.”²⁸ The Court framed its choice as whether “a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.”²⁹ On that issue, the Court held, “[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.”³⁰

The Court’s core justification for *Kingsley*’s holding was its understanding of the meaning of “punishment.” The Court explained that the Fourteenth Amendment forbids punishment of pretrial detainees, whose incarceration is not, after all, premised on their conviction of any crime:

Bell’s focus on “punishment” does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial

²⁶ *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015).

²⁷ *Id.* at 2470–71.

²⁸ *Id.* at 2472.

²⁹ *Id.*

³⁰ *Id.* at 2473.

detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.³¹

Thus, in a detainee excessive force case, constitutional liability attaches when the force used is objectively unreasonable, evaluated “from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight,” and deferring to the “legitimate interests that stem from [the government’s] need to manage the facility in which the individual is detained,” and to “policies and practices that in th[e] judgment’ of jail officials ‘are needed to preserve internal order and discipline and to maintain institutional security.’”³² “Challenged governmental action” that is, can amount to “punishment,” the *Kingsley* Court held, *either* based on the intent of a state actor *or* based on entirely objective evidence of harm and lack of justification.³³

Kingsley did not expressly address conditions of confinement cases—lawsuits about issues like medical care, protection from violence, nutrition, and use of restraints. But its objective approach clearly applies to conditions cases too. For starters, the *Kingsley* Court explained that its approach followed the 1979 conditions precedent *Bell v. Wolfish*. Moreover, to the extent the threshold for liability has differed for conditions and force cases, the Court requires a *higher* degree of personal culpability for liability in force cases, on the understanding that force is often used in uncertain and quickly changing circumstances.³⁴ If use-of-force is governed by an objective standard, rather than a more plaintiff-unfriendly subjective one, it follows *a fortiori* that conditions cases are also governed by an objective standard. Consequently, both pretrial detention use-of-force and conditions cases are properly adjudicated under an objective standard; the former was *Kingsley*’s holding and the latter its clear implication, as a number of courts of appeals have found.³⁵ It is important for lawyers to plead and argue for this approach; since *Kingsley*, it has too often been waived.

The *Kingsley* Court’s understanding of punishment is eminently sensible. As I explain in the next section, it aligns with other caselaw. Moreover, it is both morally attractive and capable of accurate implementation. It is, however, entirely inconsistent with *Whitley/Wilson/Farmer*. Recall that the principal justification for a subjective standard in those cases was that the Eighth Amendment’s use of the word “punishment” *requires* focus on the intent of a government official, purportedly as a matter

³¹ *Id.* at 2473-74.

³² *Id.* (quoting *Bell*, 441 U.S. at 540, 547).

³³ *Id.* at 2473 (describing *Bell* as imposing liability based on “actions taken with an ‘expressed intent to punish’” *or* “in the absence of an expressed intent to punish,” on objectively unreasonable conditions).

³⁴ Compare *Whitley v. Albers*, 475 U.S. 312 (1986) (a use of force case) with *Wilson v. Seiter*, 501 U.S. 294 (1991) (a conditions case).

³⁵ Court of Appeals cases applying an objective standard to pretrial detention conditions of confinement include: *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 856 (7th Cir. 2017); *Ingram v. Cole Cty.*, 846 F.3d 282, 286 (8th Cir. 2017); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018). There are a few courts that have not agreed with this bottom line, though generally without analysis. *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (“*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case.”); *Nam Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419-20 & n.4 (5th Cir. 2017). Their conclusions seem clearly wrong.

of straightforward textualism. *Kingsley* expressly rejected this understanding of “punishment.” So, after *Kingsley*, *Whitley/Wilson/Farmer* are untenable.

Kingsley itself acknowledged that its holding cast doubt on *Whitley’s* analysis:

[O]ur view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.³⁶

This invitation to challenge *Whitley/Wilson/Farmer* is mildly stated but unmistakable. In his *Kingsley* dissent, Justice Scalia wrote that punishment requires more than objective unreasonableness.³⁷ He declared the Eighth Amendment and Fourteenth Amendment concepts of punishment one and the same and protested the Court’s rejection of *Wilson’s* approach. That is, Justice Scalia—who wrote *Wilson*—thought that *Kingsley* was inconsistent with *Wilson*. He was correct; after *Kingsley*, no jurisprudential basis remains for *Whitley/Wilson/Farmer’s* insistence on a subjective test for Eighth Amendment liability.

III. WHITLEY/WILSON/FARMER’S SUBJECTIVE TEST WAS ANOMALOUS AND INCORRECT

The *Whitley/Wilson/Farmer* subjective test for what constitutes “punishment” is not only incompatible with *Kingsley*, it is also inconsistent with other precedent that defines punishment. The Court has used a multifactor test to differentiate punishment from non-punishment (“penal” from “regulatory” restrictions) over many years and “across a variety of contexts.”³⁸ In 1963, the leading case, *Kennedy v. Mendoza-Martinez*, listed the factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . .³⁹

³⁶ *Id.* at 2476. Given that *Kingsley’s* objective approach applies *a fortiori* to pretrial detention conditions cases, as I have suggested and many courts have found, *see supra* note 6, the same questions attach to *Wilson* and *Farmer*, the Court’s subjective Eighth Amendment conditions cases.

³⁷ *See Kingsley*, 135 S. Ct. at 2477–78 (Scalia, J., dissenting).

³⁸ *Smith v. Doe*, 538 U.S. 84, 97 (2003). *See De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (bill of attainder); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (due process); *United States v. Ward*, 448 U.S. 242, 249–55 (1980) (self-incrimination); *Allen v. Illinois*, 478 U.S. 364, 375 (1986) (self-incrimination); *Kansas v. Hendricks*, 521 U.S. 346, 362, 371 (1997) (ex post facto and double jeopardy); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365–66 (1984) (double jeopardy). *See generally* Erin Murphy, *Paradigms of Restraint*, 57 *DUKE L.J.* 1321, 1348 (2008).

³⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

Whitley/Wilson/Farmer are inconsistent with *Mendoza-Martinez* in two distinct ways: First, instead of insisting that punishment invariably requires the purpose to “chastise or deter,” *Mendoza-Martinez* includes many other factors. This is sensible. Many consequences of criminal misbehavior that are indisputably part of punishment are not “intended to chastise or deter.” Criminal restitution, for example, is intended to make victims whole. In the era of self-supporting or profit-making prisons, sentences of hard labor were intended to promote profitable use of prisoner labor. Conversely, deterrence is a common purpose of both private and public civil law. The examples could multiply, but the point is simple; an “intent to chastise or deter” is neither necessary nor sufficient to identify punishment.

Moreover, *Mendoza-Martinez* and later cases consider intent important but again not dispositive. In *Mendoza-Martinez* itself, these factors were evaluated objectively, independent of “congressional intent as to the penal nature of a statute.”⁴⁰ As the Court later developed,

If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is “so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” Because we “ordinarily defer to the legislature’s stated intent,” “only the clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.⁴¹

Whitley/Wilson/Farmer are wrong: chastisement and deterrence are far from the only purposes of punishment, and intent to punish is important but not definitional in identifying punishment. *Kingsley’s* model of punishment as either subjective or objective aligns with other precedents, while *Whitley/Wilson/Farmer’s* insistence to the contrary was anomalous.

IV. WHAT ABOUT “CRUEL AND UNUSUAL”?

Even as it invited a future Eighth Amendment challenge to the *Whitley/Wilson/Farmer* doctrine, the *Kingsley* majority hinted that the challenge would face a textualist hurdle. Comparing the Cruel and Unusual Punishments Clause to the Due Process Clause, the Court noted:

The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less “maliciously and sadistically.” Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.⁴²

⁴⁰ *Id.* at 169.

⁴¹ *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal citations omitted); *see also id.* at 107 (Souter, J., concurring in the judgment) (“I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction.”).

⁴² *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015) (citations omitted).

In other words, a pretrial detainee can win a lawsuit based on her demonstration that she was subjected to punishment, but a convicted prisoner must show more. For convicted prisoners, only “*cruel and unusual* punishments” are unconstitutional. In this Section, I argue that a simple swap of the constitutional text under consideration from “punishment” to “*cruel and unusual*” cannot support a culpability-based focus.

Prior to *Kingsley*, the Supreme Court had only gestured towards the words “*cruel and unusual*” as a textual hook for a subjective liability standard. In a case about the Fourth Amendment, the Court noted (in dicta), “the Eighth Amendment terms ‘*cruel*’ and ‘*punishments*’ clearly suggest some inquiry into subjective state of mind.”⁴³ But Eighth Amendment case law in other contexts suggests that this off-handed remark was unduly confident. There is a fully developed Eighth Amendment jurisprudence elaborating on the meaning of “*cruel and unusual*” with respect to sentencing. In that jurisprudence, the Court has implemented the constitutional ban on cruelty by testing state-inflicted punishments against the “evolving standards of decency that mark the progress of a maturing society.”⁴⁴ In sentencing law, the mental state of state actors plays no part of the “*cruel and unusual*” inquiry. In *Trop v. Dulles*, for example, the Court deemed denaturalization “*cruel and unusual*” not because of the intent of the legislature but because of the potential indignities imposed upon an individual rendered stateless by the punishment.⁴⁵ Recent scholarship exploring the interpretation of the entire Cruel and Unusual Punishments Clause in a conditions-of-confinement context confirms that the phrase “*cruel and unusual*” does not support, much less compel, a subjective understanding of the Eighth Amendment.⁴⁶

The Court has not yet analyzed this issue, but both Justices Kennedy (the effect of whose retirement on the future of prison litigation remains to be seen) and Sotomayor exhibited appropriate skepticism towards any other result during the *Kingsley* oral argument. Justice Kennedy began: “I find it very difficult to understand how it would be a different standard if these same facts occurred, but it was an inmate who was serving a sentence. What is the rationale for why they should be different?” Justice Sotomayor similarly asked, “Why are we giving a license to prison guards to use unreasonable or unnecessary force... against anybody?” *Kingsley*’s counsel responded, “Convicted prisoners actually can be punished. That is one of the legitimate objectives with respect to convicted prisoners.” To which Justice Sotomayor responded, “But they can’t be punished corporally.... Do you think... you can knock them against the wall as punishment?”⁴⁷ Sotomayor later stated, “Whether it’s a pretrial detainee or post-trial detainee, I don’t think the Constitution gives you a free pass to punish a prisoner by inflicting unwanted corporal punishment.”⁴⁸

Justice Sotomayor was exactly right. With the exception of the death penalty, corporal punishment for crime is categorically forbidden by the Eighth Amendment. While the Supreme Court has not—quite—baldly stated the point, this was the effective bottom line of the Eighth Circuit case *Jackson v. Bishop*, in which then-Judge

⁴³ *Graham v. Connor*, 490 U.S. 386, 398 (1989).

⁴⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴⁵ *Id.* at 101-102.

⁴⁶ For citations to and discussions of the voluminous relevant scholarship, see Schlanger, *supra* note 8, at 428-430.

⁴⁷ Transcript of Oral Argument at 12, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (No. 14-6368), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-6368_linq.pdf [<https://perma.cc/57CZ-HDN4>].

⁴⁸ *Id.* at 20.

Blackmun enjoined the use of disciplinary flogging in the Arkansas prison system in an opinion that has been repeatedly cited with approval by the Supreme Court.⁴⁹ If *some* corporal punishment of prisoners were allowed, there might be some reason to use an intention-focused standard to distinguish permissible from impermissible force/punishment under the Eighth Amendment. Since neither pretrial detainees nor post-conviction prisoners can lawfully be subjected to any corporal punishment, such a distinction is unjustified. There is no reason, then, that *Kingsley's* objective standard should not apply post-conviction as well as pre-trial.

With conditions of confinement, however, there *is* a need to distinguish permissibly from impermissibly harsh prison conditions. As the Court held in *Rhodes v. Chapman*, “conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”⁵⁰ Some might even think it is appropriate for conditions to be harsher for convicted prisoners than for pretrial detainees.⁵¹ Granting that there is a need to separate appropriate from inappropriate conditions—and even if post-conviction conditions *are* permissibly harsher than pretrial conditions—there is nothing attractive, textually or normatively, in using a particular officer or official’s state of mind to mark the separation between unconstitutional and constitutional. Intentionality, as I have already argued, is not required by the Eighth Amendment’s text, whether the relevant words are “cruel and unusual” or “punishment.” And in Part VI, I argue that an intent requirement suffers from both practical and normative flaws. *Kingsley's* approach of testing conditions to ensure they are “reasonably related to a legitimate governmental objective”—that is, to ensure that they are objectively reasonable—is both more direct and lacks these untoward effects. Harsh post-conviction conditions that risk “serious deprivations of basic human needs,”⁵² while serving no legitimate function, constitute cruel and unusual punishment.

V. JAILS TREAT PRETRIAL DETAINEES AND CONVICTED PRISONERS THE SAME

Notwithstanding its frequent reminder to lower courts that different constitutional clauses cover pretrial detainees and post-conviction prisoners,⁵³ the Supreme

⁴⁹ *Jackson v. Bishop*, 404 F.2d 571, 581 (8th Cir. 1968). See *Furman v. Georgia*, 408 U.S. 238, 287–88 (1972) (“Since the discontinuance of flogging as a constitutionally permissible punishment, death remains as the only punishment that may involve the conscious infliction of physical pain.” (Brennan, J., concurring) (citing *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968)); *id.* at 430 (“Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears—punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution.” (Powell, J., dissenting) (footnote omitted) (citing *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968)). Other cases citing *Jackson* with approval include *Rhodes v. Chapman*, 452 U.S. 337, 359 (1981); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

⁵⁰ *Rhodes*, 452 U.S. at 347.

⁵¹ I do not, personally, agree; in my ideal criminal justice system, the loss of liberty inherent in incarceration, not harsh conditions on the inside, would be the punitive aspect of postconviction imprisonment. And in actual practice, the differences run in the opposite direction. See Schlanger, *Inmate Litigation*, *supra* note 1, at 1686–87 & sources cited.

⁵² *Rhodes*, 452 U.S. at 347.

⁵³ See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Kingsley*, 135 S. Ct. at 2477; *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994); *Hudson v. McMillian*, 503 U.S. 1, 5–6 (1992); *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

Court before *Kingsley* avoided articulating different liability standards for use-of-force and conditions cases for the two settings. Instead, the Court offered only the comment that “due process rights . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner.” In response, lower federal courts blurred the standards in pre- and post-conviction cases.⁵⁴ Until courts recognize that the *Whitley/Wilson/Farmer* cannot withstand *Kingsley*’s logic, however, pre- and post-conviction standards will now be different. This divergence conflicts with operational reality: American incarcerative facilities make little distinction in practice between pretrial detainees and convicted prisoners with respect to either use of force or conditions of confinement.

Pretrial detainees are nearly always housed in the same facilities as post-conviction prisoners. On any given day, one-third of American inmates—nearly 750,000 people—are in jail. One-third of that portion are post-conviction.⁵⁵ Post-conviction prisoners may be confined in a jail while they await sentencing, if they are convicted of a misdemeanor, or when their felony sentence is less than some length chosen by the state for prison incarceration (often less than one year, but in some states far longer).⁵⁶ In addition, over 80,000 “state prisoners” are housed in county jails.⁵⁷ In many states, jails do not systematically separate pretrial detainees from convicted prisoners; jail classification experts find that it is safer to mix pretrial and post-conviction populations, separating people based on risk and need rather than status.⁵⁸

Once pretrial and post-conviction prisoners are housed together, they are subjected to the same treatment, as a matter of policy, training, and simple operational need. If the Constitution were to impose different liability standards for pretrial detainees and convicted prisoners, those differences could not, practically, be reflected in practice. In *Florence v. Board of Chosen Freeholders of County of Burlington*, the Court focused on operational considerations to hold that the constitutional regulation of strip searches for pretrial detainees housed in a jail’s general population is no stricter than for convicted prisoners.⁵⁹ Likewise, facilities that house both cannot, practically, distinguish pretrial detainees from post-conviction prisoners in use-of-force or conditions. It therefore makes sense for the same liability standard to apply to both. The Supreme Court held, correctly, that the objective reasonableness standard is workable pretrial; it is equally workable post-conviction.

⁵⁴ For a typical Court of Appeals treatment, see, for example, *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007) (“Although the Eighth Amendment only applies to convicted prisoners, this court has previously stated that the same standard applies to pretrial detainees under the Fourteenth Amendment’s due process clause.”); *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760, 764 (7th Cir. 2002) (“[W]hen considering a pretrial detainee’s claim of inadequate medical care, we frequently turn to the analogous standards of Eighth Amendment jurisprudence.”).

⁵⁵ Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf> [https://perma.cc/D4JB-8QKW].

⁵⁶ See BRIAN ALBERT, NAT’L ASSOC. OF CTYS. RESEARCH DIV., STATE PRISONERS IN COUNTY JAILS 3 (2010), <http://www.naco.org/sites/default/files/documents/State%20Prisoners%20in%20County%20Jails%20Updated.pdf> [https://perma.cc/WQ7A-7QBQ].

⁵⁷ E. ANN CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 (2018), at 14 <https://www.bjs.gov/content/pub/pdf/pl6.pdf> [https://perma.cc/3TXH-DGYA]. For discussion, see ALBERT, *supra* note 59.

⁵⁸ See A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-5.6 at 40–43 (3d ed. 2011), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf [https://perma.cc/4VQC-KCNV].

⁵⁹ *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 335–39 (2012).

VI. REASONS TO PREFER AN OBJECTIVE TEST

Finally, there are abundant reasons to prefer an objective liability standard in both pre- and post-conviction cases. Objective standards are more administrable, more reliably subject to accurate adjudication. They are normatively more attractive. They incentivize more appropriate treatment. And, unlike a subjective test, they are doctrinally coherent.

A. ADMINISTRABILITY

Subjective standards are dauntingly difficult to operationalize. As a group of former corrections officials argued in a *Kingsley* amicus brief, a “subjective standard would erode staff accountability” because a staff member could defend “an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice.”⁶⁰

The point holds for conditions as well as force cases. The Court held in *Farmer v. Brennan* that under a subjective standard, “a prison official cannot be found liable . . . unless the official knows of and disregards an excessive risk to inmate health or safety.”⁶¹ Thus a subjective “deliberative indifference” standard invites defendants to say that they didn’t know, didn’t appreciate, or didn’t understand the danger that ripened first into harm and then into a lawsuit. For both force and conditions, it is far easier and far more even-handed for supervisors to assess reasonableness rather than any form of a what-did-you-believe-in-your-heart question.

What is true for jail or prison administrators is even truer for incarcerated persons. Even when officers engaged in the most egregious unconstitutional conduct—summary corporal punishment—inmates, who nearly always proceed pro se,⁶² are unlikely to be able to prove it. The officer’s state of mind is extremely difficult to adjudicate accurately. Plaintiffs will rarely have direct evidence, and officers will nearly always be able to argue that even if the force they used was objectively excessive, they were honestly (if unreasonably) mistaken, rather than malicious, sadistic, or reckless. Even if a subjective standard was conceptually correct, one would expect many false negatives, which in turn challenges judicial competence and impartiality. Objective standards are, by contrast, announceable *ex ante* and enforceable *ex post*. As the *Kingsley* amicus brief by retired corrections officials argued, “Clear, enforceable standards ensure that jail staff members know what they can and cannot do, and they guarantee that officers who use excessive force can be held accountable for their actions.”⁶³

Returning to an objective focus for Eighth Amendment liability would align policy and law; the issue that matters for good practice would also matter for law, and legal institutions would actually be capable of assessing it.

B. INCENTIVIZING REASONABLE USE OF FORCE AND CONDITIONS

If we desire reasonable use of force and reasonable conditions, it makes sense to set that as the liability standard, not merely an aspirational goal. Even if deciders-of-fact could have perfect knowledge of the true intent of government officials who applied force or made harmful decisions about conditions of confinement, the

⁶⁰ Brief of Former Corrections Administrators and Experts as *Amici Curiae* in Support of Petitioner at 21, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (No. 14-6368), at *21.

⁶¹ *Farmer v. Brennan*, 511 U.S. 825, 837.

⁶² Schlanger, *Trends*, *supra* note 1, at 167.

⁶³ Brief of Former Corrections Administrators, *supra* note 60, at *20.

Constitution is best understood not subjectively but objectively, to ban unreasonable force and unreasonable conditions of confinement. Because jail and prison officials have constitutionally enforceable affirmative obligations to safeguard their charges, unreasonable ignorance of a risk should not be constitutionally exculpating. In addition, a subjective approach encourages a feedback loop where unreasonable force and conditions beget more unreasonable force and conditions.

1. *Culpable Ignorance*

Farmer v. Brennan held that prison officials are liable only for risks they actually know about. The *Farmer* Court rejected a civil recklessness standard that would have imposed liability for disregard of obvious risks, adopting instead a criminal recklessness standard violated “only when a person disregards a risk of harm of which he is aware.”⁶⁴ “Should have known” is not enough for liability—even culpable ignorance cannot support a constitutional claim.

In many settings, a rule that the Constitution does not require officials to become informed about risks works hand-in-glove with the Supreme Court’s general reluctance to constitutionalize affirmative duties. But prisons and jail are different—in these custodial situations, “forethought about an inmate’s welfare is not only feasible but obligatory.”⁶⁵ Jails and prisons are exceptions to the general rule against constitutionalization of affirmative duties because incarceration renders inmates unable to protect themselves without state participation; they are unable to lock their doors, unable to exit a threatening situation, unable to seek medical treatment, unable to buy food, and so on. For this reason, the Court has explained, the Constitution does, indeed, impose affirmative obligations to protect inmates from serious risks of harm⁶⁶ and to provide them “the minimal civilized measure of life’s necessities.”⁶⁷ In this context, as in other contexts of affirmative duties, it is anomalous to immunize ignorance. Consider, for example, the affirmative duties of parents. Parents cannot defend against parental neglect charges by asserting that they simply did not notice their child starving or suffering from a medical issue;⁶⁸ the failure to notice is, if anything, *confirmation* of the neglect accusation. Similarly, an official’s unreasonable failure to notice a dangerous situation is just as individually culpable as a failure to act reasonably to avert a noticed danger. And it is just as harmful. It makes no sense, either doctrinally or normatively, to immunize culpable ignorance. At the very least, liability should attach for failure to reasonably address risks the defendant *should have* known about.

⁶⁴ *Farmer*, 511 U.S. at 837.

⁶⁵ *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

⁶⁶ *See Deshaney*, 489 U.S. at 199–200.

⁶⁷ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁶⁸ *See State ex rel. N.K.C.*, 995 P.2d 1, 6 (Utah Ct. App. 1999) (“Perhaps the mother was unaware of the severity of her child’s condition when he appeared limp and lethargic. Perhaps she did not fully understand the precise significance of fixed pupils and the child’s inability to nurse. A reasonable parent standard may accommodate the cautious and the hesitant, but it cannot accommodate inaction in the face of an obvious cause for immediate concern.” (footnote omitted)), cited as offering useful guidance in JOHN E.B. MYERS, 1 MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 319 (3d ed. 2005); *People v. Henson*, 304 N.E.2d 358, 361 (N.Y. 1973) (“[T]he record evidence warranted the verdict that the defendants’ failure to provide prompt medical care for their son reflected a culpable failure to perceive a substantial and unjustifiable risk of death, constituting a gross deviation from the standard of care that a reasonable [parent] would observe.” (alteration in original) (internal quotation marks omitted)).

2. Fragmented Responsibility

In fact, I would argue for an approach that is less individualized, focusing not on who knew what when and what they should have known, but rather on the conditions and whether they were reasonable. This better aligns with the reality that prison and jail conditions are organizational, not personal. Hierarchical bureaucracies typically fragment responsibility, separating decision making and decision implementation into different parts of the organization. That is, the person assigned to understand the facts on the ground—say the officer who sees evidence of a particular inmate’s need for protection from a violent cellmate (e.g., a line-level correctional officer)—may not be the person who makes housing assignments (e.g., a unit administrator), much less the person who decides *how* housing assignments are made (e.g., a deputy warden or warden). Thus the officer who knows of the risk may lack authority or opportunity to alleviate that risk, while the officer who creates the risk may lack specific knowledge about it.⁶⁹ Moreover, even when knowledge and responsibility are assigned to a single location within a bureaucracy, hand-off problems (endemic to so many institutions) obstruct safe practices; without appropriate procedures, shift change often means that the officer with knowledge of a problem leaves no trace of that knowledge with his next-shift analog.

Given the way prisons and jails are organized, *Farmer’s* subjective approach frequently blocks constitutional liability even for easily preventable harm. For instance, even if a requested cell move might easily have prevented a serious assault, liability would only follow in the unlikely situation that a particular defendant both knew the individual circumstances and was authorized to approve the move. This is what Professors Luban, Strudler, and Wasserman called the “problem of fragmented knowledge.”⁷⁰ *Farmer’s* response, according to them, is simply to “accept as a tragic fact of modern existence that organizational wrongs may be committed for which no one—neither individuals nor the organization—can rightly be held responsible.”⁷¹ But there is neither doctrinal nor normative justification for this outcome. The problem of fragmented knowledge demands *Kingsley’s* solution—use of a standard that is objective rather than subjective and that examines the institutional processes as a whole, not one person at a time.

3. Problematic Feedback

An analytically separate reason to avoid inquiry into mental states is that those mental states are themselves affected by standards for behavior. One report, for example, found that in the violent setting of the L.A. county jail system:

[T]olerance for excessive force used by at least some deputies . . . has the danger of leading to what one expert cautioned can become “abuses of force . . . so ‘normalized’ that deputies can no longer perceive them as abusive.” This can perpetuate a damaging culture

⁶⁹ I am not arguing that *Farmer* blocks liability in all such circumstances; a plaintiff may be able to persuade a judge or jury that a particular officer both knew of the risk and failed to reasonably address it.

⁷⁰ David Luban, Alan Strudler, & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2365 (1992).

⁷¹ *Id.*

that can ultimately affect even those deputies... who do not subscribe to these views and are intent on doing the right thing.⁷²

An amicus brief filed by the ACLU in *Kingsley* makes the point more generally:

When objectively unreasonable uses of force pervade the jail environment, that culture shapes guards' subjective perceptions of the appropriateness of violence.... [T]he perpetrator [of excessive force] should not be able to evade liability by invoking a subjective perception of violence that reflects an environment in which such violence is par for the course.⁷³

An objective standard suitably keeps the focus on the appropriateness of state officials' conduct.

4. *Unreasonable Conditions Are Unreasonable*

Ultimately, if the goal is reasonable conditions and reasonable force, there is nothing to justify a liability standard that strays from that goal. The subjective intent of the official involved is simply a red herring.

Consider force applied when officers simply don't care at all about the pain they are inflicting—when rather than relishing pain, they are indifferent to it. Pain compliance techniques—efforts to induce obedience by application of pain—have become more common in jails and prisons in recent years, as standard weaponry has multiplied. A video from New Mexico's Bernalillo County jail illustrates the potential for harm. As described by the *Albuquerque Journal*:

The video shows jail officers confronting [an inmate] over pictures—perhaps pages torn from a magazine—put up near her bunk. [The inmate] won't hold still, demanding to know the name of the officer holding her against a wall. An officer applies a stun gun to her. The inmate, who is 4 feet, 11 inches tall, falls to the ground and shrieks and sobs after that, so much so that jail officers try repeatedly to get her to be quiet. "Put her in a wrist lock," one officer tells another, "and twist her wrist until she shuts up and stops crying." ... [She] cries out in pain and continues to sob. Officers threaten to spray her with Mace if she won't be quiet. Eventually, she is sprayed in the face after she starts banging her head on the floor.⁷⁴

⁷² County of Los Angeles Citizens' Commission on Jail Violence, Report of the Citizens' Commission on Jail Violence 98 (2012), <http://www.lacounty.gov/files/CCJV-Report.pdf> [<https://perma.cc/DA2C-9NSR>].

⁷³ Brief for American Civil Liberties Union and American Civil Liberties Union of Wisconsin as Amici Curiae in Support of Petitioner at 15–16, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1045424, at *15–16.

⁷⁴ Dan McKay & Maggie Shepard, *County Commission Chairman Wants Oversight Board to Study Jail Video*, ALBUQUERQUE J. (Aug. 12, 2016, 11:42 PM), <http://www.abqjournal.com/824777/official-wants-oversight-board-to-study-video.html> [<https://perma.cc/G48U-2Z3V>]; see Dan McKay, "Twist Her Wrist Until She Shuts Up," ALBUQUERQUE J. (Aug. 11, 2016, 10:56 PM), <http://www.abqjournal.com/823915/county-releases-disturbing-video-of-jail-incident.html> [<https://perma.cc/WAM2-88F6>]; Albuquerque J., *Susie Chavez Jail Video*, YOUTUBE (Aug. 11, 2016), <https://www.youtube.com/watch?v=-ZFf782fyJw> [<https://perma.cc/7L7L-8MCL>].

The video continues in this vein for forty-five minutes; even after the inmate is escorted/dragged to an infirmary and allowed to wash her face, repeated warnings of additional force are punctuated by the casual whistling of the sergeant wearing the video camera. It is extremely hard to watch. This kind of pain compliance is common. It may well not be summary punishment—the goal truly may be compliance, not retribution. But the coercive method chosen drastically undervalues the pain imposed.

Cruelty of this sort should be actionable. Acting with unconcern about the pain and harm imposed may not be “malicious or sadistic,” but it violates the crucial moral imperative that the state should value every person’s welfare. Yet surely this normative principle is beyond argument. It is appalling for a government official to use pain as a method to control another human being, in the absence of a legitimate need that is—or at least that reasonably seems, in the moment—pressing enough to outweigh that pain. The officer who whistles his way past a prisoner’s distress as she is pepper sprayed and her wrist is twisted is the model, not of sadism, but of an equally abhorrent nonchalance. The same would be true if an officer walked into a dayroom and started shooting without bothering to distinguish between rioters and nonrioters. The point is, intentional uses of force with patently insufficient security justification deny the full humanity of their subjects by failing to value their welfare. It may be unclear in any given case whether there was insufficient justification, but where the answer *is* clear, so too is the normative principle. The *Whitley* standard rejected by *Kingsley* for pretrial detainees—under which the Constitution is deemed to forbid only force used “maliciously and sadistically for the very purpose of causing harm”⁷⁵—contradicts that principle and immunizes from liability large swathes of force that are harmful and unnecessary.

Liability for the example just given requires rejection of the *Whitley* malicious-and-sadistic standard. Admittedly, the facts presented would probably be actionable even under a subjective deliberate indifference standard, rather than *Kingsley*’s objective standard. But there is nothing attractive about this in-between liability rule. To see why, consider inmates who are tased for four different reasons: (a) as punishment for calling an officer a rude name; (b) to induce the return of a meal tray; (c) by a cowboy officer paying no attention to which inmates are involved in an ongoing altercation; and (d) by an officer who unreasonably fails to notice that the inmate has ceased resisting. In each scenario, the prisoner experiences the same pain. Justice Holmes may have been correct that “even a dog distinguishes between being stumbled over and being kicked”⁷⁶—but these are all kicks. We might want our legal system to provide a different remedy for these different scenarios. Only more culpable conduct should lead to criminal sanction against the officer, for example. And an injunction would be appropriate only if the violation is systemic and redressable by the court order. But why would we want our constitutional law to entirely excuse one or more of them? Both unreasonable uses of force and unreasonable conditions are, well, unreasonable, and undesirable for that reason. Aligning the standard with the desired behavior seems simple and attractive. That’s why the federal government, state governments, corrections standards-setting organizations, and jails themselves

⁷⁵ Brief for Respondents at 15, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1519055, at *15.

⁷⁶ OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Little, Brown and Co. 1963) (1881).

have insisted in their policies⁷⁷ that the standard must be objective, and that reasonable force is proportionate force. The same is true for conditions: policies governing medical care in jail and prison, for example, focus on the objective appropriateness of the treatment provided, not the mental state of the provider.⁷⁸

To be clear, objective reasonableness does not require perfection. *Kingsley* (and *Graham v. Connor*) instruct that the objective inquiry should proceed “from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.”⁷⁹ So the point here is not that government officials are required to use surgical precision when they deal with threats to prisoner safety and security, whether using force or making decisions about protection from harm, medical care, nutrition, and so on. An objective reasonableness standard directs attention where it normatively belongs: to the justification for a harmful or risky decision or its absence.⁸⁰

C. FAILURE TO FUND

One final doctrinal point. If the constitutionality of treatment of jail and prison inmates turns on the subjective intent and culpability of their jailers, it would seem to follow that even the most appalling conditions would pass constitutional muster if those jailers can blame someone else not reachable by a constitutional tort lawsuit. Most consequentially, if legislators decline to fund some needed prison service—food, medical care, hygiene, sufficient security staff—they have absolute legislative immunity for that decision.⁸¹ And the ensuing starvation, preventable deaths, and other inhumane conditions wouldn’t be anyone else’s fault. If the subjective culpability of an individual defendant is paramount, a cost defense seems to follow, at least if budgeting is done by a legislature, as it usually is.⁸² So no liability would attach to anyone.

Even as the Supreme Court made what I have argued was a wrong turn in the *Whitley v. Albers* and *Wilson v. Seiter*, it has never embraced this result.⁸³ It has, rather, implied—though not held—that the cost defense is unavailing. In *Whitley*, the case in which Justice O’Connor set out the malicious-and-sadistic standard by which excessive force is adjudicated under the Eighth Amendment, the Court explained

⁷⁷ For a summary of each of these types of sources, see Brief of Former Corrections Administrators and Experts as *Amici Curiae* in Support of Petitioner, *supra* note 63, at *ii.

⁷⁸ See, e.g., NAT’L COMM’N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JAILS (2018); NAT’L COMM’N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (2018), AM. CORR. ASS’N, PERFORMANCE-BASED STANDARDS FOR CORRECTIONAL HEALTH CARE IN ADULT CORRECTIONAL INSTITUTIONS (2001).

⁷⁹ *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁸⁰ To be clear, the standard is not negligence, either; the *Kingsley* Court explained that liability requires an unreasonable intentional act, and therefore the rule under *Daniels v. Williams* and *County of Sacramento v. Lewis* that mere negligence is not unconstitutional remains good law. *Id.* at 2472 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁸¹ See *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

⁸² See, e.g., *Peralta v. Dillard*, 744 F.3d 1076, 1084 (9th Cir. 2014) (en banc), *cert. denied* 135 S. Ct. 946 (2015).

⁸³ The closest the Court has come was in *Block v. Rutherford*, 468 U.S. 576, 588 n.9; 600 n. 10 (1984), when it listed the “substantial” “costs—financial and otherwise”—of individuated pre and post-visit searches of pretrial detainees as something “a facility’s administrators might reasonably attempt to avoid,” and, in a footnote, weighed those costs against a finding of Fourteenth Amendment violation under *Bell*. The Court has not, however, ever again adverted to this footnote.

that “[t]he deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State’s responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities.”⁸⁴ If costs were permissibly weighed in the constitutional balance, this would be self-evidently false. So, it is fair to infer, costs must not count.

The resulting doctrinal tension has not gone unremarked. Justice White’s concurrence in the judgment in *Wilson*, in 1991, warned that the Court’s holding “le[ft] open the possibility ... that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials.”⁸⁵ Justice Scalia’s majority opinion responded with unconcern, but also without any real analysis: “Even if that were so, it is hard to understand how it could control the meaning of ‘cruel and unusual punishments’ in the Eighth Amendment.”⁸⁶ An intent requirement, Justice Scalia insisted, is implicit in the text’s reference to “punishment” and therefore cannot be evaded.

Of course, this understanding of the word “punishment” was rejected in *Kingsley*. And for obvious reasons—omitting costs from the constitutional calculus in conditions-of-confinement challenges is a more attractive way of thinking about the Constitution’s protections. A constitutional right trumped by (nearly inevitable) resource constraints is a right somewhere between thin and illusory. The Court’s evident disinclination to endorse a cost defense makes sense—but it suggests that subjective culpability simply cannot bear the analytic weight assigned to it by *Whitley*, *Wilson*, or *Farmer*. *Kingsley*’s focus on the conditions actually experienced, rather than either intentional or reckless misconduct by officials, suffers no such flaw.

CONCLUSION

For convicted prisoners, the Constitution should guarantee that deliberate force and intentionally created conditions do not deliver “serious deprivation[s] of basic human needs”⁸⁷ without justification. Unreasonable force and unreasonable conditions of confinement undermine the dignity of American prisoners and of the American criminal justice system. The Court’s prior, pinched understanding of deliberate indifference is ripe for aggressive challenge. Prisoners’ rights lawyers should be arguing that for both detainees and prisoners, the Constitution means that deliberate force and intentionally created conditions cannot cause “serious deprivation[s] of basic human needs”⁸⁸ without justification. The Supreme Court, in turn, should reject *Whitley*, *Wilson*, and *Farmer* and adopt *Kingsley*’s objective reasonableness standard in the service of justice.

⁸⁴ *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

⁸⁵ *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring in the judgment).

⁸⁶ *Id.* at 301.

⁸⁷ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁸⁸ *Id.*

ABOUT THE AUTHOR

Margo Schlanger is the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan. She teaches constitutional law, torts, and classes relating to civil rights and to prisons. She also founded and runs the Civil Rights Litigation Clearinghouse, <http://clearinghouse.net>. Schlanger serves as court-appointed monitor for a statewide settlement dealing with deaf prisoners in Kentucky. She previously served as the presidentially appointed Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security. Schlanger earned her J.D. from Yale in 1993. She then served as law clerk for Justice Ruth Bader Ginsburg of the U.S. Supreme Court from 1993 to 1995. From 1995 to 1998, she was a trial attorney in the U.S. Department of Justice Civil Rights Division, where she worked to remedy civil rights abuses by prison and police departments and earned two Division Special Achievement awards.

What the Military Law of Obedience Does (and Doesn't) Do*

Christopher Fonzone

The responsibility of the military to obey orders from superiors surprisingly became a hot topic during the 2016 presidential campaign, when then-candidate Trump proposed to bring back waterboarding and a “hell of a lot worse” and appeared to suggest targeting intentionally the civilian family members of terrorists.¹ These comments prompted a swift and severe response, with a number of former officials—including, most prominently, former Central Intelligence Agency and National Security Agency Director Michael Hayden—making clear that they would expect the military to disobey such illegal orders.² Trump responded to the uproar by stating that he would “not order a military officer to disobey the law,”³ and he has since signaled that he is willing to defer to his Cabinet and cast those proposals aside.⁴

Although the specific controversies that arose during the campaign have seemingly passed, more recent events have again returned to the public eye questions of when members of the military must obey superior orders.⁵ What happens, commentators have asked, “if President Trump orders Secretary of Defense Mattis to do

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¹ See, e.g., *Transcript of the New Hampshire GOP Debate, Annotated*, WASH. POST (Feb. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/transcript-of-the-feb-6-gop-debate-annotated/?utm_term=.f78e11353e7f (comments on waterboarding); Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families,'* CNN (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>.

² See, e.g., Nick Gass, *Ex-CIA Director: Armed Forces Would Ignore Trump*, POLITICO (Feb. 27, 2016, 9:48 PM), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/cia-director-armed-forces-ignore-trump-219918#ixzz41QYxQAFN>; Rebecca Kheel, *Joint Chiefs Chairman: Trump Orders Would Harm Troop Morale*, THE HILL (March, 17, 2016, 2:13 PM), <http://thehill.com/policy/defense/273441-joint-chiefs-chairman-trump-orders-would-harm-troop-morale>.

³ See, e.g., David M. Jackson, *Trump: I Won't Order the Military to Break the Law*, USA TODAY (Mar. 4, 2016, 2:45 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/03/04/donald-trump-military-the-wall-street-journal-international-law/81325216/>.

⁴ See, e.g., Richard Sisk, *Trump to Defer to Mattis on Keeping Torture Ban*, MILITARY.COM (Jan. 27, 2017), <http://www.military.com/daily-news/2017/01/27/trump-defer-mattis-keeping-torture-ban.html>.

⁵ For example, Admiral Swift, the commander of the United States Pacific Fleet, recently responded to a question by saying that he would comply with a presidential order to attack China with nuclear weapons. See Austin Ramzy, *What if Trump Ordered a Nuclear Strike on China? I'd Comply, Says Admiral*, N.Y. TIMES (July 27, 2017), https://www.nytimes.com/2017/07/27/world/asia/us-admiral-nuclear-strike-china-trump-order.html?_r=0. Although a spokesman for the Pacific Fleet later pointed out that the question was purely hypothetical and that Admiral Swift was merely emphasizing the importance of civilian control, *id.*, this answer and rising tensions with North Korea have brought the law of obedience back into the public eye, see, e.g., Dan Lamothe, *If Trump Wants a First Nuclear Strike Against North Korea, His Advisers Have Few Options*, SYDNEY MORNING HERALD (Aug. 11, 2017), <http://www.smh.com.au/world/if-trump-wants-a-first-nuclear-strike-against-north-korea-his-advisers-have-few-options-20170811-gxud1v.html>.

something deeply unwise?”⁶ These questions implicate a body of law that has a long history and that sits at the intersection of some of our country’s most fundamental values and interests: the rule of law, civilian control of the military, and the need for good order and discipline in our armed forces.

In light of the continued focus on this topic, this Issue Brief aims (a) to provide a quick primer on the law of military obedience; (b) to illustrate how that law might apply to some current debates; and (c) to highlight how the law of obedience, while an important doctrine with a long and distinguished lineage, does not, and was never intended to, serve as a mechanism for debating the course of contested areas of national security policy.

It is important to note at the outset that books have been written on this rich topic, which almost invariably arises in difficult situations where lives are on the line. The Brief therefore does not purport to offer a definitive treatment of the subject or answer every question; rather, the hope is that it will inform generalist readers on the basics of the doctrine, so they can understand and participate in contemporary debates. To that end, Sections I and II provide background on the military chain of command and the legal responsibility of military officials to obey superior orders, laying out how members of the armed forces face a dual obligation to obey lawful orders and to disobey unlawful orders. Section III then explains how the law might apply to then-candidate Trump’s campaign comments about waterboarding and targeting the families of terrorists, before Sections IV and V discuss how those legal principles may apply in other scenarios. In doing so, the Issue Brief makes clear that the U.S. military has a strong rule of law culture and takes seriously its obligation to operate lawfully, but that the law of obedience is not intended to be, and should not be seen as, a forum for re-litigating contested legal determinations on publicly debated issues. That is the responsibility of other actors in our political system—not least of which is an engaged citizenry making clear its views and working through the political process to make them a reality.

I. THE CHAIN OF COMMAND

Before turning to a detailed discussion of the law governing when military orders must be obeyed, it is worth beginning with the basics of who has the authority and responsibility to make and implement military orders under U.S. law. These individuals constitute what is known as the military chain of command.⁷ The chain of command dictates which commanders can convey orders to which subordinates.⁸

The Constitution, statutory law, and executive branch practice combine to define the chain of command. Article II of the Constitution places the president at the apex, making him the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁹ As Justice Robert Jackson noted in his famous concurrence in

⁶ See Sarah Grant & Jack Goldsmith, *What If President Trump Orders Secretary of Defense Mattis To Do Something Deeply Unwise?*, LAWFARE (Aug. 22, 2017, 12:36 PM), <https://www.lawfareblog.com/what-if-president-trump-orders-secretary-defense-mattis-do-something-deeply-unwise>.

⁷ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 225 (2013).

⁸ *Id.* at 226 (noting that the “essence of military command is the conveyance of lawful orders from commander to combatant soldier”).

⁹ U.S. CONST., ART. II, § 2.

Youngstown Sheet & Tube Co. v. Sawyer,¹⁰ “[t]hese cryptic words have given rise to some of the most persistent controversies in our constitutional history,” but whatever else they might mean, they “undoubtedly pu[t] the Nation’s armed forces under presidential command.”¹¹

Title 10 of the U.S. Code delineates the operational chain of command below the president.¹² It makes the Secretary of Defense the statutory “head” of the Department of Defense, with delegated authority to run the Department,¹³ and authorizes the president to establish, through the Secretary, combatant commands to execute “the range of combat and peacetime missions in accordance with tasking from the Secretary.”¹⁴ Title 10 further specifies that, “unless otherwise directed by the President,” the chain of command to a combatant command runs “from the President to the Secretary of Defense” and “from the Secretary of Defense to the commander of the combatant command”¹⁵ The commanders of combatant commands are also granted the statutory authority to “prescrib[e] the chain of command to the commands and forces within the command,” unless “otherwise directed by the President or the Secretary of Defense.”¹⁶

The fact that the statutes specifying the chain of command explicitly state that the president may “otherwise direct” a different arrangement “represents congressional recognition of the president’s discretion as commander in chief to shape the structure of his own command” or “at least a constitutional accommodation between the political branches.”¹⁷ In other words, within the constitutional limits set by the Appointments Clause, the president may design the chain of command as he sees fit (as may the Secretary of Defense or combatant commanders with respect to their subordinates, so long as their arrangements do not conflict with the views of their superiors).

Nonetheless, the statutory chain of command is a “norm, which has generally held”¹⁸—for example, current military directives and doctrine mirror the relevant statutes by stating that the operational chain of command runs from the president to the Secretary of Defense to the commander of a combatant command, with the

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹¹ *Id.* at 641 (Jackson, J., concurring). Although, as discussed later in this Issue Brief, there remains great controversy about the breadth of the president’s Commander in Chief powers—*e.g.*, to what extent that grant of authority allows the president to use force without constitutional approval, there “seems to be no question” that the Clause “establishes a particular hierarchical relationship within the armed forces and the militia (when called into federal service), at least for purposes of traditional military matters—and this relationship appears to be something no statute can change.” David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 768 (2008).

¹² There are actually two distinct branches of the military chain of command. See JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES xiii (25 March 2013) (hereinafter JOINT PUB. 1). One branch, called the operational chain of command, runs from the president, through the Secretary of Defense, to the Combatant Commanders for missions and forces assigned to the Combatant Commands. See *id.* at xiii-xiv. For purposes other than the operational direction of the Combatant Commands, the chain of command runs from the president to the Secretary of Defense to the Secretaries of the Military Departments. *Id.* For simplicity’s sake, given the subject matter of most of the issues discussed in this brief, all references to the chain of command herein are references to the operational chain of command unless otherwise noted.

¹³ 10 U.S.C. § 112-13.

¹⁴ Grant & Goldsmith, *supra* note 6; see also 10 U.S.C. § 161 (2012).

¹⁵ 10 U.S.C. § 162 (2012).

¹⁶ 10 U.S.C. § 164(c)(1)(B) (2012).

¹⁷ BAKER, *supra* note 7, at 226.

¹⁸ *Id.*

commander of the combatant command further prescribing the chain of command for forces within his or her command.¹⁹

II. THE LAW OF OBEDIENCE

The law governing when the Secretary of Defense and members of the Armed Forces may disobey orders—and the consequences of their doing so—reinforces the proper functioning of the chain of command.

The Secretary of Defense is the only civilian in the operational chain of command (as it currently exists in statute and military doctrine), and he is therefore subject to a different legal regime than the members of the armed forces who constitute the rest of the chain. Under this regime, there is no specific legal provision that subjects him or her to criminal punishment for failing to follow orders.²⁰ The Supreme Court has made clear, however, that the Constitution requires the heads of “purely executive” agencies, such as the Department of Defense, to be at-will employees who serve at the pleasure of the president.²¹ The Secretary of Defense can therefore refuse to follow a presidential order for any number of reasons—because of a policy disagreement, as a matter of conscience, or because he believes the order is unlawful—but must be prepared to lose his or her job for doing so.²²

Indeed, although presidents rarely fire Cabinet officials, some of the most notable examples of presidents doing so, or Cabinet officials resigning in anticipation of being fired, involve disobedience. The so-called “Saturday Night Massacre” involved Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigning rather than carrying out President Nixon’s order to fire special prosecutor Archibald Cox, who was investigating the Watergate affair. More recently, President Trump fired Acting Attorney General Sally Yates after she refused to

¹⁹ See, e.g., U.S. DEPARTMENT OF DEFENSE, DIRECTIVE 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS 2 (December 21, 2010) (hereinafter DOD DIR. 5100.01) (“The operational chain of command runs from the President to the Secretary of Defense to the Commanders of the Combatant Commands.”); JOINT PUB. L. *supra* note 12, at xiii-xiv (noting that the operational chain of command “runs from the President, through [the Secretary of Defense], to the [Combatant Commanders] for missions and forces assigned to their commands” and that the Combatant Commanders prescribe the chain of command within their commands)”

²⁰ Secretary Mattis, as a former military officer, presents an interesting and, given the long tradition of not having retired military officers serve as the Secretary of Defense, essentially unique question in this respect. Retired members of the armed forces “who are entitled to pay” are subject to the Uniform Code of Military Justice (UCMJ). See 10 U.S.C. § 802(a)(4). If this provision covers Secretary Mattis—an issue this Brief does not explore—he would then face the prospect of criminal penalties for disobeying lawful superior orders, as discussed later in this Brief, in addition to the possible consequences facing a civilian Secretary of Defense.

²¹ See *Humphrey’s Executor v. United States*, 295 U.S. 602, 632 (1935) (discussing *Myers v. United States*, 272 U.S. 52 (1926)). The Supreme Court has held, in contrast, that Congress may provide the heads of agencies that exercise “quasi-legislative” and “quasi-judicial” functions—*i.e.*, agencies such as the Securities and Exchange Commission or Federal Trade Commission that focus on rulemaking and adjudication—with tenure protection such that they can only be removed for good cause. See *id.* at 628-29.

²² One further point worth making: Although Cabinet officials serve at the pleasure of the president, it is not accurate to say, as many press reports do, that the president may fire such officials for “any or no” reason. The president is, at the very least, bound by his constitutional obligations, such that he could not fire a Cabinet official because of his religion or race. See Marty Lederman & David Pozen, *Why Trump’s Disclosure to Russia (and Urging Comey to Drop the Flynn Investigation, and Various Other Actions) Could be Unlawful*, JUST SECURITY (May 17, 2017, 12:36 PM), <https://www.justsecurity.org/41024/why-trumps-disclosure-and-more-might-be-unlawful/>.

defend the president's Executive Order that suspended entry into the United States for individuals from seven Muslim-majority countries.²³

While the Secretary of Defense risks losing his job if he fails to follow an order issued by the president, the stakes are even higher for soldiers, sailors, airmen, and Marines in the chain of command. That's because, unlike civilian officials, members of the armed forces face not only the loss of a job for disobeying superior orders,²⁴ but also the prospect of criminal punishment.

Members of the armed forces are subject to the Uniform Code of Military Justice (UCMJ),²⁵ which forms the foundation of the military justice system and defines criminal offenses under military law. The UCMJ has a number of provisions that touch upon obeying orders.²⁶ Most relevantly, Article 90 of the UCMJ states that anyone who "willfully disobeys a lawful command of his superior commissioned officer" shall receive a punishment that could possibly include death (if the offense is committed during wartime).²⁷ Another provision, Article 92, subjects to punishment anyone who "violates or fails to obey any lawful general order or regulation" or, "having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order."²⁸ Furthermore, the Manual for Courts Martial (MCM), the document the Department of Defense officially publishes to guide courts-martial, makes clear that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."²⁹ In other words, the interest in military discipline is thus vindicated by a "clear presumption... that service members will obey the orders issued by their superiors."³⁰

The duty of obedience extends only to "lawful" orders, however, and the MCM makes clear the "inference [that a superior's order is legal] does not apply to a patently illegal order, such as one that directs the commission of a crime."³¹ Service members are therefore not expected to obey—and are, in fact, required to

²³ See Press Release, Office of the Press Sec'y, *Statement on the Appointment of Dana Boente as Acting Attorney General* (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/statement-appointment-dana-boente-acting-attorney-general>.

²⁴ The president's ability to fire a member of the armed forces is not quite as straightforward as his ability to fire the Secretary of Defense. Congress has provided commissioned military officers with limited tenure protections, stating that they can only be "dismissed" from the armed forces "by sentence of a general court-martial"; "in commutation of a sentence of a general court-martial"; or "in time of war, by order of the President." The ongoing hostilities in Afghanistan and elsewhere likely make this a "time of war" for purposes of this statute, such that, although "it's extraordinarily unlikely that any President in the modern era would be obliged to force officers out, as almost all would retire if asked," if "it became necessary to compel an officer to leave the military, the Constitution and the law provide a way to make that happen." Charles Dunlap, *Can Presidents 'Fire' Senior Military Officers? Generally, yes...but it's complicated*, LAWFARE (Sept. 15, 2016), <https://sites.duke.edu/lawfare/2016/09/15/can-presidents-fire-senior-military-officers-generally-yesbut-its-complicated/>.

²⁵ See 10 USC §§ 801-946 (2016).

²⁶ See Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (April 6, 2016), <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist>.

²⁷ 10 U.S.C. § 890 (2016).

²⁸ 10 U.S.C. § 892 (2016).

²⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2) (2016) (hereinafter MCM).

³⁰ Reeves & Wallace, *supra* note 26.

³¹ MCM, *supra* note 29, pt. IV, ¶ 14(c)(2).

disobey—orders that are “manifestly” or “patently” illegal.³² This rule squares with a long history “of holding soldiers responsible for manifestly illegal acts” that “is already apparent in the military law of ancient Rome.”³³ The Charter of the Nuremberg Tribunal also famously made clear that “the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility,”³⁴ and the organic statutes of more recent international criminal tribunals contain similar language.³⁵ Case law from domestic courts-martial also reflect this principle.³⁶

As Colonel David Wallace, the Head of West Point’s Department of Law, and his Deputy, Lieutenant Colonel Shane R. Reeves, have recently noted, the fact that the law both expects members of the armed forces to follow orders and holds them criminally liable for doing so in certain circumstances seemingly places the service members in a “difficult position.”³⁷ This seeming difficulty stems from the fact that the law of obedience implicates two, potentially competing interests: military

³² See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 359 (2010) (discussing “manifest” illegality as the standard). While the terms “manifestly” and “patently” are used most frequently to identify those orders that must be obeyed, the modern military codes used by armed forces around the world use a variety of “identical or virtually identical” terms to identify such orders, such as “manifest,” “outrageous,” “gross,” “palpable,” “indisputable,” “clear and unequivocal,” “transparent,” “obvious,” “without any doubt whatsoever,” or “universally known to everybody.” See Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 952 (1998).

³³ See *id.* at 946.

³⁴ *Charter of the International Military Tribunal*, art. 8, annexed to Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 UNTS 280, 288; see also SOLIS, *supra* note 32, at 354-57 (discussing the evolution of the standard from Nuremberg).

³⁵ See U.S. DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL*, § 18.22.4 (June 2015) (hereinafter *LAW OF WAR MANUAL*); see also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Annex to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, art 7(4) (1993), U.N. Doc. S/25704 (May 3, 1993), adopted by U.N. Security Council Resolution 827 (1993), U.N. Doc. S/RES/827(1993) (May 25, 1993) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility.”); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art 6(4), Annex to U.N. Security Council Resolution 955 (1994), U.N. Doc. S/RES/955(1994) (Nov. 8, 1994) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him [or her] of criminal responsibility.”).

³⁶ See *United States v. Calley*, 22 U.S.C.M.A. 534, 543-44 (C.M.A. 1973) (“In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder.”). The Supreme Court has recognized this principle in civil cases. See, e.g., *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851) (“Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. . . . And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.”).

³⁷ Reeves & Wallace, *supra* note 26.

discipline and the supremacy of the law. With respect to the former, one of the first things that every service member learns upon starting training is that he or she shall follow orders,³⁸ as no “military force can function effectively without routine obedience” to superior orders.³⁹ The Supreme Court has put it this way:

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.⁴⁰

At the same time that obedience to higher orders is essential to military effectiveness, the supremacy of the law is also a fundamental value.⁴¹ Presidents of both parties have long recognized that the law itself is an important national security tool,⁴² as has the Department of Defense. Consistent with these views, the Department of Defense’s then-General Counsel recently noted that “the law of war is of fundamental importance,” not only because following it is the “right thing to do,” but also because it is consistent with “fighting well and prevailing.”⁴³

Scholars have noted the potentially conflicting nature of these two interests. If the law governing obedience were to reflect only military discipline, it would require obedience to all orders and hold the individual who issued the order liable for any unlawful conduct he or she commanded. Conversely, if the law governing obedience reflected solely a concern with the supremacy of the law, it would hold “subordinates liable for all crimes committed pursuant to superior orders, even when the offense

³⁸ SOLIS, *supra* note 32, at 341.

³⁹ MICHAEL WALZER, *JUST AND UNJUST WARS* 311 (4th ed. 2006).

⁴⁰ *In re Grimley*, 137 U.S. 147, 153 (1890); *see also* *Parker v. Levy*, 417 U.S. 733, 743-44 (1974) (repeating the point); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (noting that the “inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection”).

⁴¹ *See* Osiel, *supra* note 32, at 961-65.

⁴² *See* PRESIDENT BARACK OBAMA, *NATIONAL SECURITY STRATEGY* 3 (February 2015) (“The strength of our institutions and our respect for the rule of law sets an example for democratic governance. When we uphold our values at home, we are better able to promote them in the world. This means safeguarding the civil rights and liberties of our citizens while increasing transparency and accountability. It also means holding ourselves to international norms and standards that we expect other nations to uphold, and admitting when we do not.”); PRESIDENT GEORGE W. BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* 36 (March 2006) (“We will encourage all our partners to expand liberty, and to respect the rule of law and the dignity of the individual, as the surest way to advance the welfare of their people and to cement close relations with the United States.”); PRESIDENT WILLIAM J. CLINTON, *A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE* (December 2000) (“Our national interests are wide-ranging. They cover those requirements essential to the survival and well-being of our Nation as well as the desire to see us, and others, abide by principles such as the rule of law, upon which our republic was founded.”); PRESIDENT GEORGE H.W. BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* 6 (January 1993) (“Maintaining our own high standard of democratic practice and the rule of law is vital to our ability to lead by example.”); PRESIDENT RONALD REAGAN, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* 3 (January 1988) (“National Security Strategy must start with the values that we as a nation prize. Last year, in observing the 200th anniversary of our Constitution, we celebrated these values with a sense of rededication—values such as human dignity, personal freedom, individual rights, the pursuit of happiness, peace and prosperity.”).

⁴³ *LAW OF WAR MANUAL*, *supra* note 35, at ii.

was relatively minor, seemingly lawful under the circumstances, or commanded under threat of court martial.⁴⁴ There is almost universal recognition, however, that neither of these extreme approaches is acceptable. The former elides the fact that crimes are committed by individuals who should, at least in certain circumstances, bear responsibility for their actions; while the latter risks good order and discipline by encouraging the re-litigation of orders as they move down the chain of command.⁴⁵

So how does the law of obedience mediate between the two interests in a way that doesn't put service members in an untenable position? In short, it does so by narrowly defining the set of orders that soldiers are required to disobey—i.e., manifestly or patently illegal orders—to ones that are not, in practice, hard to discern.⁴⁶ Rather, the illegality of such orders are typically present on their face—or, at the very least, plain—leaving a service member no need to “reason why” the orders are unlawful.⁴⁷

Indeed, as one noted military justice scholar has noted, “manifestly” or “patently” illegal orders are “exceedingly rare,” such that a service member “may go through an entire military career and never encounter” one.⁴⁸ There are accordingly few courts-martial finding orders to be manifestly illegal, and the facts of such cases demonstrate the obviousness of the illegality that meets that standard.⁴⁹ For example, in one case, a court-martial found manifestly unlawful an order to take a wounded trespasser “out to the Bomb Dump and shoot him.”⁵⁰ Another case found manifestly unlawful an order to take a prisoner “down the hill and shoot him.”⁵¹

III. A CASE STUDY IN WHAT THE LAW OF OBEDIENCE CAN DO: TRUMP'S CAMPAIGN RHETORIC ON WATERBOARDING AND TARGETING CIVILIANS

This backdrop helps explain the swift and strong response to then-candidate Trump's suggesting the possibility of orders directing the use of waterboarding or the targeting of civilians under a Trump Administration. Campaign rhetoric is, of course, different than a specific military order, and some commentators have pointed out that there is some uncertainty as to what then-candidate Trump was precisely recommending.⁵² That said, in both of these scenarios, the hypothetical orders being contemplated raise the specter of “manifest” illegality.

Consider the following reaction by a well-known former senior military lawyer to the prospect of targeting the civilian family members of terrorists:

⁴⁴ See Osiel, *supra* note 32, at 962.

⁴⁵ *Id.*

⁴⁶ See Reeves & Wallace, *supra* note 26.

⁴⁷ SOLIS, *supra* note 32, at 359.

⁴⁸ *Id.* at 358.

⁴⁹ *Id.* at 360 n. 119.

⁵⁰ *United States v. Kinder*, 14 C.M.R. 742, 750 (A.F.B.R. 1954).

⁵¹ *United States v. Griffen*, 39 C.M.R. 586 (ACMR 1968).

⁵² See Charles J. Dunlap, Jr., *Trump's Campaign Rhetoric, ISIS, and the Law of War*, THE CONVERSATION (Mar. 9, 2016, 6:14 AM), <https://theconversation.com/trumps-campaign-rhetoric-isis-and-the-law-of-war-55807> (discussing possible interpretations of Trump's comments on targeting the family members of terrorists).

“Any order to specifically target civilian family members who are not directly participating in hostilities is simply a nonstarter for today’s military,” says [Charles J. Dunlap, Jr., former Deputy Judge Advocate General of the Air Force and current Professor of Practice at Duke Law School.] Such a command, he adds, would be a “classic example of an illegal order that could not and would not be obeyed.”⁵³

Similarly, the Heads of West Point’s Department of Law wrote the following about a potential order to bring back waterboarding or a “hell of a lot worse” under the law in place today:

The manual regulating interrogation for the armed forces, Field Manual (FM) 2-22.3, expressly prohibits waterboarding, conducting mock executions, inducing hypothermia or heat injury, as well as many other actions. The McCain-Feinstein Amendment to the 2016 National Defense Authorization Act enshrines in congressional legislation the requirement for military members to only use the interrogation techniques found in the manual making waterboarding and other similar techniques obviously illegal. It is clear today that a service member directed to waterboard could...justifiably refuse the manifestly illegal order.⁵⁴

Although the law of obedience is difficult to apply in the abstract, since the manifest illegality of an order is “usually an objective question related to a specific situation,”⁵⁵ numerous other commentators have expressed their agreement with these views. In short, the hypothetical action in both of these scenarios—at least as that action has been popularly understood—would transgress a clear and well-known legal command, and therefore be one of those “extremely rare” orders that commands disobedience.

IV. WHAT THE LAW OF OBEDIENCE DOES NOT DO

As the law of obedience continues to be a subject of public discussion, however, it is important to keep in mind that the hypothetical scenarios concerning waterboarding and the intentional targeting of civilians are much more the exception than the rule. Few legal prohibitions are as clear, and, even when the legal rules are clear, the facts are often murky. Disobeying a superior order is something that is “extremely unusual” in the military, and it is only the “extraordinarily rare” order that falls outside the obligation to obey superior orders and therefore triggers the obligation to disobey. Put simply, the law of obedience is simply not a mechanism for contesting difficult legal or policy issues.

This is not to say that the Department of Defense or broader U.S. national security community shortchanges the importance of the rule of law. To the contrary, U.S. national security institutions have an extremely strong rule of law culture. For

⁵³ Mark Thompson, *President Trump’s Illegal Military Orders*, TIME (Mar. 4, 2016), <http://time.com/4244608/donald-trump-military-orders-illegal/>.

⁵⁴ Reeves & Wallace, *supra* note 26.

⁵⁵ SOLIS, *supra* note 32, at 359.

example, the Department of Defense takes a number of steps to ensure that its people understand their legal obligations. It generally requires service members to receive basic law of war training.⁵⁶ It, as required by certain treaties, disseminates those treaties and promotes their study.⁵⁷ And it also promulgates “instructions, regulations, and procedures” to implement the law of war throughout the organization.⁵⁸

More broadly, career officials care deeply about ensuring that their actions are lawful, and national security processes therefore incorporate timely and competent legal advice, often by having counsel participate in the preparation of options.⁵⁹ The precise nature of this legal counsel will, of course, vary by context. Thus, President Trump’s directive laying out his Administration’s national security process grants a seat at all National Security Council (NSC) and Principals Committee meetings to the White House Counsel and NSC Legal Adviser, presumably so that they can, as appropriate, relay to policymakers legal advice that has been coordinated with subject matter experts from across the interagency.⁶⁰ More tactical legal issues may, on the other hand, be handled by military lawyers in theater, as the Department of Defense officially requires “qualified legal advisers” to be “available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations” and also mandates that “commanders of the combatant commands ensure that all plans, policies, directives, and rules of engagement, and those of subordinate commands and components, are reviewed by legal advisers to ensure their consistency with the law of war and [Department of Defense] policy on the law of war.”⁶¹

Attention to the legality of military operations does not, however, eliminate legal uncertainty. The Constitution itself is full of “open-textured dictates”⁶²—e.g., the president is the “*Commander-in-Chief*” who must “*take care*” that the laws be faithfully executed; individuals are entitled to all of the process that is “*due*”⁶³—and other key legal provisions use similarly flexible terms—e.g., parties to a conflict must take

⁵⁶ See DOD DIRECTIVE 2311.01E, *DoD Law of War Program*, ¶ 5.8 (May 9, 2006).

⁵⁷ LAW OF WAR MANUAL, *supra* note 35, at § 18.6.1.

⁵⁸ *Id.* § 18.7.

⁵⁹ See, e.g., Jack Goldsmith, *Libertarian Panic, Unlawful Action, and the Trump Presidency*, LAWFARE (Nov. 22, 2016, 2:28 PM), <https://www.lawfareblog.com/libertarian-panic-unlawful-action-and-trump-presidency> (noting that “career officials in the intelligence and defense communities are deeply committed to lawful action to a degree that outsiders do not appreciate”).

⁶⁰ See National Security Presidential Memorandum-4 of April 4, 2017, *Organization of the National Security Council, the Homeland Security Council, and Subcommittees*, 82 Fed. Reg. 16881 (Apr. 6, 2017).

⁶¹ LAW OF WAR MANUAL, *supra* note 35, § 18.5. Academic scholarship, based on interviews with military lawyers, discusses how these policies have been implemented and suggests that judge advocates play an integral role in theater. See Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1 (2010) (discussing how judge advocates, among other things, “mingle with operational employees, the commanders and troops on the battlefield,” “help devise the rules of engagement and train troops in those rules, both before they deploy and on the battlefield,” and “play a key role in ensuring that commanders impose penalties on rule breakers within the military justice system.”).

⁶² See Lisa Monaco, *Help Wanted: Custodians for the Rule of Law*, JUST SECURITY (July 28, 2017, 8:41 AM), <https://www.justsecurity.org/43688/wanted-custodians-rule-law/>.

⁶³ U.S. CONST., ART. II, §§ 2-3 & AMEND. V.

“feasible” precautions to reduce the risk of civilian harm;⁶⁴ combatants must refrain from attacks where the civilian harm would be “excessive” in relation to the “concrete and direct” military advantage expected to be gained.⁶⁵ And there are relatively few court decisions construing and making more definitive the meaning of these open-textured commands, to say nothing of the fact that it would likely be unreasonable to require all service members to be familiar with cutting-edge legal developments.⁶⁶

It is thus common for there to be reasonable disagreement on national security legal questions. For example, as Georgetown Law Professor and former Department of Defense official Rosa Brooks has noted, several military leaders have questioned the “legality, morality and strategic wisdom” of targeting U.S. citizens with drone strikes outside of traditional battlefields.⁶⁷ Commentators have similarly raised questions about the United States’ targeting of the Islamic State’s oil-related infrastructure in Iraq and Syria.⁶⁸ But these contested questions are precisely the sort of issues that do not trigger a service member’s obligation to disobey a superior order. As a noted scholar of military justice has put it:

Junior soldiers are not expected to parse the orders they receive or apply a lawyer’s judgment to directions from those of higher grade. They are not expected to review law books or be familiar with case law. . . . In doubtful cases, the order must be presumed lawful and it must be obeyed.⁶⁹

It is important to note here that we are not talking about the responsibilities of those individuals, including legal counsel, who are involved in advising the president, the Secretary of Defense, or other military officers who are making decisions in the first instance. These individuals should, as appropriate given their positions and roles, state their views and advocate for the contested legal and policy positions that they think are right.

That said, once the individual vested with the authority to make a decision does so, the strong presumption is that those subordinate to the decision maker in the chain of command will carry out that order. To be sure, Department of Defense doctrine contemplates members of the armed forces asking questions on legal issues

⁶⁴ Harold Koh, Legal Adviser, Department of State, *Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland’s Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons*, Dec. 30, 2009 (“In particular, the U.S. reservation is consistent with article 57(2) (ii) and article 57(4) of the 1977 Additional Protocol I to the Geneva Conventions. Article 57(4) provides that governments shall ‘take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.’ Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination.”).

⁶⁵ LAW OF WAR MANUAL, *supra* note 35, § 5.12 (citing Additional Protocol I to the Geneva Conventions).

⁶⁶ *Id.* at § 5.5.2.

⁶⁷ See Rosa Brooks, *The Military Wouldn’t Save Us from President Trump’s Illegal Orders*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/the-military-wouldnt-save-us-from-president-trumps-illegal-orders/2016/03/04/9ef8fd44-e0ea-11e5-846c-10191d1fc4ec_story.html?utm_term=.f6f277d6934b.

⁶⁸ See Marty Lederman, *Is it Legal to Target ISIL’s Oil Facilities and Cash Stockpiles?*, JUST SECURITY (May 27, 2016, 8:57 AM), <https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/>.

⁶⁹ SOLIS, *supra* note 32, at 359-60.

through appropriate channels,⁷⁰ and, in practice, “service members are expected to clarify any questionable orders,”⁷¹ but it is only the extremely rare order that is “manifestly” or “patently” illegal that mandates disobedience.

Practical considerations further support this approach. As laid out at the outset, the president (and other senior officials) have broad discretion to fire individuals below them in the chain of command and to restructure the chain as they see fit. Thus, if a defense official is refusing to carry out an order because of concerns surrounding its legality and the president or another senior official does not share those concerns, he or she likely has many ways in which to try to find another official that will carry out the order. This, of course, could take time and the internal disagreement could alert other institutional actors to the issue; depending on the circumstances, there thus may be substantial political costs if the president or another official chooses to fire or reassign an official over a legal dispute. But, in reality, the president’s and other superiors’ broad authority over the chain of command will make it difficult for a defense official to prevent the implementation of an order on legal grounds unless there is a broad and deep recognition of its illegality—perhaps because the order crosses a fundamental line with respect to the laws of war or is illegal in a highly salient way that threatens significant strategic and professional blowback (such as the targeting of civilians or waterboarding).

V. THE DUTY TO OBEY AND THE DECISION TO USE FORCE

Up to this point, this Issue Brief has almost exclusively discussed the law of obedience in the context of issues concerning how the United States conducts hostilities it has already entered (called the *jus in bello*). But what about legal questions concerning whether the United States should go to war (called the *jus ad bellum* in international law)? Questions of whether to use force in the first place are among the most important a president can face, and such decisions can have extraordinary consequences, particularly in this nuclear age. Indeed, public discussion about the possibility of the United States using force against North Korea is in fact what has recently placed the responsibility of military members to follow superior orders back on the public’s radar.⁷²

So how does the law of obedience apply to these questions? A starting point for analysis is the fact that military personnel below a certain rank are generally not held liable for *jus ad bellum*, as opposed to *jus in bello*, violations. Here is how the court in the High Command Trial of the Nuremberg Tribunals put it:

Somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the

⁷⁰ See LAW OF WAR MANUAL, *supra* note 35, § 18.3.1 (“Similarly, individual service members are not expected to be experts in the law of war; service members should ask questions through appropriate channels and consult with the command legal adviser on issues relating to the law of war.”); *id.* at § 18.5.2 (“During military operations, questions on the law of war from U.S. forces or coalition partners related to a specific issue should be referred through the operational chain of command for resolution. It may also be appropriate to refer questions to either the office of the Judge Advocate General of a Military Department, the Staff Judge Advocate to the Commandant of the Marines Corps, the General Counsel of a Military Department, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, or the DoD General Counsel.”).

⁷¹ Reeves & Wallace, *supra* note 26.

⁷² See Lamothe, *supra* note 5.

boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it.⁷³

This distinction has since been incorporated into U.S. military doctrine and more recent international instruments,⁷⁴ and reflects the fact that “it would be unjust to punish individual military members based on *jus ad bellum* considerations when they have no influence on whether their State has resorted to force lawfully under applicable international law.”⁷⁵

Thus, since the vast majority of military personnel are not “in a position effectively to exercise control over or to direct the political or military action” of the country,⁷⁶ they are not liable for *jus ad bellum* violations. And precisely because they face no *jus ad bellum* liability, a number of military justice scholars argue, these individual service members have no corresponding obligation to disobey manifestly illegal orders to initiate the use of force.⁷⁷

This leaves those members of the military who do have a say in whether the United States goes to war: It is at least theoretically possible that these individuals could be held liable for *jus ad bellum* violations, provided there was an appropriate forum with jurisdiction over them. How would the law of obedience apply to them?

To begin, it is difficult to define who precisely would fall within this category. The Constitution grants Congress the power to declare war and, as discussed above, makes the president the Commander in Chief, with substantial authority to direct the actions of the military and relieve or replace those who do not heed his or her commands.⁷⁸ It is thus not entirely clear which officials below the president in the chain of command would be considered in a position where they could “influence”

⁷³ United States v. Von Leeb et al. (“The High Command case”), 11 TWC 462, 486 (1950).

⁷⁴ See, e.g., Keith Petty, *A Duty to Disobey?*, JUST SECURITY (Nov. 28, 2016, 8:40 AM), <https://www.justsecurity.org/34612/duty-disobey/> (discussing, among other things, the U.S. Army Field Manual on the Law of Land Warfare and negotiations over the crime of aggression at the International Criminal Court).

⁷⁵ LAW OF WAR MANUAL, *supra* note 35, § 3.5.2.3.

⁷⁶ Proposed amendments to the Rome Statute of the International Criminal Court would make this class of individuals potentially liable for the crime of aggression—*i.e.*, waging certain types of unlawful wars. See Resolution RC/Res.6, Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, Jun. 11, 2010. The United States has expressed reservations about aspects of these proposed amendments. The language in the text should thus not be taken as a definitive statement about the scope of *jus ad bellum* liability, see Harold Hongju Koh, Legal Adviser, Department of State, *Statement at the Review Conference of the International Criminal Court* (June 4, 2010), although it does track the traditional view that only those who have influence over the decision to go to war may be held liable for it. Cf., e.g., David Rodin, *The Liability of Ordinary Soldiers for Crimes of Aggression*, 6 WASH. U. GLOBAL STUDIES L. REV. 591, 591 (2007) (noting the traditional view that “ordinary soldiers who participate in an unjust war do no wrong so long as they do not violate the norms of *jus in bello*” and arguing that “there is at least a theoretical basis for extending liability for the crime of aggression” to those soldiers).

⁷⁷ See, e.g., Petty, *supra* note 74 (“Where there is a limited duty to disobey manifestly unlawful orders in the *jus in bello* context, there is no corresponding duty in the *jus ad bellum*—the laws governing the initiation of armed conflict.”); see also SOLIS, *supra* note 33, at 359 (“Manifest illegality is not a soldier disobeying based on the asserted illegality of his nation’s *jus ad bellum* resort to force.”). Of course, even if a soldier has no responsibility to disobey a particular order on *jus ad bellum* grounds, a first strike can still present *jus in bello* questions—for example, as Anthony J. Colangelo has recently pointed out, the use of nuclear, instead of conventional, weapons would raise extremely challenging *jus in bello* questions. See Anthony J. Colangelo, *Would the Military Really Have to Obey a Trump Command to Fire a Nuclear Weapon?*, L.A. TIMES (Aug. 4, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-colangelo-duty-nuclear-20170804-story.html>.

⁷⁸ U.S. CONST., ART. I, § 8, cl. 11 & ART. II, § 2.

the decision to use force or “effectively . . . exercise control over or to direct the political or military action” of the country. There appears to be no direct precedent that answers the question of which U.S. officials might be subject to *jus ad bellum* liability; and, given our constitutional structure, it seems likely that, at most, only a small number of individuals would be covered.

Nonetheless, any individuals who do fall in this category could find themselves in a situation where they receive an order from a superior that, if followed, could lead to their being held liable for *jus ad bellum* violations. But even if this is the sort of conflict where an obligation to disobey a manifestly illegal order might theoretically kick in—and it is not clear that such an obligation applies here⁷⁹—it is worth noting that the reasons identified above that caution against extending the hypothetical scenarios concerning waterboarding and the intentional targeting of civilians too broadly apply with particular force to questions concerning the United States’ resort to the use of force in the first instance.

There are few legal issues that have been subjected to more debate. Consider how, in the past couple of years alone, numerous commentators and Members of Congress have questioned the Executive Branch’s interpretation of the 2001 Authorization for Use of Military Force and the domestic and international legality of U.S. strikes on the Assad Regime in response to its use of chemical weapons. Courts, moreover, have rarely addressed when the president may direct the use of military force, and scholars have taken a range of views on the topic.⁸⁰ Although written in a slightly different context, the following passage from Justice Jackson’s famous *Youngstown* concurrence does a fairly good job of explaining the state of the law:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate

⁷⁹ Many of the scholarly statements noting that there is no duty to disobey manifestly illegal orders in the *jus ad bellum* context do not differentiate between the vast majority of service members who would not be subject to liability for *jus ad bellum* violations and the small handful that would. The statements would thus appear to cover all service members. Nonetheless, one of the major reasons for concluding that service members are not under an obligation to disobey manifestly illegal orders to use force is that they face no liability for such decisions, and the analyses of which I am aware do not specifically consider whether a different conclusion should be reached for service members to whom such liability might attach.

⁸⁰ The academic literature on the president’s constitutional authority to direct the use of military force is vast and complex. For a good, albeit very brief, summary of the debate, a good place to start is Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I—The Constitution, The Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/>. Lederman points out that there are “three principle schools of thought” on this question: (1) a “traditional view” that “except in a small category of cases where the President does not have time to wait for Congress before acting to interdict an attack on the United States, the President must always obtain ex ante congressional authorization, for any use of military force abroad”; (2) a view “at the other extreme” that “there are virtually no limits whatsoever,” as the president can take the nation to war to advance “the national security interests of the United States”; and (3) a “third way,” which has governed recent U.S. practice, pursuant to which the president has substantial authority to act, so long as the action does not rise to the level of war in the constitutional sense. *Id.*

and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.⁸¹

International law similarly does not always offer definitive answers to questions of when a state may resort to the use of force. Absent a United Nations Security Council Resolution or host nation consent, states may traditionally only use force in self-defense against an actual or “imminent” armed attack. But the question of when an attack is “imminent” is hotly debated, particularly in a world where armies do not mass on borders and nuclear weapons can cause grave damage in an instant.⁸²

Against this backdrop, while one can of course imagine a manifestly illegal order to use force, it seems more likely that such an order would, in all but the rarest circumstances, present a question of contested illegality that does not trigger an obligation to disobey.⁸³ Indeed, consistent with this view, courts—whether appropriately or not—have repeatedly refused to second-guess presidential decisions to order the use of military force abroad, and courts martial have also ruled that such decisions are political questions not susceptible to judicial second-guessing.⁸⁴

Moreover, the practical considerations discussed above—i.e., the president’s broad authority to structure the chain of command and choose individuals to fill it—would appear to apply with particular force in the context of presidential decisions to use force. Disobedience on legal grounds would thus only be effectual if the views were broadly shared and the dissenting individual was not easily replaced or circumvented.

In the end, the foregoing does not mean that senior military officials who might theoretically be liable for *jus ad bellum* violations have no prospect of raising concerns about the legal basis for going to war. To the contrary, the entire premise of these individuals’ potential *jus ad bellum* liability is that they have some measure of influence over the decision to go to war. They thus should have the opportunity to raise their legal concerns—just as the General of U.S. Strategic Command recently said he would do.⁸⁵ Of course, there is no guarantee that raising such concerns will be successful, and there is always the possibility that a senior official may face a conflict between a superior’s order to go to war and his or her own view as to the legality of that order. But there are no definitive precedents or easy answers as to what happens in such a scenario, and given the discussion above, one should be cautious about extending the waterboarding and civilian targeting examples to this context.

⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

⁸² See, e.g., Press Release, Office of the Press Sec’y, *Remarks of John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws”* (Sept. 16, 2011) (“Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”).

⁸³ See, e.g., Jack Goldsmith, *The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea*, *LAWFARE* (Sept. 14, 2017, 8:53 AM), <https://www.lawfareblog.com/ease-writing-olc-opinion-support-military-action-against-north-korea>.

⁸⁴ See, e.g., *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *United States v. Huet-Vaughn*, 43 MJ 105 (1995).

⁸⁵ See Daniella Diaz, *Top General Says He’d Push Back Against “Illegal” Nuclear Strike Order*, CNN (Nov. 20, 2017, 5:07 PM), <http://www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html>.

CONCLUSION

The foregoing illustrates that the military law of obedience is a doctrine designed to protect service members from having to obey manifestly illegal orders. As the response to then-candidate Trump's comments on waterboarding and the targeting of civilians demonstrates, the doctrine helps ensure that the U.S. military does not transgress clear and well-known legal commands. But what the law of obedience most distinctly is not is a tool for saving the Nation from simply unwise or legally contested orders.

This may seem unsatisfying, particularly given how the presidency has accumulated power since World War II. But it is the way it should be. The law of obedience currently enables members of the military to check momentary excesses from leadership in exceptional and rare cases. Expanding it beyond these narrow confines and making service members' willingness to disobey orders an operative legal check would not only decrease the incentive for national leadership to engage in a deliberate, coordinated, and reasoned legal review of military action, but it would also undermine service members' confidence in their orders—with adverse impacts on good order and discipline—and, more fundamentally, have a potentially deleterious impact on civil-military relations. An elected president, Senate-confirmed military leadership, and strict adherence to the chain-of-command are “core elements” of civilian control of the military,⁸⁶ and refusing to follow orders from the president or Secretary of Defense because of a policy or legal disagreement undermines this principle of fundamental importance to American democracy. As Yale Law Professor Bruce Ackerman has noted, military disobedience in these circumstances can “become a precedent for future generals to take the law into their own hands”—a dynamic with uncertain, and potentially disastrous, consequences.⁸⁷

In the end, relying on the military to disobey orders is not the way to prevent unwise or questionable national security practices. Indeed, there is no legal silver bullet to this end. Rather, the best hope is for other institutional actors to exercise their constitutional authorities to change the Nation's course or do what they can to convince the president of the rightness of their views. National security professionals can argue for their preferred positions before saluting smartly if their views don't carry the day. Members of Congress can use their oversight and legislative authority to try to prompt positive action; some, in fact, have already begun to do so by holding hearings or beginning to focus on potential legislative proposals that would address some of the concerns that have put the law of obedience back in the public eye.⁸⁸ And an engaged citizenry can “speak out strongly and repeatedly, in the

⁸⁶ Grant & Goldsmith, *supra* note 6.

⁸⁷ Dan Lamothe, *If Trump Wants a Nuclear Attack Against North Korea, His Military Advisers Have Few Other Options*, WASHINGTON POST (Aug. 10, 2017), <https://www.washingtonpost.com/news/check-point/wp/2017/08/10/if-trump-wants-a-nuclear-attack-against-north-korea-his-military-advisers-have-few-other-options/>.

⁸⁸ See, e.g., Ted Lieu, *The Need to Reform the Nuclear Weapons Launch Approval Process*, THE HILL (Aug. 5, 2016, 6:04 AM), <http://thehill.com/blogs/congress-blog/the-administration/290410-the-need-to-reform-the-nuclear-weapons-launch-approval>. (“Congress must work to reduce the structural defects in America's nuclear launch protocols. One reform would be to require more people—who are not beholden to the President—to concur prior to launching a nuclear strike, such as the Speaker of the House and the Senate Majority Leader. It is time to put appropriate checks and balances on the one decision that could annihilate civilization as we know it.”); Garrett Hinck, *Video and Testimony: Senate Foreign Relations Committee Hearing on Authority to Order the Use of Nuclear Weapons*, LAWFARE (Nov. 14, 2017, 10:40 AM), <https://www.lawfareblog.com/video-and-testimony-senate-foreign-relations-committee-hearing-authority-order-use-nuclear-weapons>.

media, in the classroom, in the neighborhood and on the streets.”⁸⁹ For, even though the feedback loop may not occur as quickly as one might wish, national security policy is always ultimately responsive to the will of the people, through the ballot box, if nothing else.

ABOUT THE AUTHOR

Christopher Fonzone is a partner in the Washington D.C. office of Sidley Austin. Previously, he served in the Obama Administration as Deputy Assistant to the President, Deputy Counsel to the President, and National Security Council (NSC) Legal Adviser. He also worked at the Department of Justice in the Office of Legal Counsel and on the Civil Division’s Appellate Staff; served as Special Counsel to the General Counsel of the Department of Defense; and clerked for Justice Stephen Breyer of the United States Supreme Court and Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit. Fonzone is a graduate of Cornell University and Harvard Law School.

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⁸⁹ Brooks, *supra* note 67.

Husted v. A. Philip Randolph Institute: What's at Stake for Voters*

Allegra Chapman

On January 10, 2018, the U.S. Supreme Court heard oral arguments in *Husted v. A. Philip Randolph Institute*, a case that could impact how states maintain their voter registration lists. The National Voter Registration Act (NVRA), the main law at issue, takes great care in specifying what a state may—and may not—do when removing registrants' records from state rolls. Its very aim, when passed 25 years ago, was to enhance voter turnout through providing additional voter registration opportunities at agencies across the country. Ohio and a handful of states, though, engage in practices that most strict textualists and voting rights advocates would say defy both the letter and the spirit of the law. Under Ohio's practices, voters who miss just one federal election are targeted for removal from the registration rolls.¹ Only one appellate court—the Sixth Circuit Court of Appeals—has addressed the matter, holding that Ohio's practice of targeting voters who've missed an election (or more) to initiate the purging process violates federal law.² Will at least five justices see it that way?

This Issue Brief will address the NVRA's purpose and how Ohio's current voter registration purging practices violate the spirit and intent of the law. It will also examine arguments on both sides of the *Husted* case, as demonstrated in oral argument, and the impact of practices such as those in Ohio. Lastly, the Issue Brief will provide an alternative method for maintaining registration lists that comports with the NVRA.

I. THE NATIONAL VOTER REGISTRATION ACT'S PURPOSE: ENHANCING VOTER PARTICIPATION

Unlike most other established democracies, the United States has not yet solved its registration and voter turnout deficiencies, many of which date back to the Jim Crow era and continue to reflect racial and economic disparities in our system. Although the Voting Rights Act of 1965 helped millions of citizens register for the first time—the Black registration rate in Mississippi alone soared from 6.7% in 1965 to 60% in 1968—registration rate disparities between high- and low-income Americans and by race persisted for decades.³ With the aim of reducing these divisions and enhancing overall turnout, Congress passed the NVRA in 1993. Members found that “discriminatory and unfair registration laws and procedures can have a

* This Issue Brief was initially published in April 2018.

¹ Georgia, Oklahoma, Oregon, Pennsylvania, and West Virginia each target individuals after they've missed more than one federal election.

² *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

³ J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS, <http://www.demos.org/sites/default/files/publications/RegisteringMillions-NVRA-Demos.pdf>

direct and damaging effect on voter participation...and disproportionately harm voter participation by various groups, including racial minorities.”⁴ The NVRA’s overall goals were to “increase the number of eligible citizens who can register to vote,” while also “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office,” and “ensur[ing] that accurate and current voter registration rolls are maintained.”⁵

The bulk of the law specifies how states are to provide voter registration opportunities: through use of a mail voter registration application, during transactions made at departments of motor vehicles, and at any number of designated voter registration agencies, including all state offices providing public assistance and state-funded disabilities services.⁶ Again, the NVRA aimed to enhance voting opportunities for Americans by getting previously unregistered citizens registered and on the voting rolls. Lawmakers knew that the way to increase turnout was to open the gateway to voting through more accessible registration.

An additional section—known as “Section 8”—specifies how each state is to update and maintain the voter registration lists in order to have the timeliest information and list of voters. It provides clear instructions on what steps a state must take before it can deem an individual no longer eligible to vote at his or her earlier stated address and thus can remove the person from the registration rolls.⁷ States are prohibited, for example, from removing individuals from the rolls for the sole reason that they failed to vote, and are additionally prohibited from engaging in purging processes that are non-uniform, discriminatory, or otherwise in violation of the Voting Rights Act. These instructions aside, the main thrust of the NVRA is to get eligible citizens registered to vote and keep them registered: “[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction.”⁸ It’s worth noting, too, that the Department of Justice—the agency tasked with the NVRA’s enforcement—entered into several settlement agreements with

states prohibiting them from targeting individuals for removal from registration rolls for the very reason that they had missed an election.⁹

II. OHIO TARGETS VOTERS SOLELY FOR MISSING ELECTIONS

Under the NVRA, a state’s chief election officer must ensure the state abides by the federal law’s requirements, including maintenance of its voter registration lists. In Ohio, the secretary of state, currently Jon Husted, carries this responsibility. With respect to how the state updates its registration lists—and whom it removes—the state employs two practices. The first practice is consistent with the NVRA’s requirements and does not factor into the current litigation. It employs the statute’s so-called “safe-harbor provision,” whereby the secretary’s office compares change-of-address

⁴ 52 U.S.C. § 20501(a)(3) (2016).

⁵ 52 U.S.C. § 20501(b)(1), (2), and (4) (2016).

⁶ 52 U.S.C §§ 20504-20506 (2016).

⁷ See 52 U.S.C. § 20507 (2016).

⁸ See S. REP. No. 103-6, at 19.

⁹ See discussion at Section III *infra*. The constitutionality of the NVRA, moreover, has been upheld several times based on Congress’ authority under the Elections Clause to “pre-empt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections...including regulations relating to ‘registration.’” U.S. Const. art. I, § 4; see *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

data obtained from the U.S. Postal Service with the voter rolls to identify registrants who may have moved. County boards of elections then send NVRA-compliant notices to the identified registrants requesting that they contact the boards if they still reside at that address and additionally notifying them that, if they do not respond to the notice and then fail to vote during the next two consecutive federal elections, their registrations will be canceled.¹⁰ This process adequately complies with the requirements of Section 8 of the NVRA.

Ohio additionally uses a “supplemental process,” which is the practice in question before the Supreme Court. Under this process, elections boards in Ohio send notices to registrants who have earlier been identified as not having voted during the previous two-year period.¹¹ The boards have no other information indicating that these individuals may have since moved or otherwise become ineligible to vote. Instead, these registrants are targeted for potential removal from the registration rolls based *solely* on a failure to vote during a very short period. If a registrant receives and returns the notice, or otherwise responds through the internet, then the board updates that individual’s information and the registrant remains on the rolls. If, however, he or she “ignore[s] the notice [or fails to receive and return it] and [then] fail[s] to vote or update their registration over the next four years, boards cancel the registration.”¹²

In April 2016, plaintiffs A. Philip Randolph Institute, the Northeast Ohio Coalition for the Homeless, and Larry Harmon, a U.S. Navy Veteran whose registration record was removed as a result of Ohio’s supplemental process,¹³ filed suit against Ohio Secretary of State Husted for violations of the NVRA. While the district court dismissed the case, the Court of Appeals for the Sixth Circuit reversed, finding that Ohio’s process of targeting individuals for failure to vote acted as a “trigger” to initiate purging their records from the registration rolls, in violation of the federal law.¹⁴ The U.S. Supreme Court granted Husted’s petition for a writ of certiorari and heard oral arguments on January 10, 2018.

III. AT THE SUPREME COURT

A. THE DEPARTMENT OF JUSTICE’S SUDDEN SHIFT

The Department of Justice (DOJ), the federal agency tasked with enforcing the NVRA,¹⁵ has traditionally found practices such as Ohio’s supplemental process in violation of the statute’s prohibition against removing registrants for missing an election. As it claimed in amicus briefs submitted before both a Georgia federal district court and the Sixth Circuit Court of Appeals in this case, “states may not ‘consider a registered voter’s failure to vote to be reliable evidence that the voter has become ineligible by virtue of a change of residence, thus triggering the [subsection 8(d) Confirmation Procedure].”¹⁶ Well before that, in 1994, DOJ “advised Georgia that its then-proposed program to ‘send[] a registration confirmation notice to persons who have not voted . . . during a three-year period’ was ‘directly contrary to the

¹⁰ OHIO REV. CODE ANN. § 3503.21 (West 2018).

¹¹ OHIO REV. CODE ANN. § 3503.21(D) (West 2018).

¹² *Id.*

¹³ All plaintiffs are represented by Demos and the American Civil Liberties Union.

¹⁴ A. Philip Randolph Institute v. Husted, 838 F.3d 699 (6th Cir. 2016).

¹⁵ 52 U.S.C. § 20510 (2016).

¹⁶ Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, A. Philip Randolph Institute v. Husted, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 (“U.S. C.A. Br.”).

language and purpose of the NVRA.”¹⁷ And it additionally argued that a comparable law in Pennsylvania “r[an] afoul of Section 8(b)(2)’s prohibition on purges for non-voting,”¹⁸ and sent notice-of-intent-to-sue letters to Alaska and South Dakota for comparable purging programs.¹⁹ As a number of former DOJ attorneys, both politically appointed and career, note in their amicus brief to the Supreme Court in this case, “although the NVRA allows a state to *confirm* its belief that a voter has changed her residence by sending a mailing and then seeing that she has not voted in several elections, it forbids the state from using nonvoting to *derive* its belief that a voter has changed her residence.”²⁰ That’s why, from 1994 until recently, “the Department has repeatedly expressed its view that the statute prohibits states from initiating a voter-purge process based merely on the failure to vote.”²¹

With Attorney General Jeff Sessions at the helm, DOJ has now switched positions for the first time since the NVRA became law, claiming that the Sixth Circuit’s finding that Ohio’s supplemental process violates the NVRA “is not the best reading of [the law] as originally enacted, and it is foreclosed by the clarifying clause that Congress added in [the Help America Vote Act].”²² This reference concerns the Help America Vote Act (HAVA) which was enacted in 2002 and amended parts of the NVRA. The DOJ further claims its reversal is warranted due to voter fraud concerns that programs such as the supplemental process purportedly remedy, despite failing to demonstrate evidence of widespread fraud at either the national level or in Ohio and in contradiction to extensive research finding no such problem.²³ This new view—a reversal of DOJ’s longstanding view that practices such as Ohio’s violate the text and purpose of the NVRA—could be an attempt to shrink, rather than expand, the electorate, as the federal law has aimed to do for the past 25 years.

B. THE NVRA’S LANGUAGE

The issue before the Supreme Court is straightforward: Under Section 8 of the NVRA, can Ohio target voters for the sole reason that they did not vote in one election to be purged through its supplemental process? The NVRA provides that a state’s removal program “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person’s failure to vote.*”²⁴ Indeed, under the NVRA, states may remove registrants’ records from the rolls for one of *only five specific reasons*: (1) at the individual’s request; (2) by reason of criminal conviction; (3) by reason of mental incapacity; (4) by reason of death; or (5) by reason of a change in residence.”²⁵ “[N]either

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Brief for Eric Holder et al. at 6 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

²¹ *Id.* at 7.

²² Brief for the United States at 10 as Amici Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

²³ Brief for Eagle Forum Education and Legal Defense Fund at 16, 17 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018); see Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, *WASH. POST* (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?noredirect=on&utm_term=.9bff26482bb3.

²⁴ 52 U.S.C. § 20507(b)(2) (2016) (emphasis added).

²⁵ 52 U.S.C. § 20507(b)-(d) (2016).

failure to vote, nor failure to respond to a notice—nor the two together—is among the grounds for removal under subsection 8(a).²⁶ Furthermore, subsection 8(b) of the law, which addresses mass programs to update registration rolls, prohibits state practices that “result in the removal of the name of any person...by reason of the person’s failure to vote.”²⁷ The question for the Court then concerns what is a fair interpretation of this language, especially in light of the NVRA’s overall purpose to expand—not shrink—the electorate.²⁸

Although oral arguments are never a sure-fire way to get inside the justices’ minds, one could easily note dissension among the nine on January 10, 2018, particularly on the issue of how to interpret the “by reason of” language in the NVRA. Ohio State Solicitor Eric. E. Murphy insisted that “[a] failure to respond to the [confirmation] notice breaks any causal prohibition between failure to vote and removal.”²⁹ Thus, according to Ohio, the state does not remove voters’ names for the sole reason that they failed to vote but rather because they failed to respond to confirmation notices and then failed to vote in two successive federal elections. Justices Kagan, Ginsburg, and Sotomayor seemed unconvinced by Ohio’s argument.

Paul Smith, arguing on behalf of the challengers, noted that, to the contrary, Ohio’s practice targets individuals precisely because they had not voted, in violation of the NVRA’s “by reason of” language. This position relies on the principle that Ohio’s practice violates the law because it purges voters from the rolls for reasons other than the five permitted under the statute. As Smith noted during oral argument, “the failure to vote for two years tells you almost nothing about whether or not anybody has moved.”³⁰ Unfortunately, American voters often skip elections for any number of reasons, including dislike of the candidates, busy schedules, or belief that one’s vote would not make a difference, among others (including not being registered).³¹ As a result, turnout for a presidential election is often below 60% of the electorate.³²

C. HAVA’S LANGUAGE

A second focus of oral argument centered on how to reconcile language in HAVA with the language in the NVRA. As previously noted, HAVA clarified that the NVRA “prohibits programs that result in removal of [a registrant] by reason of the person’s failure to vote, except that” such prohibition does not prevent a state from using confirmation procedures in which the state (1) informs voters by notice that they’ll be removed unless they respond affirming that they still live at that residence, and (2) then removes those voters’ names if they’ve both failed to respond and then failed

²⁶ Brief of Respondents in Opposition at 25, 26, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

²⁷ 52 U.S.C. § 20507(b) (2016).

²⁸ See *supra* note 5.

²⁹ Transcript of Oral Argument at 12, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

³⁰ *Id.*

³¹ Gustavo López and Antonio Flores, *Dislike of Candidates or Campaign Issues was Most Common Reason for not Voting in 2016*, PEW RESEARCH CENTER (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/>.

³² *Id.*

to vote in two successive federal elections.³³ In these instances, and these instances only, the individuals' names can be removed for failure to vote.

Justice Alito expressed concern with what he saw as a contradiction between HAVA's language and the NVRA's language, given that the former allows the state to remove a voter's registration record after he or she has failed to vote. His questions, which appeared to align with Ohio's argument, emphasized that the failure to return a confirmation notice is what triggers a purge from the voting rolls, rather than the nonvoting. Justice Alito maintained that this reading of HAVA and the NVRA reconciles what appears to be contradictory language in the statutes.

It is true that the NVRA permits a state to remove a registrant's name from the rolls if, following its mailing to the voter of a confirmation notice,³⁴ the voter both fails to respond to the notice, as he or she is instructed to do, and then fails to vote over the next four years. However, as Smith explained at oral argument, the state may *only* consider non-voting as a means for removal *after* the confirmation notices have been sent.³⁵ The state may *not* send these confirmation notices to registered individuals *for the very reason* that they missed an election. In other words, they may not send these mass mailings as a means to determine whether voters have moved. Rather, the confirmation process may only be administered by the state if it has received some information—whether from the U.S. Postal Service or some other legitimate means—that the individual has changed residence.

As the challengers to Ohio's process argued, "[i]t would make no sense for Congress to demand that states use the Confirmation Procedure when a state has objective evidence of an address change from the Postal Service, while at the same time authorizing a state to use the Confirmation Procedure as a standalone mechanism to purge registrants when it does not have any evidence of a change in residence whatsoever."³⁶

Furthermore, any reading of the NVRA and HAVA must recognize that these laws were designed to protect the sanctity of the vote. Programs such as Ohio's most certainly cut from the rolls eligible voters who are still present in the state.³⁷ Considering there are other more effective ways of updating voter registration rolls, removing voters simply because they missed an election both smacks of unfairness and runs afoul of both the letter and purpose of the NVRA and HAVA. Justice Sotomayor emphasized that when she asked:

Is [the failure to vote] ... a reasonable inference to draw that conclusion [that one has moved] when ... do[ing so] results in disenfranchising disproportionately certain cities where large groups of minorities live, where large groups of homeless people live, and across the country they're the group that votes the least ... So

³³ See 52 U.S.C. § 20507(b)(2).

³⁴ 52 U.S. § 20507(d)(2) (2016).

³⁵ Transcript of Oral Argument, *supra* note 29, at 55.

³⁶ Brief of Respondents in Opposition, *supra* note 26, at 41.

³⁷ Indeed, a federal district court allowed 7,515 voters who were improperly removed by Ohio to cast a ballot before Election Day in 2016. See Matt Ford, *Use It or Lose It?*, ATLANTIC (May 30, 2017), <https://www.theatlantic.com/politics/archive/2017/05/supreme-court-ohio-voting/528573/>.

if the word ‘reasonable effort’ has any meaning with a Congress who said that the failure to vote is a constitutional right, how can we read this statute to permit you to begin a process of disenfranchising solely on the basis of that with no independent evidence whatsoever that the person has moved?³⁸

Indeed, a voter’s failure to miss an election in no way indicates that he or she has moved given—as noted earlier—the many reasons Americans miss elections. Ohio has no additional independent evidence to indicate a move aside from this one failure. Most states, moreover, do not treat such an omission as indicative of a move, as demonstrated by their failure to use processes comparable to Ohio’s. Indeed, 38 states and the District of Columbia use independent sources, such as the U.S. Postal Service, to identify whether an individual has moved before issuing confirmation notices. Additionally, six states either do not have a voter registration requirement or have same day registration and are exempt from these NVRA requirements.³⁹ Common sense, coupled with the letter of the law, therefore, dictates a reading of these laws that does not deprive citizens of their right to vote.

IV. AN OHIO VICTORY WOULD HAVE SERIOUS, DISCRIMINATORY CONSEQUENCES

In Ohio, hundreds of thousands of voter registration records have been removed for the sole reason that the voters failed to cast a ballot in one or more elections. Secretary of State Husted has conceded that “at least 7,515 citizens were struck from the rolls despite not moving.”⁴⁰ That number is likely much higher. According to other findings, “[r]ecords from just *two* of Ohio’s 88 counties show that 66,570 registrants were removed from the rolls due to the Supplemental Process.”⁴¹ In the 2015-2016 period, moreover, “Ohio purged 426,781 voters who failed to respond to the confirmation notice for voter inactivity.”⁴² Before that, “from 2011 to 2014 Ohio purged 846,391 voters for the same reason.”⁴³

As current and former elections officials from Ohio claim, such removals run afoul of Ohio law. The law “ensures that voters who move within the State remain eligible to vote. Ignoring this critical component of Ohio law, the [state] eliminates them from the rolls even though they can still lawfully appear at their polling place and cast a ballot under Ohio’s portable voter-registration system.”⁴⁴ If, then, Secretary Husted truly believes the supplemental process eliminates voters from the rolls because they likely moved, then he is depriving those who did in fact move with the opportunity to cast a ballot using the state’s portability law, at which time an address update could be made without compromising the individual’s right to vote.

³⁸ Transcript of Oral Argument, *supra* note 29, at 18-19.

³⁹ Brief for the League of Women Voters of the United States et al, at 21, as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁴⁰ Brief of Petitioner at 14, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁴¹ Brief for the League of Women Voters of the United States et al., *supra* note 38, at 19 (citing Bell Decl. R. 9-1 (emphasis included)).

⁴² Brief for Current and Former Ohio Elections Officials as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁴³ *Id.*

⁴⁴ *Id.* at 2.

And those whose records were purged despite having *not moved* similarly lose a right to which they are constitutionally entitled.

Furthermore, some populations are likely to be impacted by Ohio's practice more so than others. In the 2016 presidential election, for example, "Ohio saw a decline in Black voter participation rates compared to the national decrease in Black voter turnouts, despite overall record national turnout among total voters."⁴⁵ Though decline was likely due, in part, to cuts to what's known as "Golden Week," in which eligible voters have the opportunity to both register and vote on the same day,⁴⁶ as a result of this lower turnout, Black voters are more likely to be targeted by the state for removal from the rolls. "African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity, compared to only 4% of voters in a suburban, majority-white neighborhood."⁴⁷ Several other voting sub-groups are also disproportionately impacted. For example, because Ohio's confirmation notice is generally in English only, limited English proficient populations may not understand its instructions and, thus, may not respond, potentially resulting in their removal as well.⁴⁸

It is potentially for this reason that only a handful of states currently engage in practices comparable to Ohio's supplemental process: Georgia, Oklahoma, Oregon, Pennsylvania, and West Virginia.⁴⁹ Even so, Ohio is the only state that targets individuals after having missed just one election.⁵⁰ If all states were to adopt practices comparable to Ohio's, millions of eligible voters could be cut from registration rolls, resulting in potentially millions showing up on Election Day only to learn they cannot cast a ballot that will be counted.

When members of Congress were considering the NVRA, they heard testimony from experts as to what is behind low turnout rates. Many experts "concluded that cumbersome state registration laws—including purging for non-voting—were among the primary culprits. Critics also cited evidence showing that these laws disproportionately impacted poor and minority voters."⁵¹ Indeed, these problems persist and, if other states adopt practices comparable to Ohio's supplemental process, several sub-groups stand to lose their electoral impact because they vote at lower levels:

- Lower-income and working Americans, many of whom are minorities, due to multiple responsibilities and fewer resources vote less often than Americans of higher means. "In 2016, less than forty-six percent of eligible adults with family incomes under \$20,000 voted whereas over seventy-eight percent of eligible adults with family incomes \$100,000 and over voted."⁵²

⁴⁵ Brief for the National Association for the Advancement of Colored People and the Ohio State Conference of the NAACP at 13 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at 18 (citing Andy Sullivan & Grant Smith, *Use it or Lose it: Occasional Ohio Voters May be Shut Out in November*, REUTERS (June 2, 2016, 7:05 AM)).

⁴⁸ Brief for Asian Americans Advancing Justice et al., at 3 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁴⁹ *Id.* at 25.

⁵⁰ *Id.*

⁵¹ Brief for American History Professors at 4 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁵² Brief for National Disability Rights Network et al., at 18 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018) (citing U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members by Age and Family Income: Nov. 2016 (2017)).

Poorer Americans, moreover, are likelier to fail to respond to a confirmation notice: “scarcity of resources—of time, opportunities, or money—can have significant impact on an individual’s attention to anything other than the present scarcity.”⁵³

- Disabled and older citizens, due to barriers at polling places, vote at lower rates than individuals without disabilities or younger voters do.⁵⁴
- Limited English proficient citizens are less likely to respond to confirmation notices, which are usually written in English only, and thus are likelier to be removed from the rolls under programs such as the supplemental process.⁵⁵
- Service men and women vote less often than other voters, and the actual voting rate for active duty service members fell from 59% during the 2012 election to just 46% in 2016.⁵⁶
- Third-party voters may be less likely to show up on Election Day if their candidates are not on the ballot, and as a result, are likely to be removed.⁵⁷

If the Supreme Court grants Ohio and other states *carte blanche* to target individuals who have missed an election, millions of Americans could lose their registration status, undoing the NVRA’s legacy and purpose.

CONCLUSION

“Congress was clear that the touchstone for any ... state-devised method [for identifying ineligible voters] is reasonableness.”⁵⁸ Reasonableness in this area would include clear and highly accurate ways for a state to identify voters who are no longer eligible before purging them from the voter rolls. A law designed to encourage greater participation in the franchise could not achieve this goal if it was easy to inaccurately remove citizens from the voter rolls. Ohio’s approach does not meet this standard of reasonableness. According to state elections officials across the country, “there are far better sources of readily available evidence that a voter has moved than the mere fact that a person did not vote,” including use of Postal Service information, tracking of undeliverable mail, reconciling of voter registration rolls with other more up-to-date information, and the inter-state sharing of information on moves, through the Electronic Registration and Information Center (ERIC) and other services.⁵⁹ Indeed, most states plus the District of Columbia use some combination of these processes.

We do not know yet how the Supreme Court will rule on the matter, but even if it upholds Ohio’s supplemental process as compliant with the NVRA, states should not read this ruling as encouragement to adopt a comparable program. Doing so would not only result in inappropriate removals but would potentially also cause

⁵³ *Id.* at 31.

⁵⁴ *Id.* at 7-8, 22.

⁵⁵ Brief for Asian Americans Advancing Justice et al., *supra* note 48, at 3.

⁵⁶ Brief for VoteVets Action Fund at 13 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018) (citing U.S. Dep’t of Defense, Federal Voting Assistance Program, 2016 Post-Election Report to Congress, at 9 (2017)).

⁵⁷ Brief for the Libertarian Party of Ohio and the Center for Competitive Democracy at 3, 4 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁵⁸ Brief for Lawyers’ Committee for Civil Rights Under Law et al., at 9 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (argued Jan. 10, 2018).

⁵⁹ Brief for the states of New York et al., at 12 as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Institute*, No. 16-980 (2018).

administrative headaches for elections officials. When voters, who believe themselves to be currently registered, show up at the polls to vote, only to learn that their names are no longer on the rolls, the resulting confusion and disputes result in longer lines and thus added work for those running the election. To be sure, voters and administrators alike want and need a streamlined, efficient process both for voting and for keeping updated registration rolls. Ohio's process, even if deemed legal, leads to more problems than it does solutions.

Thus, in order to ensure compliance with the NVRA's mission and text, the Supreme Court should hold Ohio's supplemental process incompatible with the law. Courts have already upheld the constitutionality of the NVRA as an extension of Congress's power under the Elections Clause, and the law's language clearly prohibits states from discriminating against voters for failure to have missed a vote. Additionally, apart from its recent deviation, the DOJ, the agency tasked with enforcing the law, has interpreted the NVRA this way over its 25-year history. No other interpretation comports with either the language or spirit of the law.

We still have much work to do in this country to ensure that every eligible American has access to the polls on Election Day, and one of the most effective ways to provide equal access to the franchise is to eliminate hurdles surrounding the voter registration process. For two and a half decades, the states, in compliance with the NVRA's mandates, worked toward closing the registration gaps that still exist in this country based often on race and class. The law had not yet realized full access for all citizens, but it was trending in that direction. Indeed, in cases where the DOJ and other private plaintiffs brought actions to ensure compliance, voter registration rates increased in those areas. As Justice Ruth Bader Ginsburg noted in her dissent in *Shelby v. Holder*, throwing out a voting rights protection that has been working is akin to "throwing away your umbrella in a rainstorm."⁶⁰ You just don't do it.

As advocates, legislators, and citizens push for additional registration reforms—same day registration, online registration, and automatic voter registration—it is essential that, once these citizens become newly registered, the state not be permitted to undo the good work of pulling Americans into a system—our most important for democracy's sake—of which they had previously been on the outskirts. A true democracy requires participation from all citizens, not just the bare majority. That's why the NVRA aimed, in 1993, to improve access to voter registration. And that's why it cannot be taken away now.

ABOUT THE AUTHOR

Allegra Chapman is the Director of Voting and Elections at Common Cause, where she leads national and state efforts to reduce barriers to voting and ensure that elections are run efficiently and fairly throughout the country. Prior to coming to Common Cause, Chapman was an Assistant Attorney General in the Civil Rights Bureau for the State of New York. She was also previously staff counsel for Demos, where she engaged in litigation and negotiations in several states to enforce Section 7 of the National Voter Registration Act. She also helped defend the constitutionality of New York's statute eliminating prison-based gerrymandering and worked on other electoral reforms including Election Day voter registration. Chapman clerked for D.C. Superior Court Judge Michael Rankin. She graduated from Emory University Law School in 2002.

⁶⁰ *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Federal Civil Rulemaking, Discovery Reform, and the Promise of Pilot Projects*

Brooke D. Coleman

In a memorable scene from the movie *The Princess Bride*, the criminal mastermind Vizzini peers over the Cliffs of Insanity to see that the Dread Pirate Roberts is indeed still alive. Flustered, Vizzini states, “He did not fall! Inconceivable.” Inigo Montoya, with a puzzled look, addresses Vizzini and observes, “You keep using that word. I do not think it means what you think it means.” We could say the same about discovery reform.

Judges, lawyers, academics, and federal civil rulemakers bandy about the phrase “discovery reform” as if we agree to its meaning—we don’t. Consider the basic story that lawyers tell about discovery and how that story uniquely depends on which side of the “v” they sit. On one side, plaintiffs’ attorneys argue that defendants are not forthright in discovery because they engage in gamesmanship to avoid disclosing information. On the other side, defense attorneys argue that plaintiffs ask for too much information, often with a goal of coercing settlement. Because of these positional and attitudinal differences, discovery reform simply cannot mean the same thing to both sides.

This divide begs the following question: How should the federal civil rulemaking process respond to calls for “discovery reform” when the problem about which both sides of the Bar are complaining—a so-called “discovery crisis”—is so differently defined? In other words, how does the Civil Rules Committee solve what is a multi-layered set of problems with one set of reforms when those problems, as defined, are often diametrically opposed?

Over the past thirty years, the Committee has tried in vain to be responsive and to reform discovery, but by its own account, it has failed.¹ The Committee is now embarking on a new adventuresome experiment to achieve that elusive reform: Pilot Projects. The first pilot project—which has already been initiated—is directly related to discovery. A second planned pilot project—one that is only in the planning stages and not yet up and running—is more generally focused on reducing litigation cost and delay. These pilot projects, while still in their infancy, hold much promise for federal civil rulemaking and for successful reform. In the age of alternative facts and indeed alternative definitions of a problem, the pilot projects provide an opportunity to objectively test a rule change before it is broadly implemented. Stakeholders in our civil justice system may not ever agree on how to define the discovery crisis, but pilot projects may help bring about a unified solution.

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¹ See Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, JUDICATURE (Autumn 2017), at 13.

I. FEDERAL CIVIL RULEMAKING AND DISCOVERY REFORM

The federal civil rulemaking process—the process by which the Federal Rules of Civil Procedure are drafted and amended—has been in place for over eighty years. For over a third of that time, the Civil Rules Committee has been occupied with how to fix civil discovery. This section will review the basic steps of the federal civil rulemaking process and discuss how that process has intersected with modern civil discovery reform.

A. SUMMARY OF THE FEDERAL CIVIL RULEMAKING PROCESS

The Rules Enabling Act, adopted in 1934, delegated responsibility for adopting rules to govern federal trial and appellate courts to the Supreme Court of the United States.² The Supreme Court delegated that responsibility to an Advisory Committee made up of an elite set of practitioners and academics. That Committee drafted the first Federal Rules of Civil Procedure that were officially adopted in 1938.

Over time, the process by which the rules are adopted and amended evolved. The rulemaking process can take about three years from start to finish, guided by a combination of federal statute, official guidelines, and informal custom. The modern rulemaking process is multilayered; instead of one Advisory Committee, there is now a Standing Committee on the Federal Rules of Practice and Procedure that oversees five separate advisory committees: appellate, bankruptcy, civil procedure, criminal procedure, and evidence. Those committees are responsible for originating and adopting changes to their respective rule systems.

In the civil rulemaking process, the modern committee voting membership is comprised of seven federal judges (one who serves as chair), one state court judge, four practitioners, and one academic. An academic also serves as reporter (a non-voting role), and the Department of Justice also has a member who sits *ex officio*. The Civil Rules Committee considers proposals received both from inside and outside of its committee, meeting on a bi-annual basis to discuss and adopt potential rule changes. Once it has approved a rule change, the proposal is sent to the Standing Committee for its approval, and if approved, published and circulated for public comment. After garnering public feedback, the Committee considers the comments and decides whether to alter the rule, table the rule, or move forward. If the Committee moves forward with the rule, it is sent to the Standing Committee and then the Judicial Conference of the United States for approval by those bodies. After Judicial Conference approval, it is sent to the Supreme Court. If the Supreme Court approves the rule proposal, it then forwards it to Congress. Congress then has until December 1 of that year to reject or modify the proposal. If Congress fails to act, the rule becomes law.³

B. MODERN DISCOVERY REFORM

The Civil Rules Committee's foray into discovery reform began in the late 1970's. Since then, it has consistently considered and periodically implemented rule changes aimed at making civil discovery more efficient. That reform has been, in a word, bumpy. This section will provide an overview of the major discovery reforms the Committee has undertaken during the last thirty-five years and the response to

² 28 U.S.C. § 2072 *et seq.* (2018).

³ U.S. Courts, *Overview for the Bench, Bar, and Public*, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public>.

those changes. While it is not a complete picture of the work the Committee has done in the realm of discovery reform, it is an instructive context for understanding the promise of the pilot projects.

The 1938 discovery rules, namely under Rule 26, allowed for the discovery of all relevant information related to the subject matter of the litigation. These new discovery rules did not maintain the status quo and represented the committee's sense that the rules should encourage a free exchange of information, lest there be any surprises at trial. The Advisory Committee note to the original Rule 26 stated, "While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation."⁴ The new civil rules ushered in an age of discovery where each party could obtain the information it needed, limited only by objections of attorney-client privilege and relevance.⁵

But that was 1934. By the time the Rules Committee convened in the late 1970's and early 1980's, there was a growing sense, if not reality, that the civil justice system could no longer bear the pressure created by unfettered discovery.⁶ It is this change that ushered in modern discovery reform.

The first major changes to discovery appear in 1983. The most significant change was to amend Rule 26(b)(1) to add factors meant to assist judges in addressing what the committee called "over-discovery."⁷ The new language provided the first iteration of "proportionality" language, stating in part that a judge must assess whether "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."⁸ The Committee expressed concern that judges had "been reluctant to limit the use of discovery devices" in the past.⁹ This new rule language, the Committee hoped, would "guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry...."¹⁰ These changes caused much controversy, in part because they represented a shift from the discovery ethos of the past, but mostly because they accompanied an incredibly controversial amendment to Rule 11 that imposed mandatory attorney sanctions in the event the court determined the filing was frivolous.

The controversy over the amendments to Rule 26(b)(1) and Rule 11 ushered in the second set of major discovery rule changes in 1993. Again, Rule 11 and Rule 26 were amended in tandem. If one thought the 1983 amendments were controversial,

⁴ Fed. R. Civ. P. 26(b)(1) Advisory Committee's note to 1937 adoption. Similarly, in 1946, Rule 26(b)(1) was amended to clarify that parties could seek inadmissible evidence through discovery. The Advisory Committee note explained, "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 1946 amendment.

⁵ Work product protection, or trial preparation material protection, was codified in 1970. FED. R. CIV. P. 26(b)(3) Advisory Committee's note to 1970 amendment. This codification followed the U.S. Supreme Court's decision in *Hickman v. Taylor* in 1947, where the Court ostensibly created that protection. See 329 U.S. 495, 511 (1947).

⁶ Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1784–85 (2015).

⁷ FED. R. CIV. P. 26 Advisory Committee's note to 1983 amendment, subdivision (b): Discovery Scope and Limitations.

⁸ FED. R. CIV. P. 26(b)(1) (1983), reprinted in 97 F.R.D. 165, 214-15 (1983).

⁹ *Id.*

¹⁰ *Id.*

it was only because they hadn't yet seen the firestorm over the 1993 amendments.¹¹ While Rule 11 was changed to provide greater discretion to courts in imposing sanctions,¹² the discovery rules were amended to require mandatory initial disclosures under Rule 26(a)(1).¹³ These disclosures included basic information such as documents, witnesses, and damages information the parties might have.¹⁴ The disagreement over this rule change came from all sides. Defense lawyers worried that it required disclosure of this information not just as it related to a plaintiff's claim or a defendant's defense, but instead as it related to the subject matter of the litigation. To some, this "civil *Brady* rule" felt antithetical to civil litigation's adversarial ethos. On the other hand, plaintiffs' lawyers worried that it only required production for issues pleaded with particularity, language that could be gamed to decrease actual disclosure. To mitigate this controversy, the new rule explicitly allowed for a district court to "opt out" of the rule.¹⁵ This, of course, led to a lack of uniformity across the country with respect to mandatory initial disclosures, as nearly half of the federal district courts opted out of the provision.

The academic response to these two sets of rule changes was scathing. Steve Burbank, a renowned scholar on federal court rulemaking, famously called for a "a moratorium on ignorance and procedural law reform."¹⁶ The primary theme of this criticism was that there had been little or no empirical evidence upon which the committee relied.¹⁷ Specific to Rule 26(a)(1), critics again assailed the lack of empirical evidence in support of the rule change.¹⁸ In fact, even though the Committee had access to the experience of local state courts that had adopted similar mandatory initial disclosure provisions, it had neither sought out nor utilized any of that empirical evidence.

While there was no moratorium on civil rulemaking, the Committee clearly heard and absorbed this criticism. Consequently, it engaged in self-reflection both formally

¹¹ Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 295 (1994) ("The 1993 revisions of the Federal Rules of Civil Procedure evoked more vigorous opposition than any rule revision ever promulgated by the Supreme Court of the United States, save the single exception of the Federal Rules of Evidence. Much, but by no means all, of the criticism has been directed at... Rule 26(a)(1)..."). In addition, members of the Supreme Court expressed concern regarding the rules package. See H.R. Doc. No. 74, at 104 (1993) (dissenting statement of Justice Scalia), reprinted in 113 S. Ct. (Preface) at 581. Justice Scalia dissented from the Court's adoption of amendments to Rule 11 (sanctions) and to Rules 26, 30, 31, 33 and 37 (discovery). Justice Thomas joined in full, while Justice Souter joined in the dissent with respect to the discovery rules.

¹² The 1993 version of Rule 11—the version still in place today—provides that sanctions are discretionary and meant to serve a deterrent, not punitive, purpose. In addition, the revised Rule 11 provided for a 21-day safe harbor in which a litigant could pull an offending paper without consequence.

¹³ FED. R. CIV. P. 26(a)(1).

¹⁴ FED. R. CIV. P. 26 Advisory Committee's note to 1993 amendment. This amendment also resulted in the splitting of the factors adopted in 1983 from Rule 26(b)(1) into Rule 26(b)(2). See FED. R. CIV. P. 26 Advisory Committee's note to 1983 amendment.

¹⁵ FED. R. CIV. P. 26(a)(1).

¹⁶ Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for A Moratorium*, 59 BROOK. L. REV. 841, 855 (1993); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991) (stating that when Rule 26(a) was proposed for adoption there had been "virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the results of informal discovery").

¹⁷ Apparently, the Committee relied on two law review articles penned by Wayne Brazil, a professor and later magistrate judge, and Judge William Schwarzer, who at the time was the head of the Federal Judicial Center. These articles, while informed by important experience, were nothing more than anecdotal and impressionistic.

¹⁸ Burbank, *supra* note 16, at 845 ("Again, there was little relevant empirical evidence ...").

through a self-study and informally through committee discussions. In its self-study, the Committee took heed of one of the ongoing suggestions regarding its process—the committee should request and use more empirical work before engaging in rule reform.¹⁹ With respect to discovery, the Committee formed a subcommittee to examine discovery in greater detail. That subcommittee, along with the greater committee, also sought out empirical research regarding the mandatory initial disclosure rule to determine how it was working in practice. It received this information from both the Federal Judicial Center and the RAND Corporation. In addition, the committee held conferences in major cities where it could interact with members of the Bar, judges, and the academy over potential rule proposals.

This additional research and outreach led to another round of discovery changes in 2000. The “opt-out” provision of Rule 26(a)(1) was eliminated, meaning that all federal courts would abide by a uniform mandatory initial disclosure rule. The disclosures, however, were limited to claims or defenses being made by the disclosing party, meaning that information that might be helpful to the other side did not have to be automatically disclosed.²⁰

This “diluted disclosure rule,”²¹ while characterized as modest, was still met with criticism. Critics mainly noted that while the Committee looked at empirical evidence, the rule it proposed did not line up with that evidence. Specifically, the studies of lawyers and judges who used the broader mandatory initial discovery rule—that applied to the subject matter—found it to work quite well. More generally, studies showed that discovery was not that expensive in most cases and that the stakes of any particular case—not the nature of the discovery rules—drove the observed higher costs. Critics also expressed concern that the Committee had succumbed to effective lobbying by powerful attorney groups like the American College of Trial Lawyers and, in essence, had become too politicized.²²

Even while this storm was still brewing, however, the Committee was already at work on its next set of reforms—electronic discovery. A subcommittee on electronic discovery had been formed well before 2000.²³ That subcommittee convened two “mini-conferences” on electronic discovery, in San Francisco and in New York City, where various lawyers, litigation specialists, technology experts, and judges were invited to present and discuss the issues.²⁴ In addition, in 2001, the Federal Judicial

¹⁹ Daniel R. Coquillette, *A Self-Study of Federal Judicial Rulemaking A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 699, 711 (1995).

²⁰ This change mirrored changes to the scope of discovery under Rule 26(b)(1), which was also modified to only include a party’s claim or defense, allowing the party to expand its inquiry to the subject matter of the claim upon a showing of good cause. The Committee note explained that “[c]oncerns about costs and delay of discovery have persisted” in spite of previous revisions to the discovery provisions. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1993 amendment, subdivision (b)(1).

²¹ Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to the Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure 7 (May 18, 1998).

²² Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 571 (2001) (“emphasiz[ing] that the empirical data available suggested that the current broad scope of discovery was not viewed as a problem by lawyers”); *id.* at 578 (nothing that “[a] fair reading of the FJC and Rand studies does not suggest that the current ‘subject matter’ scope of discovery is a particular problem”); and *id.* at 618 (arguing that “[i]n short, the Advisory Committee vote on scope of discovery, despite a debate of considerable sophistication, in the end resembled Capitol Hill as much as a judicial deliberation”).

²³ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 67 (2006).

²⁴ *Id.*

Center conducted studies regarding judicial experience with electronic discovery.²⁵ As it had with the 2000 mandatory initial disclosure rule, the Committee reached out to those who had expressed interest in electronic discovery. This outreach was larger, reached more people, and included sets of informal proposals with actual rule language. The Committee's research and study culminated in a larger, formal electronic discovery conference at Fordham Law School in New York City.²⁶

These efforts resulted in the 2006 electronic discovery amendments. Unlike the previous reform efforts, these rules proved to be rather non-controversial. While there were some substantive debates about the normative choices within the rules, there was little or no criticism of the process itself. Indeed, even a scholar who expressed general "gloom" about the rulemaking process overall noted that the electronic discovery rules were a place where the committee showed its ability "to lead and innovate."²⁷

This relative calm did not last for long. The perception that the civil justice system was still in a crisis, and that discovery was a major cause of this discord, led the Committee to convene the 2010 Duke Conference on Civil Litigation. The conference not only allowed for in-person discussion about issues like discovery, it also produced a great deal of internal and external empirical research.²⁸ This research presented a challenge to the committee (and the subcommittee that it appointed following the conference) because the research was often at loggerheads. Most notably, one Federal Judicial Center study found that the median discovery costs for plaintiffs amounted to \$15,000, and the median costs for defendants amounted to \$20,000.²⁹ A related study determined that higher discovery costs are meaningfully associated with cases where the parties have more at stake.³⁰ In contrast, an Institute for the Advancement of the American Legal System survey of corporate legal counsel found that counsel believed that discovery costs in federal court were not proportional to the value of the case ninety percent of the time.³¹ The potential and limits of empirical research were readily apparent.³²

Regardless of the conflicting data, the 2010 Duke Conference ushered in more discovery reform. In 2015, revised Rule 26(b)(1), the most notable of changes to the discovery rules that year, was adopted. The rule was amended to include

²⁵ *Id.* at 68.

²⁶ *Id.* at 70.

²⁷ Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 Nw. U. L. REV. 447, 449 (2013).

²⁸ See 2010 Civil Litigation Conference, *Empirical Research*, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil>.

²⁹ Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., *Case-based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules 2* (2009), <https://www.fjc.gov/sites/default/files/2012/DisSurv1.pdf>.

³⁰ Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules 5, 7* (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf>. The study found that for both plaintiffs and defendants, a 1% increase in stakes was associated with a 0.25% increase in total discovery costs. *Id.*

³¹ U.S. Courts, Advisory Committee on Rules of Civil Procedure—April 2014, at 83, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>. Another study by the American College of Trial Lawyers Task Force on Discovery found that almost half of the respondents "believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers." *Id.*

³² For a discussion of how social science explains why these study outcomes differed, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1107-08 (2012).

proportionality within the definition of the scope of discovery. Five of these factors were taken directly from then-Rule 26(b)(2)(C), which was a section of the discovery rules that explicitly granted the court power to limit discovery. Those factors—whether the “burden or expense of the proposed discovery outweighs its likely benefit,” “the amount in controversy,” “the parties’ resources,” “the importance of the issues at stake,” and the “importance of discovery in resolving the issues”—were joined by one additional factor: “the parties’ relative access to relevant information.”³³

This new proportionality rule was extraordinarily controversial. A detailed account of this controversy is beyond the scope of this brief.³⁴ At bottom, people disagreed as to whether this was a simple change of moving one part of the rule to a place where it would be front-of-mind for judges or whether this was a complete departure from traditional discovery norms because it would severely restrict the discovery obtainable by plaintiffs. The Committee attempted to mitigate the controversy by editing its Committee note to respond to some of the major concerns, but at the end of the day, the committee found itself mired in a great deal of controversy and, one might even say, some bad press.³⁵

Even while this controversy was brewing, the Committee was considering a new approach to gathering information for its next potential set of rule proposals. Following the brouhaha over proportionality, the Committee seemed even more keen to take a chance with this new approach. The experience with discovery reform, long and challenging, has led the Committee to a new frontier—pilot projects.

II. PILOT PROJECTS

In addition to information gathering and formal empirical work, the Committee is now engaging in pilot projects. The Committee has developed two pilot projects—one on mandatory initial discovery and one on expedited procedures. The former is directly related to discovery and farther along, so while this brief will discuss both projects, it will focus mostly on the project that is well underway—the Mandatory Initial Discovery Pilot Project (MIDP).

Judge David Campbell, chair of the Standing Committee, described the goal of the pilot projects as “advanc[ing] improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventure-some to adopt all at once in the national rules.”³⁶ In other words, prudence in rulemaking might now require some hands-on experimentation. Indeed, one

³³ FED. R. CIV. P. 26(b)(1).

³⁴ For a broader discussion of the controversy, see Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).

³⁵ See *id.*; Suja Thomas, *Via Duke, Companies are Shaping Discovery*, LAW360 (Nov. 4, 2015, 2:41 PM), <https://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery>.

³⁶ The pilot projects grew out of another subcommittee created by the Civil Rules Committee. That subcommittee, chaired by Judge David Campbell (D. Ariz.), included members from both the Civil and Standing Rules Committee. Civil Rules Advisory Committee Minutes (Apr. 14, 2016), at p. 18, http://www.uscourts.gov/sites/default/files/2016-04-14-civil_rules_minutes_final_0.pdf. Judge David Campbell, former Chair of the Civil Rules Committee and current chair of the Standing Committee, chaired the subcommittee. Other members include Judge Jeffrey Sutton (6th Cir.), Judge John Bates (D.D.C.), Judge Paul Grimm (D. Md.), then Judge Neil Gorsuch (10th Cir., now Supreme Court Justice), Judge Amy St. Eve (N.D. Ill.), John Barkett (attorney, Shook, Hardy & Bacon), Parker Folse (attorney, Susman Godfrey), Virginia Seitz (attorney, Sidley Austin), Edward Cooper (professor, University of Michigan Law School and Civil Rules Committee reporter), and Judge Phillip R. Martinez (W.D. Tex).

committee member observed when discussing the prospect of pilot projects that “[a] pilot will provide the data to support broader . . . innovations.”³⁷ On June 6, 2016, the Standing Committee approved the two initial projects the Civil Rules Committee proposed, which Chief Justice Roberts then touted in his 2016 Year End Report.³⁸

A. MANDATORY INITIAL DISCOVERY

While the 1993 broad version of the mandatory initial disclosure rule was not uniformly adopted and the 2000 uniform rule was limited in scope, it did not dissuade other jurisdictions from requiring broad mandatory initial discovery. State courts in Arizona and Colorado, as well as courts in other countries, like Canada, reported sustained success with a broad initial disclosure rule.³⁹ The subcommittee, after engaging in discussions with individuals working in each of these jurisdictions and after looking anew at some of the data from its initial attempt at the rule, decided to pursue a pilot project that would implement broad mandatory initial discovery.

1. *The Pilot District Courts*

In the MIDP, two district courts—the United States District Court for the District of Arizona and the United States District Court for the Northern District of Illinois—have implemented a rule that requires parties making mandatory initial discovery responses “to disclose both favorable and unfavorable information that is relevant to their claims or defenses regardless of whether they intend to use the information in their cases.”⁴⁰ The project will run for three years with the goal of assessing “whether requiring parties in civil cases to respond to a series of standard discovery requests before undertaking other discovery reduces the cost and delay of civil litigation.”⁴¹

In Arizona, the MIDP officially launched on May 1, 2017.⁴² Arizona was chosen because the judges were willing to do it, but also because Arizona state courts had adopted a similar rule almost twenty-five years prior. A survey of Arizona lawyers found that seventy-three percent of lawyers who litigate in both Arizona state and federal courts prefer state courts, while only forty-five percent of lawyers practicing in state and federal courts across the country prefer state over federal court.⁴³ The consensus has been that the state courts’ mandatory initial discovery provisions explain, in large part, Arizona lawyers’ preference for state court. Hence, Arizona federal court judges were amenable to trying what has ostensibly worked so well in their home-state courts.

In contrast, the state courts in Illinois do not have a mandatory initial discovery provision. The MIDP project, which launched in the Northern District of Illinois on June 1, 2017, was thus a bit more challenging. However, the Committee felt it

³⁷ *Id.* at 22.

³⁸ Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (June 6, 2016), at 9, http://www.uscourts.gov/sites/default/files/st06-2016-min_0.pdf. The Judicial Conference also approved the projects. Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (Jan. 3, 2017), at 3, http://www.uscourts.gov/sites/default/files/st01-2017-min_0.pdf.

³⁹ *Id.*

⁴⁰ Mandatory Initial Discovery Pilot Project Model Standing Order, <https://www.fjc.gov/content/320224/midpp-standing-order>.

⁴¹ *Id.*

⁴² Civil Rules Advisory Committee Minutes (Apr. 25, 2017), at p. 23.

⁴³ *Id.*

important to go to a jurisdiction that had not yet used the rule to best test its effect. While the Northern District of Illinois signed on for the pilot, only seventy-five percent of the judges are participating, which could be viewed as a bad sign for the project.⁴⁴ The advantage of this participation rate is that, in addition to testing the rule in a jurisdiction that is not familiar with it, testing it with a control group of judges who are not participating will allow for an empirical analysis of intra-district differences between participating and non-participating judges.

2. The Pilot Projects in Action

Before the MIDP launched in 2017, the Federal Judicial Center, in collaboration with the Civil Rules Committee, created a set of template documents to help courts implement the project. The documents include a standing order, user's manual, and checklist.

The standing order is the definitive document. It provides the specific rule requirements with respect to (1) the court's authority to adopt the order; (2) the required disclosures; (3) the scope of those disclosures; (4) the timing; (5) logistics of disclosure; and (6) exceptions. Both districts participating in the MIDP have adopted this standing order.

First, the order specifies that Rule 26(a)(1) no longer applies. Instead, under the court's "inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C)," the parties are required to produce the disclosures set forth in the standing order.

Second, the information to be produced includes the following:

- Names, and if known, contact information for "all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess;"
- Names, and if known, contact information for "all persons who you believe have written or recorded statements relevant to any party's claims or defenses," and, subject to privilege or work product protection, provide a copy of each such statement;
- "[D]ocuments, electronically stored information, tangible things, land, or other property known to you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses;"
- For each claim or defense, a statement of "the facts relevant to it and the legal theories upon which it is based;"
- A "computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered;" and
- Any "insurance or other agreements under which an insurance business or other person or entity may be liable to satisfy all or part of possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment."

⁴⁴ Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (Jan. 3, 2017), at 10, http://www.uscourts.gov/sites/default/files/st01-2017-min_0.pdf.

Third, the scope of information parties must produce is notably expanded from current Rule 26(a)(1) to what is “relevant to the parties’ claims or defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses.”⁴⁵ In other words, parties are required to produce information that might be unfavorable to them. That information must be based on “information that is reasonably available to [the party],” but as with other discovery, the party must supplement as it becomes aware of additional information.

Fourth, the timing of discovery shifts. Each party must produce the information required within thirty days after the first pleading filed in response to the opposing party’s complaint, counterclaim, or third-party complaint. The standing order accelerates that deadline. It provides that parties must file these responsive pleadings as required under Rule 12(a)(1)-(3) even if they have already filed a Rule 12(b) pre-trial motion to dismiss. This contrasts with the current rule which allows for the responsive pleading to be delayed until the court disposes of the Rule 12(b) motion to dismiss. However, the judge may defer the obligation to produce the initial disclosures while she considers motions to dismiss based on subject-matter jurisdiction, personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity—the argument being that those issues require resolution before getting to the merits (and thus, discovery).

Fifth, the discovery mechanics are modified. The parties still cover mandatory initial discovery in their Rule 26(f) meeting and are further encouraged to include a summary of that conference in their Rule 16(b) report to the judge. Included in that report should also be any disputes that have been resolved or any open disputes—the idea being that with early intervention from the judge, costly disputes can be avoided. As to form of production, hard-copy documents are to be produced like they are kept in the usual course of business. Electronically stored information (“ESI”) is more complicated; for ESI, the parties are required to meet and confer to agree on form of production as well as the range of searches, preservation parameters, and appropriate custodians. If the parties do not agree on form of production, each party must produce the information in a form requested by the opposing party, or if there is no form specified, in “any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.”⁴⁶ If the parties cannot agree on any of these issues, they must present a single unified motion to the court (or if the court thinks it better, participate in a single conference call). Finally, instead of producing the documents, the parties can provide a descriptive list. In response to that list, the opposing party can request more information and it can request to inspect, copy, test, or sample the information under Rule 34.

Sixth and finally, the standing order applies to all civil cases, with the following exceptions: (1) cases already exempt under Rule 26(a)(1)(B);⁴⁷ (2) Private Securities

⁴⁵ Mandatory Initial Discovery Pilot Project Model Standing Order, *supra* note 40.

⁴⁶ *Id.* at Section C.2.d.

⁴⁷ Rule 26(a)(1)(B) excludes the following: “(i) an action for review on administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award.” FED. R. CIV. P. 26(a)(1)(B).

Litigation Reform Act cases; (3) patent cases controlled by local rule; and (4) multi-district litigation cases. In addition, when producing information under the mandatory initial discovery standing order, the parties may limit the scope of their production based on privilege or work product. If a party does so, however, it must—unless the parties or court order differently—describe those disclosures on a privilege log. Finally, if a party objects to production based on proportionality, it must provide a “fair description” of what it is withholding.

In addition to the standing order, the Federal Judicial Center and the Committee have created a user’s manual that contains practical information and guidelines for attorneys who are practicing in the pilot districts. There are also additional reference materials available on the pilot project website, including a video panel discussion among Arizona lawyers and judges who have previously practiced under a similar state-court discovery rule.⁴⁸

B. EXPEDITED PROCEDURES PILOT PROJECT

In addition to the MIDP, the Committee is planning an Expedited Procedures Pilot Project (“EPPP”).⁴⁹ This pilot appears to be more ambitious than the mandatory initial discovery project, and largely for that reason, it is not nearly as far along.

First, the project plans to implement a set of procedure “components.” Those components include (1) prompt case management conferences in every case; (2) firm caps on the amount of time allocated for discovery (those caps are set by the court at the conference and can be extended only once for good cause and on a showing of diligence by the parties); (3) prompt resolution of discovery disputes by telephone conference between the parties and the judge; (4) a 60-day deadline for decisions on dispositive motions to commence after the reply brief is filed; and (5) the setting (and holding) of firm trial dates.⁵⁰

Second, the project plans to measure the success of the procedure components. If it can be measured, the pilot hopes to first assess the level of compliance with the procedure components in each pilot district. The measurable goals are ambitious, including setting trial dates within fourteen months of case filings in ninety percent of civil cases and setting trial dates within eighteen months in the remaining ten percent of civil cases. The pilot also hopes to achieve a twenty-five percent reduction in the number of categories of cases in the pilot district’s “dashboard” that are decided more slowly than the national average. (The “dashboard” is a tool that the Committee on Court Administration and Case Management uses to measure disposition times in all 94 district courts across different categories of cases and compare each metric to the national average.)

Third and finally, the pilot plans to implement training programs for judges to properly manage these new components. At the beginning of the three-year pilot, the Federal Judicial Center will conduct a one-day training session and then follow up with additional training sessions every six months to a year. In addition, judges in the pilot districts will meet quarterly to discuss best practices and possible improvements to ensure they meet the pilot goals. During these quarterly meetings,

⁴⁸ Dawn Bergin et al., *Mandatory Initial Discovery Pilot: A Discussion of Practice and Effects* (Apr. 6, 2017), <https://www.fjc.gov/content/321102/midpp-panel-video>.

⁴⁹ Federal Judicial Center, *Expedited Procedures Pilot Project: Overview*, <https://www.fjc.gov/content/320247/expedited-procedures-pilot-project-overview>.

⁵⁰ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), at p. 25, http://www.uscourts.gov/sites/default/files/2016-04-14-civil_rules_minutes_final_0.pdf.

the goal is to make judges from outside the district available for consultation. Finally, the Committee will convene at least one bench and bar conference per year to discuss the pilot project with the lawyers and judges who are using it.

Unlike the mandatory initial disclosure project, the goal of the EPPP is not necessarily to amend the Civil Rules. That does not mean the project is small-scale. Judge Bates explained that “the purpose [of the expedited procedures pilot] is to demonstrate the values of active case management.”⁵¹ The goal, Judge Bates elaborated, is to do nothing less than “promote a culture change.”⁵²

Whether that culture change will be achieved is yet to be seen and relies largely on whether the project gets off the ground. So far, the Eastern District of Kentucky is confirmed to participate in the EPPP.⁵³ As of April 2017, other districts—the Eastern District of Pennsylvania, the Southern District of Texas, the District of Utah, and the District of New Mexico—are possibilities, but are not yet confirmed. As will be discussed below, in addition to getting districts to participate, there are empirical challenges to this particular pilot project. Even still, there appears to be a strong commitment to launching this pilot project and hopefully others.

III. THE FUTURE OF REFORM—PROMISE AND CHALLENGES

Undoubtedly, federal civil rulemaking is a difficult task. At the same time, there are valid criticisms of the rulemaking process.⁵⁴ The silver lining in all of this is that the process is a flexible one. That malleability allows the rulemakers—if they are willing—to be responsive to the concerns and criticism they hear. This is why the pilot projects are so very promising. They show not only a willingness on the part of the rulemakers to innovate, but also a willingness, and perhaps even an eagerness, to respond constructively to the past.

Starting the pilot projects smack dab in the middle of discovery also demonstrates that the Committee—while more recently accused of being too timid—is not afraid to wade into controversial waters. Fully aware that plaintiffs and defendants do not agree on the exact parameters of discovery reform, the pilot project attempts to build consensus around fairness and transparency. By requiring parties to share what they have at the outset and by streamlining the process for both production and disputes about that production, the MIDP may just demonstrate that not all rules have to be partisan. It might be inconceivable that defendants and plaintiffs will agree on a rule change, but it is not impossible.

That said, there are challenges inherent in the pilot projects. The primary concern is how the pilot projects will be measured, and thus, how the evidence produced by the projects will be used by the Committee. In the past, the Committee has relied selectively on empirical work when pushing forward with a rulemaking agenda. For example, one major criticism of the proportionality amendments was that there was empirical evidence showing a need for those changes, but also plenty of

⁵¹ Civil Rules Advisory Committee Minutes (Nov. 16, 2016), at p. 21, http://www.uscourts.gov/sites/default/files/2016-11-03-civil_rules_minutes_final_0.pdf.

⁵² *Id.*

⁵³ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10. See also Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 23.

⁵⁴ See generally Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. Rev. 261 (2009) (challenging the structure of civil rulemaking and its implications for access to justice); see also Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (examining the elite nature of federal civil rulemaking).

evidence showing that no change was necessary. Thus, there is reason to be cautiously optimistic when it comes to how the pilot projects will be used. The success of the projects may be difficult to measure as an empirical matter, and even if such measurements are made, the Committee may not use the information felicitously.

Broader challenges also abound, especially as relates to ambitious projects like the Expedited Procedures Pilot Project. First, it is difficult to convince judges and entire districts to participate in these projects. While the value of the projects is apparent, the cost of commitment to them is equally visible. The Committee originally hoped to recruit at least five pilot courts to participate in each project.⁵⁵ The MDPP fell well short of that, and it does not look like the Expedited Procedure Pilot Project will get any closer. As noted in the Civil Rules Committee recent meeting minutes, “[e]ven some Committee members have found it difficult to persuade other judges on their courts that they should participate in one of the projects.”⁵⁶ If close colleagues are facing difficulty in convincing each other to participate, other pilot projects may have difficulty getting off the ground.⁵⁷

Second, even if the pilots launch, timely assessment of the success of various projects is a challenge. The Federal Judicial Center has cautioned the Committee that measuring the impact of either pilot project will take some time. For example, Federal Judicial Center researcher Emery Lee explained to the Committee that “[c]ases that terminate early in the project period will not reflect the effects of the project. Many cases that are affected by the project will not conclude until some time after the formal project period closes.”⁵⁸ In other words, the value of the project may not be measurable until long after the already lengthy project has ended.

Finally, the how of assessing the projects may also present challenges. An exchange between Emery Lee from the Federal Judicial Center and the Standing Committee at their January 2017 meeting demonstrate that the Committee and the FJC are wrestling with a number of challenges in how to assess these projects. The MDPP and EPPP are different with respect to what they are measuring, meaning that two sets of data with different requirements are being collected. With the EPPP, it might be a bit easier because the FJC will track motion practice and discovery disputes, which are apparent on the dockets. The success of the MDPP will depend not just on disposition times, but also on attorney impressions. That means the FJC will have to survey attorneys—a good source of information, but one that is also susceptible to bias. There is also the question of what to compare this data to—for example, when the FJC looked at eight districts and 3,000 civil cases in a previous study, it found significant variance among district courts when it came to setting trial dates. In fact, in about forty-nine percent of those cases, no trial date could be found. The EPPP

⁵⁵ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10 (“The original goal was to have least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court.”)

⁵⁶ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 23.

⁵⁷ For example, in the January 2017 meeting, Judge Donald W. Molloy, Chair of the Advisory Committee on the Criminal Rules and also a district judge in Montana, expressed concern about the District of Montana participating in the MDPP. “Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar’s negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.” In the end, Montana did not participate. Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10.

⁵⁸ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 24.

would require a short and firm trial date, but the question of how to measure the success of those attempts without something to compare it to remains an issue. Finally, if the projects take an easier route and only assess the projects within and not across districts, there is the risk of selection bias because the judges opting in to a project may already use certain procedures and believe them to be effective.⁵⁹

In sum, the pilot projects are no panacea, but they look to be a step in the right direction. The Rulemaking Committee members are diving into something different and ambitious, and for that alone, they should be commended. While we wait to see whether the pilot projects will bear useful fruit, all indications so far are good. The pilot projects demonstrate the Committee's willingness to innovate, but they also reflect an acknowledgment that reform requires good information. Hopefully, that information is forthcoming and worth the wait.

ABOUT THE AUTHOR

Brooke D. Coleman is Co-Associate Dean for Research and Faculty Development and Professor of Law at Seattle University School of Law. Coleman's research and teaching interests focus on procedure and procedural justice, including civil procedure, advanced litigation, and federal courts. Prior to joining the faculty of Seattle University, Coleman was a Thomas C. Grey Fellow at Stanford Law School. She also clerked for Honorable David F. Levi, district judge in the Eastern District of California and then-chair of the Standing Committee on the Federal Rules of Practice and Procedure. During that time, she worked on a variety of procedural amendments, including the civil rule amendments to account for electronic discovery and the appellate rule amendments governing citation to unpublished opinions. Before her clerkship, she practiced as an attorney at Wilson Sonsini Goodrich & Rosati and Gunderson Dettmer Stough Villeneuve Franklin & Hachigian in Palo Alto, California.

⁵⁹ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 11.

Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time^{*}

Eve Brensike Primus^{**}

The Supreme Court has described the writ of habeas corpus as “a bulwark against convictions that violate fundamental fairness”¹ and as “the judicial method of lifting undue restraints upon personal liberty.”² Unfortunately, obtaining federal habeas corpus relief has become close to impossible for many prisoners. The vast majority of habeas petitions are post-conviction petitions filed by state prisoners. Congress and the Supreme Court have erected a complicated maze of procedural obstacles that state prisoners must navigate, often without the assistance of counsel, to have their constitutional claims considered in federal court. One wrong procedural step means the prisoner’s claims are thrown out of federal court altogether. In fact, federal judges now dismiss a majority of state prisoners’ habeas claims on procedural grounds.³

The rare state prisoner who successfully manages to run this procedural gauntlet faces a merits review process that has become so deferential to the state that relief remains virtually unattainable. In the extremely rare case where a federal court grants relief, the judgment often comes years after a person has been wrongly imprisoned. At that point, the case has often been forgotten and the state actors responsible for the underlying constitutional violation have often changed jobs. As a result, the federal decision effectively has no deterrent value.

One empirical study revealed that only 0.29% of non-capital state prisoners obtain any form of federal habeas relief.⁴ That number is troubling in light of evidence that states systematically violate criminal defendants’ constitutional rights⁵ and data documenting large numbers of wrongful state convictions.⁶ Many state criminal defendants have no semblance of a fair process to determine their guilt or innocence. They are processed through a system populated by underfunded and overworked

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^{**} Many thanks to Leah Litman for her feedback.

¹ *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

² *Price v. Johnston*, 334 U.S. 266, 269 (1948).

³ See NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 6 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [hereinafter KING REPORT].

⁴ See KING REPORT, *supra* note 3, at 9.

⁵ See, e.g., Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16-23 (2010) (documenting systemic violations of defendants’ rights in the states); see also Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT MAGAZINE (Winter 2018), <https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights> (“As a federal judge, I have observed a considerable number of cases where state courts overlooked clear constitutional violations....”).

⁶ See Brandon L. Garrett, *Actual Innocence and Wrongful Convictions* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

criminal defense attorneys who are often structurally ineffective,⁷ prosecutors whose incentives often are to obtain convictions and appear tough on crime rather than pursue just results,⁸ and overwhelmed trial court judges who are focused on docket management and often indifferent to the systemic mistreatment of poor people of color. To avoid reckoning with these failures, states often rely on (and even distort) state procedural rules to reject defendants' constitutional claims.⁹

Sadly, these problems typically are not fixed at the state appellate or post-conviction levels. When criminal defense attorneys fail to object to constitutional problems at the trial level, courts deem their claims waived on appeal. And most states are quite hostile to claims of deficient trial attorney performance, relegating those claims to later stages in post-conviction litigation when defendants won't have attorneys to help raise them.¹⁰

Experts concerned about the systemic violation of defendants' rights in state courts have suggested sweeping overhauls of the federal habeas review system. Some want to return to *de novo* federal court review (meaning that the federal court would decide the issues anew without deference to the state courts' legal conclusions) with fewer procedural barriers.¹¹ Others want habeas to focus more on whether an innocent person has been wrongfully convicted.¹² Still others want to restructure habeas review to focus more on correcting systemic problems in the states.¹³ Were we creating a system from scratch with a sympathetic Congress, one or more of these proposals would do a lot to rectify systemic injustices in the states and prevent the conviction of innocents. But with the byzantine procedural and substantive obstacles to review codified in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")¹⁴ and a gridlocked Congress, sweeping overhauls of federal habeas seem unlikely. The most realistic path toward habeas reform might lie in finding and expanding existing inroads in federal habeas doctrine.

Hidden in the habeas doctrinal morass are a series of underused equitable exceptions that permit more expansive federal habeas review. These equitable exceptions give us insight into the federal courts' vision of the proper scope of habeas review of state criminal convictions. Looking at the exceptions to the procedural and substantive obstacles to habeas review, a pattern emerges. The federal courts are more likely to look past procedural barriers and provide more robust merits review when

⁷ See, e.g., Eve Brensike Primus, *Defense Counsel and Public Defense* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

⁸ See, e.g., John F. Pfaff, *Prosecutorial Guidelines* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

⁹ See, e.g., *Lee v. Kemna*, 534 U.S. 362 (2002) (examining Missouri's distortion of two state procedural rules to prevent a defendant from presenting witnesses to support his alibi defense); see also Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75 (2017) (documenting how states use procedural rules to avoid constitutional challenges).

¹⁰ See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (discussing this trend).

¹¹ See, e.g., John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 471-78 (2011).

¹² See, e.g., John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691-712 (1990).

¹³ See Primus, *supra* note 5.

¹⁴ 28 U.S.C. §§ 2241-2266 (1996).

a state prisoner shows either that he (a) is innocent or (b) did not have a full and fair opportunity to have his federal claims adjudicated in state court.¹⁵

In this Issue Brief, I argue that habeas petitioners should highlight problems they had obtaining a full and fair review of their claims in state court as well as innocence concerns in an effort to push federal courts to expand the equitable exceptions that already permeate habeas doctrine. I begin by providing a brief overview of the substantive and procedural thicket of federal habeas review, including a description of the many roadblocks that state prisoners encounter when attempting to obtain relief. I then explore the doctrine's equitable exceptions and explain how concerns about a lack of access to adequate state process and actual innocence often motivate federal courts to look past obstacles to federal habeas review. Finally, I explore how litigants could use the animating principles behind these equitable exceptions to broaden procedural bypasses and inform the standard of review for merits determinations in federal court. I argue that state prisoners often fail to highlight process failures in ways that could broaden the scope and impact of federal habeas review. Sweeping reform of federal habeas review might not be feasible, but it may be possible to effectuate some change, one equitable gateway at a time.

I. AN OVERVIEW OF THE OBSTACLES TO ROBUST FEDERAL HABEAS REVIEW

The writ of habeas corpus permits a prisoner to file a civil action in federal court asking a judge to order the warden of the prison where he is being held—the one who has (“habeas”) the prisoner’s body (“corpus”)—to release the prisoner from unlawful custody. Originally, the writ was available only before conviction and only to establish that sufficient legal cause existed for a prisoner’s detention.¹⁶ A court of competent jurisdiction determined guilt or innocence, and habeas corpus was not intended to disturb that. The appellate process was the exclusive remedy for legal errors, and habeas was called “the Great Writ” because of its limited role in protecting against detention by the arbitrary will of a public official without sufficient legal cause.¹⁷

After the Civil War, Congress and the Supreme Court were concerned about state abuse of the criminal process to systematically violate some citizens’ rights and wrongfully imprison disfavored minority community members and those sympathetic to them.¹⁸ To protect against wrongful convictions and unfair state criminal procedures, Congress gave the federal courts jurisdiction to entertain post-conviction habeas corpus petitions from state prisoners who claimed that their convictions were obtained in violation of their federal constitutional rights.

¹⁵ Cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970-71) (arguing that federal habeas review of state criminal convictions should focus on preventing the conviction of innocents and ensuring that state prisoners get a full and fair opportunity to present their federal claims).

¹⁶ See Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1100-01 (1995).

¹⁷ See *id.*

¹⁸ See, e.g., William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961) (“In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments.”); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987) (describing Congressional concern about Southern state policies); see also Forsythe, *supra* note 16, at 1112 (discussing the Congressional records).

Initially, post-conviction federal habeas review of state prisoners' constitutional claims was *de novo*, and there were few procedural obstacles to obtaining relief.¹⁹ But with the incorporation of the criminal procedure provisions of the Bill of Rights in the 1960s and the draconian sentences that came with the War on Drugs, federal habeas dockets exploded. Concerns about federalism, finality, and conservation of judicial resources led Congress and the federal courts to create a number of procedural and substantive obstacles to federal habeas review.

A. PROCEDURAL OBSTACLES TO REVIEW

Three obstacles in particular—the statute of limitations, exhaustion requirement, and procedural default doctrine—ensure that many state prisoners' claims are never considered on the merits in federal court.

Statute of Limitations. To promote states' interests in finality, Congress created a statute of limitations, requiring state prisoners to file their applications for a writ of habeas corpus within one year from the date on which their state judgments became final at the conclusion of the direct appellate process.²⁰ Although the one-year statute of limitations is statutorily tolled when timely-filed state post-conviction petitions are pending,²¹ many prisoners fail to file on time. According to one empirical study, federal district courts dismissed 22% of habeas petitions in non-capital cases as time-barred.²²

Exhaustion Requirement. Grounded in the idea that the federal courts should respect their state counterparts and give the state the first opportunity to correct any mistake or injustice, the exhaustion doctrine requires a state prisoner to present any constitutional claim that she wants to raise in her federal habeas petition to the highest state court first.²³ If a state prisoner comes into federal court with a federal claim that she has not properly presented to the highest state court, and she still has a right under state law to raise the claim in state court, the federal court will deem the claim unexhausted. The federal court will dismiss the claim without prejudice to permit the prisoner to present it to the state courts first, though it may deny the claim on the merits if it is obviously frivolous.

If a state prisoner files a "mixed" federal habeas corpus petition—one that contains exhausted and unexhausted claims—the federal court must dismiss the petition.²⁴ The Supreme Court adopted this "total exhaustion" requirement to avoid piecemeal litigation of state prisoners' claims. A state prisoner whose mixed petition is dismissed may return to state court to exhaust her claims (and then return to federal court with a totally exhausted petition) or drop her unexhausted claims and amend her habeas petition to present only the exhausted claims.

Procedural Default Doctrine. Procedural default and exhaustion doctrine are doctrinal cousins. If a state prisoner fails to take advantage of an available opportunity

¹⁹ See *Brown v. Allen*, 344 U.S. 443 (1953).

²⁰ See 28 U.S.C. § 2244(d) (1996). Section (d)(1) also discusses three other potential, less common, triggering dates for the statute of limitations: the date on which a State-create impediment to filing is removed if the State-impediment prevented the state prisoner from filing, the date on which the Supreme Court recognizes a new right and deems it retroactively applicable to cases on collateral review, and the date on which a state prisoner discovers the factual predicate of a claim if the facts could not have been discovered earlier through the exercise of due diligence.

²¹ 28 U.S.C. § 2244(d)(2) (1996).

²² See KING REPORT, *supra* note 3, at 6.

²³ See 28 U.S.C. § 2254(b) & (c) (1996); *Rose v. Lundy*, 455 U.S. 509 (1982).

²⁴ See *Rose*, 455 U.S. 509.

to litigate her claim in state court, the problem is a failure to exhaust. But, if she failed to pursue an opportunity to present her claim to the state courts at an earlier time and that procedural avenue is no longer available under state law, she has procedurally defaulted—or waived—her underlying claim.²⁵ Similarly, if a state prisoner attempts to raise a federal constitutional claim in state court, but the state courts refuse to consider the claim because the prisoner failed to raise it properly under the state’s procedural rules, the federal court will deem the claim procedurally defaulted and will refuse to consider the merits of the underlying constitutional claim out of respect for the state’s procedural regime.²⁶ The state court determination that the prisoner failed to properly present the constitutional claim under the state procedural rules is deemed an adequate and independent state law ground to justify the state court decision denying relief.²⁷

The vast majority of state prisoners have to navigate these complicated procedural obstacles alone, because the Supreme Court has never held that prisoners have a constitutional right to the assistance of counsel in post-conviction proceedings.²⁸ It is not surprising that, according to one empirical study, these three procedural doctrines were responsible for the dismissal of 46% of state prisoners’ non-capital federal habeas claims.²⁹

B. SUBSTANTIVE OBSTACLES TO REVIEW

Even if a state prisoner avoids these procedural landmines and gets a substantive review of the merits of her claims, the Supreme Court has dramatically limited the scope of federal habeas review by refusing to address certain kinds of constitutional claims, deeming them not cognizable in habeas proceedings. In addition, Congress and the Court have made it difficult for state prisoners to expand the factual record in federal court through evidentiary hearings, created a presumption that state court factual findings are correct, and imposed highly deferential standards of review whenever a state has already adjudicated the merits of a claim.

Limits on Cognizable Claims. In *Stone v. Powell*,³⁰ the Supreme Court held that state prisoners may not raise Fourth Amendment challenges in federal habeas proceedings if they had a full and fair opportunity to raise those challenges in state court. The exclusionary rule exists to deter police officers from committing constitutional violations, and the Court deemed the additional deterrence achieved by applying the exclusionary rule at the habeas stage not sufficient to overcome the government interests in finality, conservation of resources, and federalism. In *Teague v. Lane*,³¹ the Supreme Court relied on those same government interests to create a presumptive ban on the retroactive application of new law on habeas.

²⁵ See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977).

²⁶ See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986).

²⁷ See, e.g., *Sykes*, 433 U.S. at 81 (discussing the adequate and independent state ground doctrine).

²⁸ See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.”) (citation omitted); see also *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

²⁹ See KING REPORT, *supra* note 3, at 6. If you add in the habeas petitions that the federal courts refuse to consider because they deem the petitions to be successive (another procedural obstacle to review), the number of claims dismissed reaches a majority. See *id.*

³⁰ See *Stone v. Powell*, 428 U.S. 465 (1976).

³¹ See *Teague v. Lane*, 489 U.S. 288 (1989).

Evidentiary Hearings. Under AEDPA, federal courts may not hold evidentiary hearings on claims that a state prisoner failed to develop in the state courts unless the prisoner can show by clear and convincing evidence that she is innocent and can also show that her claim relies on either a new rule of law that the Supreme Court has deemed retroactively applicable or new facts that she couldn't have discovered before.³² The Supreme Court has interpreted AEDPA to limit federal habeas review in most cases to the factual record created in the state courts.³³ As a result, evidentiary hearings in federal court are quite rare.³⁴ Typically, when federal courts review state prisoners' claims on the merits, they do so on the basis of limited state factual records.

Presumption of Correctness on State Factual Findings. Out of respect for state factfinding procedures, Congress requires federal habeas courts to presume that any determination of fact that a state court makes is correct.³⁵ To overcome that presumption, the prisoner must show by clear and convincing evidence that the state court's factual determination was wrong.³⁶ Given how rare evidentiary hearings are in federal court, most attempts to rebut a state court's factual findings are limited to an often-anemic state evidentiary record. The presumption of correctness is therefore quite difficult to overcome.

Deferential Standards of Review. Section 2254(d) of AEDPA famously implemented a highly deferential standard of review in federal court for claims previously adjudicated on the merits in the states.³⁷ A federal habeas court may only grant a prisoner relief if the prior state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" or if the state court's legal determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."³⁸ As the Supreme Court has explained, it is not enough if the state court's determination of the facts or application of the law was clearly erroneous.³⁹ Rather, the state court's determination must have been patently unreasonable and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."⁴⁰

For all of these reasons, even a habeas petitioner who successfully navigates the procedural complexities has less than a 0.3% chance of winning on the merits.⁴¹ Many experts believe that federal habeas doctrine is convoluted, incoherent, and not worth the amount of time and judicial energy spent on it,⁴² while others complain that we've lost sight of the historic function of the Great Writ to remedy injustice and check abuses of government power.⁴³ Perhaps most damning, some federal

³² See 28 U.S.C. § 2254(e)(2) (1996).

³³ See *Cullen v. Pinholster*, 563 U.S. 170 (2011).

³⁴ See KING REPORT, *supra* note 3, at 5 (noting that, post-AEDPA, evidentiary hearings were granted in only 0.41% of non-capital cases).

³⁵ See 28 U.S.C. § 2254(e)(1) (1996).

³⁶ See *id.*

³⁷ See 28 U.S.C. § 2254(d) (1996).

³⁸ *Id.*

³⁹ See *Williams v. Taylor*, 529 U.S. 362 (2000).

⁴⁰ *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

⁴¹ See KING REPORT, *supra* note 3, at 9. The chances in capital cases are higher at 12.4%. See *id.*

⁴² See, e.g., Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009).

⁴³ See, e.g., Primus, *supra* note 5, at 13-16.

judges lament that current habeas law requires them to “to place their stamp of approval on constitutional error.”⁴⁴ While procedural and substantive obstacles pose challenges, the animating principles of the equitable exceptions to these barriers reveal possible ways to expand the scope and impact of federal habeas review of state prisoners’ claims.

II. EQUITABLE EXCEPTIONS TO HABEAS

Hidden in the procedural and substantive morass of federal habeas doctrine is a consistent equitable thread. When a federal court believes that a state prisoner either (a) did not get a full and fair opportunity to present her claims to the state courts or (b) is innocent, it is more likely to bypass the procedural and substantive barriers to relief. To be sure, this practice is not universal. Though some federal judges are more willing to close the federal courthouse doors to habeas petitioners than others, the cases in which federal courts, including the Supreme Court, have bypassed procedural and substantive obstacles to review share these characteristics.⁴⁵ Even if there are no sure formulas for procuring more expansive federal habeas review, there are clear indications about what sorts of claims might succeed.

A. LACK OF FULL AND FAIR PROCESS

Federal habeas review has historically been about ensuring that states provide criminal defendants with a full and fair opportunity to have their federal claims adjudicated. After all, it was a concern about state hostility to newly-created federal rights that first led Congress to give federal courts the power to entertain habeas petitions filed by state prisoners.⁴⁶ Supreme Court justices who are typically quite hostile to expansive federal habeas review of state convictions have agreed that federal courts should review claims alleging a lack of available state processes for vindicating federal rights.⁴⁷ As one scholar explained it, the states have a responsibility under the due process clause “to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case,” and if the state fails to do so, “the due process clause itself demands that its conclusions of fact or law should not be respected.”⁴⁸

1. *Bypassing Procedural Obstacles to Review*

For each of the procedural obstacles outlined above, the Supreme Court and lower federal courts have relied on equitable doctrines to carve out exceptions—ways petitioners can bypass those procedural obstacles—when state prisoners have not had a full and fair opportunity to litigate their federal claims.

⁴⁴ See, e.g., Adelman, *supra* note 5; see also Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015) (describing how the federal court have “embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary”).

⁴⁵ See, e.g., Trevino v. Thaler, 569 U.S. 413 (2013); McQuiggin v. Perkins, 569 U.S. 383 (2013); Martinez v. Ryan, 566 U.S. 1 (2012); Maples v. Thomas, 565 U.S. 266 (2012); Holland v. Florida, 560 U.S. 631 (2010).

⁴⁶ See *supra* note 18.

⁴⁷ See, e.g., Brown v. Allen, 344 U.S. 443, 532-48 (1953) (Jackson, J., concurring in the result).

⁴⁸ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).

Statute of Limitations. In *Holland v. Florida*,⁴⁹ the Supreme Court recognized that a state prisoner could toll the one-year statute of limitations on equitable grounds if he could demonstrate that he had been pursuing his rights diligently and that some extraordinary circumstance beyond his control interfered with his ability to timely file his petition.

A state's failure to provide prisoners with access to the necessary resources to timely file their pleadings is a frequently-invoked circumstance to justify equitable tolling. For example, federal courts have held that prisoners are entitled to equitable tolling when their inability to file on time is the result of the state (a) denying a prisoner reasonable access to the law library;⁵⁰ (b) failing to maintain legal materials about AEDPA in the prison library;⁵¹ (c) denying a prisoner reasonable access to his legal files;⁵² (d) affirmatively misleading a prisoner about the available time he has left;⁵³ (e) affirmatively misleading a prisoner to file the wrong document or to file in the wrong court or at the wrong time;⁵⁴ or (f) substantially delaying the mailing of the prisoner's court filings or the notice of a state court decision on them.⁵⁵ In all of these circumstances, state action prevents the prisoner from complying with the statute of limitations, thus ensuring that the prisoner will not have a full and fair opportunity to present his federal claims.

In addition to state action that prevents timely filing, some federal courts will also equitably toll the statute of limitations when a prisoner suffers from an extreme medical condition, whether physical or psychiatric, which interferes with her ability to file.⁵⁶ Egregious misconduct by a state prisoner's attorney, such as failing to perform basic legal research, meet with or respond to client communications, or affirmatively misleading a state prisoner about the time restrictions, may lead to equitable tolling as well.⁵⁷

⁴⁹ *Holland*, 560 U.S. 631.

⁵⁰ See, e.g., *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).

⁵¹ See, e.g., *Pabon v. Mahanoy*, 654 F.3d 385, 399-401 (3d Cir. 2011); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000).

⁵² See, e.g., *Socha v. Boughton*, 763 F.3d 674 (7th Cir. 2014); *Lott v. Mueller*, 304 F.3d 918 (9th Cir. 2002).

⁵³ See, e.g., *Pliler v. Ford*, 542 U.S. 225, 234 (2004).

⁵⁴ See, e.g., *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007).

⁵⁵ See, e.g., *Drew v. Department of Corr.*, 297 F.3d 1278, 1288 (11th Cir. 2002); *United States ex rel. Willhite v. Walls*, 241 F. Supp. 2d 882, 888 (E.D. Ill. 2003).

⁵⁶ See, e.g., *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011) (noting that "medical conditions, whether physical or psychiatric, can manifest extraordinary circumstances, depending on the facts presented"); *Forbess v. Franke*, 749 F.3d 837 (9th Cir. 2014) (same); *Bolarinwa v. Williams*, 593 F.3d 226 (2d Cir. 2010) (same); see also *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009) (recognizing that severe mental retardation may be sufficient to warrant equitable tolling).

⁵⁷ See, e.g., *Holland v. Florida*, 560 U.S. 631 (2010). The Supreme Court has made it clear that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Id.* at 651-52 (internal quotations omitted); see also *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). It must be a "serious instance[] of attorney misconduct." *Holland*, 560 U.S. at 652. See also *Luna v. Kernan*, 784 F.3d 640, 647 (9th Cir. 2015) ("[A]ffirmatively misleading a petitioner to believe that a timely petition has been or will soon be filed can constitute egregious professional misconduct."); *Ross v. Varano*, 712 F.3d 784 (3d Cir. 2013) (finding extreme neglect sufficient for equitable tolling when attorney missed deadlines, failed to communicate with client, and gave misleading statements to client); *Dillon v. Conway*, 642 F.3d 358 (2d Cir. 2011) (finding attorney miscalculation coupled with deeply misleading statements to client sufficient for equitable tolling).

In short, when a state prisoner is otherwise diligently attempting to vindicate his rights, and an extraordinary, external factor prevents him from having his claims heard, the statute of limitations will not prevent federal habeas review.⁵⁸

Exhaustion. Citing equitable concerns about fair process, Congress and the federal courts have created procedural mechanisms to permit state prisoners to bypass, or at the very least soften, the total exhaustion requirement. First, AEDPA provides that a state prisoner need not exhaust the remedies available in state court if the state does not provide a realistic and effective procedural mechanism for considering the prisoner's federal claims.⁵⁹ The state may not create remedies that are so confusing, numerous, intricate, and ineffective that a state prisoner cannot be expected to comply with them.⁶⁰ Nor must a prisoner pursue state remedies that are only theoretically but not actually available to him.⁶¹ For example, excessive state court delay may render a state process ineffective.⁶² If pursuing state procedural remedies is pointless, the state has failed to provide a full and fair forum for adjudicating prisoners' federal claims. This process failure leads to an exception to the procedural obstacle to review in federal court.

In addition to this exception, the federal courts have also developed the stay and abeyance procedure, which is grounded in equitable principles, to soften the impact of the exhaustion requirement's "total exhaustion" rule. When a state prisoner files a mixed petition containing some exhausted and at least one unexhausted claim, the stay and abeyance procedure permits the federal court to consider whether the prisoner has "good cause" for his failure to have presented the unexhausted claims to the state courts.⁶³ If there is good cause, the claims are potentially meritorious, and there is no indication that the prisoner was intentionally delaying consideration of the claims, the federal court need not dismiss the habeas petition under the total exhaustion rule. Instead, the federal court should stay the proceedings, hold the petition with the exhausted claims in abeyance, and permit the state prisoner to go back to exhaust the unexhausted claims in state court.⁶⁴ Upon his return, the federal court will permit the state prisoner to amend the petition to include the previously-unexhausted-but-now-exhausted claims. This procedure prevents the exhaustion process from causing a state prisoner to run afoul of the one-year statute of limitations. Without the stay and abeyance procedure, the entire time that the federal court spent considering the initial mixed petition would count against the prisoner's

⁵⁸ In some circumstances, these external obstacles may lead the federal court to re-start the one-year statute of limitations instead of relying on equitable tolling. *See supra* note 20.

⁵⁹ 28 U.S.C. §§ 2254(b)(1)(B)(i) & (ii) (1996).

⁶⁰ *See, e.g.,* *Marino v. Ragen*, 332 U.S. 561 (1947). Nor must a prisoner pursue a state remedy that is already foreclosed by state law. *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (noting that petitioner could bypass the exhaustion requirement because the Florida Supreme Court had previously rejected the very same challenge, and there was no reason to believe that it would have decided petitioner's case differently).

⁶¹ *See, e.g.,* *Harris v. DeRobertis*, 932 F.2d 619 (7th Cir. 1991) (noting that there was a state statute that permitted untimely filing upon showing that the delay was not due to the prisoner's "culpable negligence," but emphasizing that there was not a single published opinion in which the state had found that standard satisfied in more than forty years).

⁶² *See, e.g.,* *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017); *Taylor v. Hargett*, 27 F.3d 483 (10th Cir. 1994) (noting that a delay of more than two years in state appellate processes is presumptively sufficient to deem the state remedy futile and excuse exhaustion); *Harris v. Champion*, 938 F.2d 1062 (10th Cir. 1991).

⁶³ *See Rhines v. Weber*, 544 U.S. 269 (2005).

⁶⁴ *See id.* at 278.

statute of limitations.⁶⁵ The Supreme Court recognized the importance of the stay and abeyance procedure in *Rhines v. Weber* and noted that it would be unjust to force a state prisoner to “run the risk of forever losing the[] opportunity for any federal review” when there are good reasons why that prisoner did not present the claims earlier to the state courts.⁶⁶

Federal courts have found “good cause” to justify use of the stay and abeyance procedure when an objective factor, not fairly attributable to the petitioner, caused the failure to exhaust.⁶⁷ When the state’s procedural rules are so complicated that a state prisoner could be reasonably confused about whether a state filing is timely, the Supreme Court has held that there is “good cause” for filing prematurely in federal court to protect the underlying federal claims.⁶⁸ Some lower federal courts have held that ineffective assistance of post-conviction counsel qualifies as good cause for filing a stay and abeyance petition.⁶⁹ Others have found that a prisoner’s severe mental illness may provide good cause for a failure to exhaust.⁷⁰

Procedural Default. There are two exceptions to the procedural default doctrine that are grounded in equitable concepts about ensuring that state prisoners have a real opportunity to present their federal claims in state court. One exception focuses on the adequacy of the state procedures themselves while the other focuses on objective, external factors that might have prevented a particular state prisoner from complying with a state’s procedural rules.

As with the exhaustion doctrine, if a state’s procedural regime does not give state prisoners a realistic opportunity to present their federal claims in state court, the federal court may deem those state procedures “inadequate” to bar federal consideration of defaulted claims.⁷¹ A state’s procedural rules can be inadequate because they violate due process,⁷² unduly burden a state prisoner’s attempts to raise federal challenges,⁷³ are inconsistently applied,⁷⁴ or are applied in novel and unforeseen ways.⁷⁵ Adequacy challenges can be based on the application of one state procedural rule or a combination of different rules. They can be facial challenges to a state procedural rule across cases or as applied challenges that object to the way a facially legitimate state procedural rule was applied in a particular case. They can be predicated on rules that exist on the books or de facto procedural rules that exist in state practice.⁷⁶ Ultimately, adequacy doctrine judges the legitimacy of the state

⁶⁵ See *Duncan v. Walker*, 533 U.S. 167 (2001) (holding that the time during which an initial federal habeas petition is pending in federal court does not toll the statute of limitations).

⁶⁶ *Rhines*, 544 U.S. at 275.

⁶⁷ See *Whitley v. Ercole*, 509 F. Supp. 2d 410, 417-18 (S.D.N.Y. 2007); *Riner v. Crawford*, 415 F. Supp. 2d 1207, 1209-10 (D. Nev. 2006).

⁶⁸ See *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005).

⁶⁹ See, e.g., *Blake v. Baker*, 745 F.3d 977, 983-84 (9th Cir. 2014). *But see Rhines v. Weber*, 408 F. Supp. 2d 844, 848 (D.S.D. 2005) (noting that district courts “have split on whether alleged ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust claims in state proceedings”).

⁷⁰ See, e.g., *Shotwell v. Lamarque*, 2005 WL 1556296 (E.D. Cal. 2005).

⁷¹ See, e.g., *Lee v. Kemna*, 534 U.S. 362 (2002).

⁷² See, e.g., *Reece v. Georgia*, 350 U.S. 85 (1955).

⁷³ See, e.g., *Lee*, 534 U.S. at 362.

⁷⁴ See, e.g., *Barr v. City of Columbia*, 378 U.S. 146 (1964).

⁷⁵ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

⁷⁶ See *Primus*, *supra* note 9 (describing the history of and different approaches to adequacy doctrine).

procedures themselves and asks if they provided a realistic, full, and fair opportunity for the state prisoner to have her federal claims considered.

Cause and prejudice, on the other hand, is an equitable exception that focuses on the state prisoner and asks whether she had a legitimate excuse for failing to comply with the state procedures.⁷⁷ A state prisoner who failed to comply with state procedural rules can still have her federal claims considered on the merits in federal court if she can show cause (meaning an objective factor external to the prisoner) for failing to comply with the state's procedural regime and prejudice to the outcome of her case.

The Supreme Court has recognized a number of cause grounds including interference by state officials that made compliance with the state procedural rules impracticable,⁷⁸ the discovery of a factual or legal basis for a claim that was not reasonably available at the time of the default,⁷⁹ ineffective assistance of counsel in violation of the Sixth Amendment,⁸⁰ ineffective assistance of initial post-conviction counsel for failing to raise a substantial ineffective-assistance-of-trial-counsel ("IATC") claim in a jurisdiction that requires such claims to be raised in post-conviction proceedings,⁸¹ the failure of a state to provide its prisoners with post-conviction counsel to raise substantial IATC claims when those claims must be raised in post-conviction proceedings,⁸² and constructive or actual abandonment by a post-conviction attorney.⁸³ In *Martinez v. Ryan*,⁸⁴ the Supreme Court emphasized the equitable concerns that animate these cause categories. It noted that ineffective performance by trial, appellate, and some state post-conviction counsel can be cause to excuse a default, because "if the attorney appointed by the State... is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."⁸⁵

In short, when a state prisoner is prevented from presenting her federal claims fully in state court—either because of state misconduct or the intervention of some external factor that she could not control, the federal courts are often willing to rely on equitable concepts of fairness to bypass the procedural restrictions and permit the petitioner to raise her federal claims.

2. Obtaining More Rigorous and Less Deferential Merits Review

Many of the limits on the scope of federal habeas review and the deference shown to state court judgments in federal habeas proceedings may disappear when there was no full and fair adjudication of a state prisoner's claims in state court proceedings.

Expansion in Cognizable Claims. Even as the Supreme Court was removing Fourth Amendment search and seizure claims from federal habeas review in *Stone v. Powell*,⁸⁶ it was careful to note that only those Fourth Amendment claims that had been fully

⁷⁷ See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁷⁸ See *Brown v. Allen*, 344 U.S. 443 (1953).

⁷⁹ See *Reed v. Ross*, 468 U.S. 1 (1984).

⁸⁰ See *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

⁸¹ See *Martinez v. Ryan*, 566 U.S. 1 (2012).

⁸² See *id.*

⁸³ See *Maples v. Thomas*, 565 U.S. 266 (2012).

⁸⁴ *Martinez*, 566 U.S. at 13-14.

⁸⁵ *Id.* at 11.

⁸⁶ 428 U.S. 465 (1976).

and fairly litigated in state courts would not be re-adjudicated in federal habeas proceedings. If a petitioner can show that his search and seizure rights were violated and that the state courts did not provide an adequate forum for litigating the Fourth Amendment challenge, the federal court will consider the claim on habeas.

Federal courts have deemed state court processes inadequate to bar federal review of Fourth Amendment claims when the state prisoner had a constitutionally ineffective trial or appellate attorney who failed to properly present the claim⁸⁷ or when the state provided no realistic opportunity to raise a Fourth Amendment challenge.⁸⁸ The inquiry into whether there was a full and fair opportunity to litigate a Fourth Amendment claim in state court resembles the equitable inquiries that animate the exceptions to the procedural barriers to review. If the reason why a prisoner could not present a Fourth Amendment claim in the state courts would satisfy the cause standard under procedural default, the prisoner probably did not have a full and fair opportunity to present the claim. And if the state procedures would fail an adequacy review under the exhaustion and procedural default doctrines, they will probably also be inadequate to bar federal consideration of a Fourth Amendment challenge.

Evidentiary Hearings. In *Michael Williams v. Taylor*,⁸⁹ the Supreme Court held that AEPDA's restrictions on the availability of evidentiary hearings only apply when a state prisoner is at fault for failing to develop a record in state court. The Court noted that a state prisoner "is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance."⁹⁰ This fault-based inquiry relies on reasoning similar to that underlying the equitable exceptions to procedural barriers to review. If the state processes are inadequate or some unforeseen factor external to the state prisoner prevented him from having an opportunity to fully and fairly develop the record in state court, AEDPA should not stand in the way of a federal evidentiary hearing. And once a state prisoner walks through the equitable opening created by *Michael Williams* and the AEDPA restrictions on evidentiary hearings no longer apply, Supreme Court precedent often *requires* federal evidentiary hearings.⁹¹

Deferential Standards of Review and the Presumption of Correctness. The deferential standards of review in AEDPA are only triggered when the underlying federal claim at issue "was adjudicated on the merits in State court proceedings."⁹² If there was no prior state court adjudication of the claim, and the state prisoner is able to overcome any procedural obstacles to federal habeas review, the federal court's review of the claim will be *de novo*.⁹³ The difference between *de novo* review and the deferential review of section 2254(d) is vast. To obtain relief under section 2254(d), a habeas petitioner must often show that the state court decision was so unreasonable that

⁸⁷ See *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

⁸⁸ See, e.g., *Monroe v. Davis*, 712 F.3d 1106, 1114 (7th Cir. 2013).

⁸⁹ 529 U.S. 420 (2000).

⁹⁰ *Id.* at 432.

⁹¹ When AEDPA does not apply because the prisoner is not at fault for the failure to develop the record in state court, *Townsend v. Sain*, 372 U.S. 293, 312 (1963), requires a federal evidentiary hearing if: "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure [in] the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence... or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

⁹² 28 U.S.C. § 2254(d) (1996).

⁹³ See *Cone v. Bell*, 556 U.S. 449, 472 (2009).

“no fairminded jurist” could have reached the conclusion that the state reached.⁹⁴ That is a tough standard to meet. As a result, a lot hinges on whether the federal courts think that a claim was adjudicated on the merits in state court proceedings.

Similarly, the deference given to a state court’s factual findings in section 2254(e) (1), which contains the presumption of correctness, only applies when the state court has made a “determination of a factual issue.”⁹⁵ Thus, it is important to consider when the state court has made a factual determination that is entitled to deference.

The federal courts have uniformly held that a state court decision is not an “adjudication on the merits” deserving of 2254(d) deference when the state court decision (a) rested on procedural grounds, (b) failed to address the federal claim because it was not presented to the state court, or (c) failed to address a particular aspect of the federal claim because the state court resolved the claim on other grounds.⁹⁶ In short, if the state never considered a claim, and habeas is the prisoner’s first real opportunity to present a federal claim, 2254(d) deference will not apply.

Even when the state addressed a prisoner’s federal claim, if the state’s factfinding procedures were inadequate (meaning that the state prisoner did not have a full and fair opportunity to develop the facts to support his claim), some federal courts will not defer to the state’s decision. Instead, they will deem the inadequate procedures sufficient to overcome AEDPA’s presumption that the state factfinding was correct, and analyze the prisoner’s federal claims under a *de novo* standard rather than a deferential one.

For example, some federal courts have held that there has been no actual adjudication of a claim on the merits when the state prisoner has not had a full and fair opportunity to develop evidence in support of his claim.⁹⁷ As the Fourth Circuit has explained, when the state courts refuse to give a prisoner an evidentiary hearing when such a hearing is necessary to develop the facts of his claim, and the state then denies his claim summarily without addressing serious factual issues raised in his pleadings, that is tantamount to never having adjudicated the claim in the first instance.⁹⁸ Without an adjudication on the merits, the deferential standards of section 2254(d) no longer apply, and the federal court will review the prisoner’s claim *de novo*.

⁹⁴ See *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

⁹⁵ 28 U.S.C. § 2254(e)(1) (1996).

⁹⁶ See RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.2 (7th ed. 2017) (collecting cases). Of course, if a state prisoner never presented the claim to the state courts, she will likely have to overcome an exhaustion or procedural default problem in federal court.

⁹⁷ See, e.g., *Gordon v. Braxton*, 780 F.3d 196 (4th Cir. 2015); see also *Morva v. Zook*, 821 F.3d 517, 527 (4th Cir. 2016) (noting that “[a] claim is not adjudicated on the merits when the state court makes its decision on a materially incomplete record” and emphasizing that “[a] record may be materially incomplete when a state court unreasonably refuses to permit further development of the facts of a claim” (internal quotations omitted; first alteration in original). *But see* *Ballinger v. Prelesnik*, 709 F.3d 558, 560-62 (6th Cir. 2013) (holding that the state court’s failure to grant an evidentiary hearing did not mean that the state court had failed to adjudicate the claim on the merits and noting that “[i]t is now clear that a state-court adjudication, even when unaccompanied by an explanation, is presumed to be on the merits” (citing *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011))).

⁹⁸ See *id.* at 202-04; see also *Winston v. Pearson*, 683 F.3d 489, 497 (4th Cir. 2012) (holding that the state court had not adjudicated petitioner’s claims when it “deni[ed]...discovery and an evidentiary hearing[,] produc[ing] an adjudication of ‘a claim that was materially incomplete’” (citation omitted)).

Other federal courts have deemed state factfinding predicated on inadequate state procedures patently unreasonable under section 2254(d)(2).⁹⁹ The Ninth Circuit has noted that “where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference.”¹⁰⁰ Having determined that the state court’s determinations of fact were unreasonable, the federal court considers the prisoner’s federal claims *de novo*, supplementing the state court record through a federal evidentiary hearing when appropriate.

Finally, some federal courts will recast the prisoner’s claim as a new claim supported by new evidence that has not been raised before in the state.¹⁰¹ If a state prisoner had no real opportunity to present evidence in support of her claim in state court (either because the state court processes would not permit it or because the prisoner had an ineffective lawyer who failed to try), Justice Breyer has suggested that the federal courts should deem the claim a new claim not previously adjudicated on the merits in the state. As he put it, “[a] claim without any evidence to support it might as well be no claim at all.”¹⁰² Even if some evidence was presented in the state courts to support the claim, if the state prisoner later discovers a substantial amount of new evidence, it might be enough to “fundamentally alter” the nature of the claim and cause a federal court to characterize the claim as new.¹⁰³ The new claim, not having been raised in state court, will be procedurally defaulted, but deficient state procedures may make the state procedural default inadequate to bar federal review. Alternatively, the ineffectiveness of state post-conviction counsel in failing to develop record evidence in the state courts may be “cause” to excuse the prisoner’s procedural default.¹⁰⁴ Either way, after bypassing the procedural default, the prisoner will then get *de novo* review of her claims in federal court.

These are three approaches lower federal courts have taken to bypass the deferential standards of review in AEDPA and review state prisoners’ claims *de novo*, because the state’s merits determination was based on an inadequate state process. Each of these approaches is motivated by an equitable concern about ensuring that state prisoners have a full and fair opportunity to present and develop their federal claims in state court.

B. INNOCENCE

If a state prisoner convinces the federal court that he is probably innocent of the crime he was convicted of, the court will bypass all of the procedural obstacles to

⁹⁹ See, e.g., *Hurles v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014); see also Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. Rev. 953, 984-86 (2012). But see *Valdez v. Cockrell*, 274 F.3d 941, 942 (5th Cir. 2001) (holding that a full and fair hearing in the state is not a prerequisite for section 2254(d) deference).

¹⁰⁰ *Hurles*, 752 F.3d at 790 (internal quotations omitted).

¹⁰¹ See, e.g., *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (relying on cases relating to exhaustion doctrine to hold that new evidence will render a claim unexhausted and therefore “new” if it “fundamentally alter[s]” the previously exhausted claim). But see *Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014) (agreeing with that standard but noting that new evidence does not “fundamentally alter” a claim if it “merely provided additional evidentiary support for [a] claim that was already presented and adjudicated in the state court proceedings”).

¹⁰² *Gallow v. Cooper*, 570 U.S. 933, 933 (2013) (statement of Breyer, J. with whom Sotomayor, J. joins respecting the denial of the petition for writ of certiorari).

¹⁰³ See *Dickens*, 740 F.3d at 1319.

¹⁰⁴ See *Martinez v. Ryan*, 566 U.S. 1 (2012).

federal habeas review. In *Schlup v. Delo*,¹⁰⁵ the Supreme Court swept aside a procedural default after the prisoner presented new evidence leading the Court to conclude that it is more likely than not that no reasonable juror would have convicted him.¹⁰⁶ In *McQuiggin v. Perkins*,¹⁰⁷ the Supreme Court established a similar innocence bypass for the statute of limitations. Noting that “equitable principles have traditionally governed the substantive law of habeas corpus,” the Court explained the innocence bypass as “grounded in the ‘equitable discretion’ of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.”¹⁰⁸ In short, federal courts will entertain defaulted claims if a state prisoner credibly asserts innocence.

Federal courts will also disregard the presumption against the retroactive application of new laws if (1) the new law makes the conduct for which a state prisoner was punished constitutionally unpunishable or the sentence that she received unconstitutional; or (2) the new rule is a watershed rule of criminal procedure that is necessary to prevent an impermissibly large risk of an inaccurate conviction.¹⁰⁹ Federal courts deem violations of federal statutes cognizable in state post-conviction habeas cases only if the alleged error qualifies as “a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.”¹¹⁰ And the Supreme Court has left open the possibility of recognizing a freestanding innocence claim that would permit prisoners who can make a truly persuasive demonstration of innocence to obtain habeas relief independent of any other constitutional violation.¹¹¹

Additionally, state prisoners who can show that they are actually innocent may often expand the factual record through evidentiary hearings in federal court. Even under AEDPA’s stricter standards, a clear and convincing showing of actual innocence coupled with new evidence that couldn’t have been discovered before will entitle a state prisoner to an evidentiary hearing.¹¹²

These procedural inroads and substantive avenues to relief show that the federal courts care about actual innocence in habeas and are willing to use equitable principles to pave the way for habeas relief when they believe that an actually innocent person has been unjustly convicted.

III. EXPANDING EQUITABLE GATEWAYS

Federal courts, including the United States Supreme Court, should be more explicit about their willingness to pierce the red tape of habeas doctrine and grant relief when they believe there has been a serious process failure or when they believe that an innocent person has been wrongly convicted. And habeas petitioners

¹⁰⁵ 513 U.S. 298 (1995).

¹⁰⁶ See also *Sawyer v. Whitley*, 505 U.S. 333 (1992) (establishing an actual innocence gateway in capital sentencing hearings).

¹⁰⁷ 569 U.S. 383 (2013).

¹⁰⁸ *McQuiggin*, 569 U.S. at 392 & 397 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

¹⁰⁹ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016); *Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

¹¹⁰ *Reed v. Farley*, 512 U.S. 339, 348 (1994) (alteration in original).

¹¹¹ *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional”); see also *District Atty’s Off. For Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (noting that “[w]hether such a federal right exists is an open question”).

¹¹² See 28 U.S.C. § 2254(e)(2) (1996).

arguing for broader procedural bypasses and more expansive merits review should explicitly cast arguments in fair process or innocence terms.

Currently, state prisoners who never had their federal claims fully and fairly considered in state court often fail to paint a complete picture of the systemic state process failures that stood in their way. This should not be surprising. Right now, there is no constitutional right to federal habeas counsel.¹¹³ Most state prisoners are indigent and cannot afford to hire federal habeas counsel.¹¹⁴ They either must proceed *pro se* or rely on pro bono assistance that typically comes from large law firms or legal institutions that do not focus on criminal cases.¹¹⁵ The attorneys who take on these cases are typically good generalist lawyers, but habeas litigation is often not their area of expertise, and they typically lack any deep experience with state post-conviction regimes.¹¹⁶ As a result, they might not understand the varied ways in which states create and implement post-conviction review systems that routinely and effectively prevent state prisoners from having their federal claims fully considered. The state prisoners who proceed *pro se* certainly do not have access to this information.

Not knowing about the systemic procedural failures in the state, most state prisoners focus on their individual circumstances when trying to get around procedural and substantive obstacles to review.¹¹⁷ They offer excuses for why they did not comply with procedural rules or why they were not at fault for failing to develop a sufficient factual record in state court. These more localized excuses are known to the petitioners and their pro bono counsel and are easier to raise, but they are less likely to motivate a federal court to grant relief, because they do not demonstrate an extraordinary or far-reaching procedural problem. They also are not as effective at catalyzing change, because they provide only indirect feedback to the offending states.

Consider the difference between the two equitable exceptions to the procedural default doctrine—cause and prejudice and adequacy. Under a cause and prejudice analysis, the question is whether the petitioner is at fault for the procedural non-compliance. A finding of cause and prejudice to excuse a default does not send any direct message to the offending state. It merely recognizes that the petitioner has an excuse sufficient to justify bypassing an otherwise acceptable state procedural rule. In contrast, a finding that the state's procedures are inadequate begins a dialogue between the federal and state courts about the legitimacy of the state process. If the federal court tells a state directly that its procedures inadequately protect federal rights, it puts the state on notice and gives the state an incentive to fix the problem or face more federal habeas grants in the future.¹¹⁸

¹¹³ See *supra* note 28.

¹¹⁴ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000) (noting that more than 80% of American criminal defendants are indigent).

¹¹⁵ See Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 860 (2013) (explaining how prisoners "must petition non-profit organizations, law school clinics, or law firms to take their cases pro bono").

¹¹⁶ See, e.g., *Maples v. Thomas*, 565 U.S. 266 (2012) (describing one such situation). There are, of course, exceptions to this rule. Some law firms have brought experienced public defenders in to create their pro bono programs and train their attorneys. See Carol S. Steiker, Keynote Address, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2710 (2013) (describing some of these law firms). And prisoners lucky enough to be represented by law school clinics at good schools often get excellent representation.

¹¹⁷ See Primus, *supra* note 9, at 109.

¹¹⁸ See Primus, *supra* note 9 (discussing the benefits of a structural approach to state procedural problems).

Habeas petitioners should ask federal courts to consider how state procedural systems are structured and force them to confront the broader questions about whether state prisoners are given a realistic opportunity to have their federal claims considered. And federal courts should use their equitable discretion to bypass procedural and substantive obstacles to review and send a clear message back to the offending state that prisoners from that state will continue to receive more favorable federal habeas review until the state revises its procedures to give prisoners a full and fair opportunity to present federal claims. If the state still refuses to modify its state procedures, federal courts can issue a stronger, constitutionally-based response by finding systemic violations of due process or the right to counsel in that state.¹¹⁹

Petitioners should also try to broaden established equitable inroads by applying procedural bypasses obtained in one area of habeas to other obstacles to habeas relief.¹²⁰ Consider the Supreme Court's decisions in *Martinez v. Ryan*¹²¹ and *Trevino v. Thaler*.¹²² In these cases, the Supreme Court held that there is cause to excuse a state prisoner's procedural default for failing to raise a substantial IATC claim whenever state law requires prisoners to raise IATC claims in initial state post-conviction proceedings and the state fails to provide prisoners with effective counsel to help them raise the claims at that stage. The equitable principles animating the Supreme Court's holdings in *Martinez* and *Trevino* have potential implications for other habeas doctrines, like equitable tolling. If a state creates a particularly complicated set of procedural requirements about the time periods for filing state post-conviction petitions and then fails to give indigent prisoners counsel to help them navigate those procedural barriers, the prisoners who get trapped in the resulting Catch-22 face the same unfairness that motivated the Supreme Court to find a way around the procedural default doctrine in *Martinez* and *Trevino*.¹²³

Martinez and *Trevino* also provide support to state prisoners who want to supplement IATC claims that were previously raised in state post-conviction proceedings but were not adequately supported due to their *pro se* status or the ineffective representation of a post-conviction attorney. If equitable concerns permit state prisoners to bypass a complete failure to raise IATC counsel claims, they certainly should permit prisoners to supplement a claim that was improperly raised by an ineffective

¹¹⁹ See Alper, *supra* note 115 (arguing that *Martinez* and *Maples* might be first steps toward a constitutional right to post-conviction counsel); Wiseman, *supra* note 99, at 992-1005 (arguing that prisoners who don't get full factual development in the state may have claims under the Suspension or Due Process Clauses).

¹²⁰ It is, of course, important to be careful when analogizing between doctrines that litigants do not ratchet up the required showing that petitioners have to make to pass through equitable gateways. For example, some courts have held that "good cause" to justify use of the stay and abeyance procedure requires a lower threshold showing than "cause" would in the procedural default context. See, e.g., *Jackson v. Roe*, 425 F.3d 654 (9th Cir. 2005).

¹²¹ 566 U.S. 1 (2012).

¹²² 569 U.S. 413 (2013).

¹²³ See *Grissette v. Westbrook*, 2013 WL 494093 (M.D. Tenn. Feb. 8, 2013) (applying *Martinez* and *Maples* to equitable tolling but finding no *Strickland* prejudice to warrant tolling in the instant case); see also *Harper v. Ercole*, 648 F.3d 132 (2d Cir. 2011) (noting that the extraordinary circumstances requirement in equitable tolling doctrine "refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period"); Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071, 2164-68 (2014). But see *Lombardo v. United States*, 860 F.3d 547, 557-58 (7th Cir. 2017) (recognizing the force of the argument that *Martinez* applies to equitable tolling, but refusing to do so because of the tension it would create with the Supreme Court's statements that garden variety claims of neglect do not warrant equitable tolling).

post-conviction attorney or a *pro se* prisoner who never supported the claim with factual evidence.¹²⁴

More generally, when faced with section 2254(d)'s deferential standards of review and section 2254(e)(1)'s presumption of correctness on factual determinations, habeas litigants should try to expand the equitable inroads that some circuits have already created. Litigants should argue that the state processes were sufficiently inadequate that the state court decision should not be considered an adjudication on the merits or the factual findings underlying the state court determination should be deemed unreasonable and the resulting determination not subject to deference. Once out of the constraints of Section 2254(d), petitioners should rely on *Michael Williams v. Taylor*¹²⁵ to contend that they were not at fault for failing to develop the facts in state court and argue for federal evidentiary hearings to expand their factual records.

State prisoners who are factually innocent should also rely on federal courts' desire to prevent miscarriages of justice to expand equitable bypasses around the restrictive section 2254(d) standards. Federal courts will be more likely to recast a claim predicated on new evidence as a new claim, not subject to AEDPA deference, when the new claim reveals that an innocent person was wrongly convicted. They might be more likely to say that the state courts never actually adjudicated the claim or that the state factfinding procedures were unreasonable under section 2254(d)(2) if doing so will permit them to redress a miscarriage of justice.

State prisoners should also focus on expanding existing factual innocence gateways to include legal innocence (where the defendant is not guilty of the charged offense even if he might be guilty of some wrongdoing)¹²⁶ and non-capital sentencing innocence (where the defendant is not eligible for an enhanced sentence but the state erroneously believed that he was).¹²⁷

These are just a few examples of ways that federal courts and litigants could rely on the equitable strands within the habeas doctrinal morass to open the federal courthouse doors to more state prisoners' claims. If litigants situate their arguments in the language, history, and evolution of equitable doctrines about ensuring fair state process and preventing the conviction of innocents, they are more likely to get robust federal habeas review while simultaneously catalyzing states to provide more realistic opportunities for state prisoners to present their federal claims in state court. It will not solve all the problems with the current structure of federal habeas review of state court criminal convictions, but it is a start.

¹²⁴ See, e.g., *Gregg v. Raemisch*, 2018 WL 447351 (D. Colo. 2018) ("It would not serve the equitable rationale of *Martinez* to conclude that the state court's decision that [the defendant's] inartfully pled *pro se* claim was 'vague and conclusory' constituted a decision on the merits."); see also *supra* notes 99-103. Once out of the constraints of section 2254(d), state prisoners with underdeveloped factual records due to ineffective post-conviction counsel should rely on *Martinez* to contend that they are not at fault for the failure to develop the record and thus should get an evidentiary hearing. See, e.g., *Jones v. Ryan*, 2017 WL 264500, at *19 (D. Ariz. Jan. 20, 2017) (holding that when a state prisoner's "procedural default is excused under *Martinez*, he is by extension not at fault for failing to develop the claim under § 2254(e)(2)").

¹²⁵ *Williams*, 529 U.S. at 420.

¹²⁶ See Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018).

¹²⁷ See *Dretke v. Haley*, 541 U.S. 386 (2004) (granting certiorari on this question but resolving the case on other grounds).

ABOUT THE AUTHOR

Eve Brensike Primus is Professor of Law at University of Michigan Law School where she teaches Criminal Law, Criminal Procedure, Evidence, and Habeas Corpus, and writes about structural reform in the criminal justice system. Her scholarship has been cited by the U.S. Supreme Court as well as lower appellate courts. She has won the L. Hart Wright Award for Excellence in Teaching on more than one occasion and is the founder and director of the Law School's MDefenders organization—a group designed to educate and support aspiring public defenders. Before joining the Michigan Law faculty, she worked in the Maryland Office of the Public Defender as a trial attorney and appellate litigator, appearing several times before the state's highest court. Primus has given legislative testimony and helped draft proposed legislation on criminal justice issues. She clerked for the Hon. Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. Primus holds a B.A., *magna cum laude*, from Brown University and a J.D., *summa cum laude*, from Michigan Law.

The Detention and Forced Medical Treatment of Pregnant Women: A Human Rights Perspective*

Cynthia Soohoo and Risa E. Kaufman

On October 26, 2017, the Seventh Circuit heard oral argument in *Loertscher v. Anderson*,¹ a case that asks how far a state can go in restricting a woman's constitutional rights under the guise of protecting the fetus that she carries. The case challenges a Wisconsin law that allows the state to take a pregnant woman into the custody of child protective services in order to protect her "unborn child,"² from "the time of fertilization to the time of birth," based on a concern that the threat of the woman's future use of alcohol or controlled substances poses a "substantial risk" to the physical health of the "unborn child."³ Wisconsin's law is unique in that it places a woman in the custody of child protective services. Several other states allow or promote similar use of their civil commitment laws to detain pregnant women.⁴ And a county prosecutor in Montana recently announced a "crackdown policy," pledging civil prosecution and incarceration of pregnant women suspected of non-medically proscribed use of drugs or alcohol.⁵

The *Loertscher* case came to the Seventh Circuit after the district court granted summary judgment to plaintiff Tamara Loertscher, finding the Wisconsin statute

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¹ *Loertscher v. Anderson*, 259 F. Supp. 3d 902 (D. Wis. 2017).

² See WIS. STAT. ANN. § 48.133 (2016) (granting the court jurisdiction over "unborn children" allegedly in need of protection or services); see also *Loertscher* 259 F. Supp. 3d at 905-6 (explaining that the Wisconsin Act 292 extended existing child welfare law to allow a county social services department to determine that unborn fetuses are children need of protective services).

³ See WIS. STAT. ANN. § 48.133; see also *Loertscher*, 259 F. Supp. 3d 918 (interpreting Wisconsin's Act 292 to include a jurisdictional standard for ordering protective services for unborn child which consists of a two-prong test of whether 1) the expectant mother severely and habitually lacks self-control in the use of controlled substances, and 2) whether the lack of self-control poses a substantial risk to the physical health of the child).

⁴ In addition to Wisconsin, there are four other U.S. states with explicit statutory provisions that target pregnant women suspected of alcohol or substance abuse for unique treatment under civil detention schemes. See *infra* notes 18 and 19 and accompanying text (describing other commitment schemes).

⁵ Briana Monte, *Big Horn County Attorney Cracking Down on Pregnant Drug, Alcohol Users*, KULR (Jan. 12, 2018, 11:14 AM), <http://www.kulr8.com/story/37253594/big-horn-county-attorney-cracking-down-on-pregnant-drug-alcohol-users>.

void on vagueness grounds, and enjoined enforcement of the law.⁶ In addition to vagueness, Loertscher raised substantive and procedural due process, First and Fourth Amendment, and equal protection claims. The district court recognized that the statute implicated the constitutional rights to be free from physical restraint and coerced medical treatment,⁷ but rested its holding solely on vagueness grounds and did not reach “the other difficult constitutional questions.”⁸ The district court denied a motion to stay the injunction pending appeal,⁹ but in July 2017, the U.S. Supreme Court granted Wisconsin’s application to stay enforcement of the injunction pending the Seventh Circuit’s review.¹⁰

Although the Seventh Circuit also may not reach the constitutional questions raised in *Loertscher v. Anderson*, because of the human rights concerns raised by the Wisconsin law, this Issue Brief provides an overview of relevant international human rights law and standards that should inform the Seventh Circuit’s consideration of the constitutional issues as well as other courts and legislatures considering the wisdom of similar civil commitment schemes. In particular, this Brief discusses the rights to be free from arbitrary detention and forced medical treatment and to privacy in personal medical information, which are universally recognized and protected by human rights law.

I. CIVIL DETENTION LAWS TARGETING PREGNANT WOMEN

The statute at issue in *Loertscher*, 1997 Wisconsin Act 292 (“Act 292”), authorizes Wisconsin’s juvenile courts to treat a fertilized egg, embryo, or fetus at any gestational stage as a child in need of protection or services if a pregnant woman:

habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.¹¹

The true practical scope of the law is not immediately clear from its language. The descriptors used in the statute, though numerous, provide little guidance as to the circumstances that trigger jurisdiction.¹² Once a court has asserted jurisdiction,

⁶ *Loertscher*, 259 F. Supp. 3d at 906. Tammy Loertscher is represented by National Advocates for Pregnant Women, the NYU Reproductive Justice Clinic, and the law firm Perkins Coie.

⁷ *Id.* at 915.

⁸ *Id.* at 906.

⁹ *Loertscher v. Anderson*, 2017 WL 2198193 (May 18, 2017).

¹⁰ *Anderson v. Loertscher*, 137 S.Ct. 2328 (July 7, 2017).

¹¹ WIS. STAT. ANN. § 48.133 (2016).

¹² The district court ruled that Act 292’s language is unconstitutionally vague because it lacks a reasonably comprehensible standard that would put women on notice of the law, and the terms “substantial risk,” “habitual lack of self-control,” and “danger to the unborn child” are ambiguous and undefined. *Loertscher*, 259 F. Supp. 3d at 918-20, 921 (“An expectant mother who does not maintain complete sobriety simply cannot know when she would be subject to the Act. There is no way for her to know what type of behavior demonstrates a habitual lack of self-control to a severe degree in the eye of the enforcer, much less whether behavior *prior to pregnancy* may end up being sufficient to trigger the Act’s control over her once she conceives....”).

it may order that a pregnant woman be detained in an inpatient drug treatment center, forcing her to leave her home and family and undergo unwanted and potentially unnecessary medical treatment.¹³ The Act also allows the state to obtain confidential medical information without the woman's consent.¹⁴ Further, the Wisconsin law authorizes the court to appoint a guardian ad litem for the fetus to "advocate for" and "[m]ake clear and specific recommendations to the court concerning the best interests of the ... unborn child at every stage of the proceeding."¹⁵ In contrast, a woman who qualifies for appointed counsel is not entitled to representation at the initial plea hearing and may be held in custody for up to 30 days before counsel is appointed.¹⁶ And even though the law is a part of the civil child welfare scheme rather than a criminal law, if the woman fails to comply with the court's order, she may be held in contempt and incarcerated.¹⁷

In addition to Wisconsin, there are four other U.S. states—Minnesota, North Dakota, Oklahoma and South Dakota—with explicit statutory provisions that target pregnant women suspected of alcohol or substance use for unique treatment under civil detention schemes. Rather than giving the juvenile court jurisdiction over pregnant women under their child protection laws, some states have added a special provision concerning pregnant women within the definition of persons who can be detained under their civil commitment schemes.¹⁸ Others have provisions that allow

¹³ Under § 48.347 of Act 292, if a judge finds that a pregnant woman is in need of treatment, then that judge must order a treatment plan including counseling, supervision, and placements. The statute ostensibly limits a court's authority to order pregnant women to involuntary treatments to situations in which "the court finds that the adult expectant mother is refusing or has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her." WIS. STAT. ANN. § 48.347 (2016) (authorizing court to order inpatient alcohol or drug treatment); *see also* WIS. STAT. ANN. § 48.193 (2016) (enumerating the circumstances under which a pregnant woman may be taken into physical custody); WIS. STAT. ANN. § 48.205(1m) (2016) (providing criteria for holding a pregnant woman in physical custody, including the requirement that intake workers have "probable cause" for believing that the pregnant woman poses a "substantial risk of physical harm to her unborn child due to her habitual lack of self-control and refusal of services"). However, because the statute is vague as to when treatment is needed and how the appropriate level of treatment is ascertained, such a limitation provides little protection to women who may have a variety of reasons to "refuse" care, including that it is not appropriate or acceptable, or that they have other concerns such as employment or childcare that the recommended treatment fails to accommodate.

¹⁴ WIS. STAT. ANN. § 48.981(2)(d) (2016) ("Any person, including an attorney, who has reason to suspect that an unborn child has been abused or who has reason to believe that an unborn child is at substantial risk of abuse may report..."); WIS. STAT. ANN. § 905.04(4)(e)(3) (2016) (stating that information regarding child abuse or neglect is not protected under the general rule of privilege for communications and information used in the diagnosis and treatment of a patient); *see also* WIS. STAT. ANN. § 48.981(4) (2016) (providing immunity from liability for any person or institution who makes a "good faith" report that an expectant mother is abusing her unborn child); WIS. STAT. ANN. § 48.981(2) (2016) (healthcare providers are mandated reporters of child abuse).

¹⁵ WIS. STAT. ANN. § 48.235(3)(b) (2016).

¹⁶ WIS. STAT. ANN. §§ 48.30 (1) & (2), 48.305 (2016).

¹⁷ Under WIS. STAT. ANN. § 785.04, imprisonment is a permissible remedy for contempt of court as defined in § 785.01(1) (b, bm, br, c, d); *see also* WIS. STAT. ANN. § 785.01(1)(b) (defining contempt of court as certain intentional acts, including disobedience or resistance to a court order, authority, or process).

¹⁸ MINN. STAT. § 253B.02 Subd. 2 (2016) (separate definition for pregnant women under chemically dependent person). *See also* S.D. CODIFIED LAWS § 34-20A-63 (2016) (amended the state's Treatment and Prevention of Alcohol and Drug Abuse scheme in 1998 by adding "is pregnant and abusing alcohol or drugs" to grounds for emergency commitment).

authorities to trigger an involuntary commitment proceeding for a pregnant woman to protect an “unborn child.”¹⁹

The impact of these laws on women’s lives is real and substantial, as the facts of the *Loertscher* case illustrate. In 2014, Tammy Loertscher suspected that she was pregnant and sought health care through the local county health department.²⁰ The department referred Loertscher to the Mayo Clinic Hospital emergency room, where she explained that she wanted to find out if she was pregnant, that she needed medical and psychiatric care for a severe untreated thyroid condition, and that she wanted to make sure her baby was healthy.²¹ Loertscher was asked to provide a urine sample, which confirmed her pregnancy and revealed “unconfirmed positives” for methamphetamine, amphetamine, and THC. Ms. Loertscher was voluntarily admitted for overnight treatment in the Mayo Clinic Behavioral Health Unit.²² The next morning, she was diagnosed with dangerously low thyroid levels that threatened her pregnancy and given medication to stabilize her hormone levels.²³

In interviews with several physicians, Loertscher stated that, due to lethargy associated with her thyroid condition, she had been self-medicating with marijuana and methamphetamine and had used small amounts of alcohol before she knew she was pregnant.²⁴ While the fetus appeared to be healthy in an ultrasound, Loertscher was concerned about its health and told emergency room doctors that she wanted to stop using drugs and obtain treatment for her thyroid dysfunction.²⁵ A social worker reported her to Taylor County Human Services for using controlled substances and alcohol during her pregnancy.²⁶ Loertscher was prohibited from leaving the hospital, and a guardian ad litem was appointed to represent her fetus.²⁷

In the days following, Loertscher was summoned to a telephonic Temporary Physical Custody hearing in a hospital conference room where she was presented with legal documents that she did not understand and stated that she did not want to take part in the proceeding without legal representation.²⁸ She left the room, but the hearing continued; in her absence, the court ordered that she be placed in an inpatient drug facility.²⁹

Loertscher did not want inpatient treatment, preferring instead to continue the medications for depression and hypothyroidism and seek care on an outpatient basis.³⁰ Her treating physician determined that she was not “an imminent danger to herself or others” and discharged her, noting that the fact that she had “used in [t]he past does not mean she will again.”³¹

¹⁹ OKLA. STAT. tit. 63, § 1-546.5 (2016). See also N.D. CENT. CODE § 50-25.1-18 (2016) [Prenatal Exposure to Alcohol Abuse] and § 50-25.1-16 (2016) [Prenatal Exposure to Controlled Substances].

²⁰ *Loertscher v. Anderson*, 295 F. Supp. 902, 909 (D. Wis. 2017).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* Loertscher was unable to afford thyroid medication because she lost her job and health insurance several months prior to her pregnancy. *Id.* at 908.

²⁵ *Id.* at 909.

²⁶ *Id.*

²⁷ *Id.* at 910.

²⁸ *Id.*

²⁹ *Id.* at 911.

³⁰ *Id.*

³¹ *Id.*

Despite the discharge by her treating physician, the guardian ad litem and Taylor County Human Services brought contempt proceedings against Loertscher for failing to report to the inpatient facility.³² At a subsequent contempt hearing where Loertscher again did not have legal representation, the court ordered that she submit to inpatient treatment or serve 30 days in jail.³³ Loertscher spent 18 days in jail where she was denied prenatal care and placed in solitary confinement.³⁴ While in jail, she finally found a list of Taylor County public defense attorneys.³⁵ She called the number listed and was appointed a public defender.³⁶ Pursuant to her attorney's advice, Loertscher signed a consent decree mandating that she submit to weekly drug testing at her own expense and release her medical records to Taylor County Human Services, after which she was released.³⁷ For the next several months, with no help from the social services authorities, she tested negative for all controlled substances.³⁸ In January of 2015, she gave birth to a healthy baby boy.³⁹

II. THE RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW TO CIVIL COMMITMENT SCHEMES

The United States is a party to human rights treaties that impose international legal obligations requiring it to protect individuals from arbitrary detention and forced medical treatment and to respect the right to confidential medical information.⁴⁰ These obligations require that the U.S. respect and ensure that women enjoy these fundamental rights on an equal basis with men.⁴¹ Core human rights treaties ratified by the U.S., including the International Covenant on Civil and Political Rights (ICCPR)⁴² and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁴³ contain specific provisions implicated by civil laws designed to detain and involuntarily treat pregnant women based on a perceived threat of future substance abuse. In addition, the U.S. has signed but not ratified other treaties that safeguard these rights, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)⁴⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁵ as well as the American

³² *Id.* (recounting that, on August 11, 2014, the guardian ad litem for Loertscher's fetus "filed a motion for remedial contempt against Loertscher in the Circuit Court for Taylor County, requesting that the court hold Loertscher in contempt pursuant to WIS. STAT. § 785.04 if she did not comply with the terms of the temporary physical custody order (i.e., inpatient drug treatment)."

³³ *Id.* at 912.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 913.

⁴⁰ See e.g., International Covenant on Civil and Political Rights, arts. 7, 9, 17, *opened for signature* Dec. 19, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter the ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

⁴¹ CAT, *supra* note 40 at arts. 2 and 3.

⁴² ICCPR, *supra* note 40.

⁴³ CAT, *supra* note 40.

⁴⁴ Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁴⁵ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

Convention on Human Rights (American Convention on Human Rights).⁴⁶ Under international law, the United States has an obligation not to act in ways that would defeat the object and purpose of treaties it has signed, even if not yet ratified.⁴⁷

U.S. courts often look to international human rights norms for guidance in analyzing constitutional claims. International law and the reasoning of international and regional human rights bodies and experts can provide a useful perspective for courts to consider, particularly when dealing with novel legal issues. For example, in *Graham v. Florida*, a case challenging the practice of sentencing juveniles to life in prison without the possibility of parole, the Supreme Court continued its “longstanding practice” of looking “beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.”⁴⁸ As Justice Breyer has stated, the experience of respected international bodies and courts can “cast an empirical light on the consequences of different solutions to a common legal problem.”⁴⁹ Policymakers, too, increasingly look to international human rights standards in assessing policy and practice.⁵⁰

III. HUMAN RIGHTS STANDARDS ON THE DETENTION AND INVOLUNTARY TREATMENT OF PREGNANT WOMEN

State civil commitment laws authorizing states to detain pregnant women to prevent future substance abuse violate core human rights principles. Specifically, these laws violate universally recognized and protected rights to be free from arbitrary detention and forced medical treatment and the right to privacy in personal medical information. In considering the scope and content of these rights, human rights bodies have emphasized the importance of incorporating a gender perspective to ensure that physical differences between women and men, such as the capacity to be pregnant, as well as stereotypical attitudes about women’s ability and right to make their own health care decisions, do not undermine women’s equal enjoyment of human rights. Human rights bodies have explicitly rejected the idea that fetal interests can be considered separately from, or promoted to the detriment of,

⁴⁶ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁴⁷ See Vienna Convention on the Law of Treaties, art. 18(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁴⁸ *Graham v. Florida*, 560 U.S. 48, 80 (2010). See also *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision and a special committee report to the British Parliament in holding that Texas law criminalizing consensual sexual conduct between same-sex partners was at odds with norms of Western civilization); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to international disapproval of the practice of executing developmentally disabled individuals, as detailed in the filing of amicus European Union).

⁴⁹ *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (supporting Justice Stevens’ dissent by arguing that looking to the federalist systems of other countries might provide insight into the question of whether U.S. constitutional law permits Congress to impose an obligation on state governments). See also Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT’L L.* 1, 11–88 (2006) (cataloging the ways in which the Supreme Court has drawn on foreign and international law in cases throughout its history).

⁵⁰ See, e.g., Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 *BRINGING HUMAN RIGHTS HOME* 127 (Cynthia Soohoo et al. eds., 2008); BARBARA M. OOMEN, MARTHA F. DAVIS & MICHELE GRIGOLO, *GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES* (2016); COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, *BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY* (2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf>.

pregnant women.⁵¹ And human rights standards emphasize that pregnant women must be treated with dignity and respect.⁵²

A. PROHIBITIONS ON ARBITRARY DETENTION

1. *Applicable Human Rights Law*

In *Loertscher*, the District Court recognized that involuntarily detaining a pregnant woman for drug treatment implicates her constitutional right to be free from physical restraint.⁵³ International law also unequivocally prohibits arbitrary detention because it violates an individual's right to liberty and freedom from physical restraint.

The International Covenant on Civil and Political Rights, a core human rights treaty ratified by the United States, protects against arbitrary arrest or detention by ensuring that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."⁵⁴ The right to be free from arbitrary detention is so universally recognized that it rises to the level of customary international law⁵⁵ and has been recognized in some contexts as a *jus cogens* norm.⁵⁶

International treaties and human rights bodies and experts have emphasized that any detention, whether civil or criminal, must be reasonable and proportionate and ensure full due process protections. The U.N. Human Rights Committee, which monitors implementation of the ICCPR, has explained that a detention authorized by law may still be arbitrary if it is inappropriate, unjust, lacks predictability, or fails

⁵¹ International human rights law recognizes the right to life as a fundamental right, which does not accrue until birth, and international and regional human rights bodies and domestic courts have established that any state-imposed prenatal protections must be consistent with woman's human rights. See CTR. FOR REPRODUCTIVE RIGHTS, WHOSE RIGHT TO LIFE? WOMEN'S RIGHTS AND PRENATAL PROTECTIONS UNDER HUMAN RIGHTS AND COMPARATIVE LAW (2014), https://www.reproductiverights.org/sites/ctr.civicactions.net/files/documents/GLP_RTL_ENG_Updated_8%2014_Web.pdf; see also AMNESTY INTERNATIONAL, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA (May 2017), <https://www.amnesty.org/en/documents/amr51/6203/2017/en/>. ("No international human rights body has ever recognized a fetus as a subject of protection under the right to life...").

⁵² HRC, GC 28, Human Rights Committee, *General Comment No 28: Article 3 (The equality of rights between men and women)*, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 29, 2000) [hereinafter HRC, GC 28].

⁵³ See *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 915-6 (D. Wis. 2017), *Reno v. Flores*, 507 U.S. 292, 315-16 (1993) (O'Connor, J., concurring) (recognizing that a person's "core liberty interest" is not limited to the criminal context and includes confinement in other custodial institutions).

⁵⁴ ICCPR, *supra* note 40, at art. 9(1).

⁵⁵ Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(c)(2) (1987) [hereinafter Restatement (Third): Foreign Relations Law]; see, e.g., *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (stating that a "clear international prohibition" exists against prolonged and arbitrary detentions); *De Sanchez v. Blanco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (listing "the right not to be arbitrarily detained" among the small group of "basic rights" that have been "generally accepted"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.").

⁵⁶ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 51, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012) [hereinafter WGAD, Deliberation No. 9]. See Restatement (Third): Foreign Relations Law § 702 (listing the prohibition on "arbitrary detention" as a customary international law norm) (emphasis added). A *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention*, *supra* note 47 art. 53; see also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

to provide due process as well as lacks essential elements of reasonableness, necessity, and proportionality.⁵⁷ Further, human rights law emphasizes that the state should make less restrictive alternatives available before involuntarily detaining someone.⁵⁸ Involuntary detention should always be a last resort and used for the shortest appropriate period.⁵⁹

The Human Rights Committee has recognized that involuntary hospitalization, in particular, may constitute arbitrary detention. In the context of involuntary hospitalization, “deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.”⁶⁰ According to the U.N. Working Group on Arbitrary Detention,⁶¹ compulsory detention for the purpose of drug rehabilitation is “contrary to scientific evidence and inherently arbitrary,” and drug use or dependence alone “is not sufficient justification for detention.”⁶² An involuntary hospitalization scheme also must be predictable and provide due process protections to ensure that it is fairly applied to a specific individual.⁶³ Predictability requires that the statute cannot be so vague that it fails to provide notice of what is prohibited.⁶⁴

Human rights law requires that basic due process protections be provided when the state seeks to deprive individuals of their liberty. It provides that anyone deprived of liberty “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention.”⁶⁵ Where the consequences of a nominally civil statute are nearly equivalent to criminal sanctions, human rights law recognizes a right to counsel.⁶⁶ Indeed, the U.N. Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court provide that access to legal counsel shall be provided “immediately after the moment of deprivation of liberty.”⁶⁷ Further, “any determination with respect to the need for treatment [should] be carried out by qualified professionals.”⁶⁸

⁵⁷ U.N. Human Rights Committee, *General Comment No. 35: art. 9*, ¶ 12. U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter “HRC, GC 35”]; *see also*, U.N. Human Rights Committee, *Womah Mukong v. Cameroon*, ¶ 9.8, U.N. Doc. CCPR/C/51/d/458/1991 (July 21, 1994) (stating that the ICCPR’s drafting history “confirms that ‘arbitrariness is to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”).

⁵⁸ HRC, GC 35, *supra* note 57, at ¶ 19.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The U.N. Working Group on Arbitrary Detention is composed of independent human rights experts who investigate alleged instances of arbitrary deprivation of liberty.

⁶² U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 59-60, U.N. Doc. A/HRC/30/36 (July 10, 2015) [hereinafter *WGAD Report on Drug Control*].

⁶³ HRC, GC 35, *supra* note 57, at 12.

⁶⁴ *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 915 (D. Wis. 2017) (“Due process requires that a law clearly define its prohibitions”).

⁶⁵ ICCPR, *supra* note 40 at Art. 9(4).

⁶⁶ U.N. Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals to a fair trial*, ¶¶ 9-10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

⁶⁷ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, Guideline 8, U.N. Doc. A/HRC/30/37 (July 6, 2015).

⁶⁸ U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to the United States of America* (Oct. 11-24, 2016) [hereinafter *WGAD, Preliminary Findings on U.S.*].

2. Wisconsin's Act 292 Violates Human Rights Standards on Arbitrary Detention

Civil confinement laws such as Act 292 are not reasonable or proportionate under human rights law and do not provide the adequate procedural safeguards outlined above. Human rights law provides that involuntary detention for medical reasons is only permitted to protect an individual from harm or to prevent immediate injury to others, and a woman's drug use, or even drug dependence, does not justify involuntary detention for drug treatment.⁶⁹

First, civil confinement laws which authorize the detention of pregnant women to prevent future substance use are not reasonable because they do not further their purported goals of maternal and fetal health.⁷⁰ As established by experts in public health, forced treatment undermines health goals because it actually dissuades pregnant women from seeking prenatal care and drug treatment in the first place.⁷¹ The American College of Obstetricians and Gynecologists has stated that "drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus."⁷² As a result, these statutory schemes fail to promote a healthy pregnancy.⁷³

Moreover, civil confinement laws which allow for the confinement of pregnant women suspected of substance abuse are not proportionate because they encompass a pregnant woman's use of a wide range of substances without proof that all, or any of them, actually pose a danger to a developing fertilized egg, embryo, or fetus, or a determination of what level of use is dangerous.⁷⁴ As the district court in *Loertscher* noted, "all agree that medical science can draw no reasonably precise line where consumption levels transition from benign to seriously risky."⁷⁵

Furthermore, civil commitment statutes such as Act 292 violate due process because they are written in a vague manner that fails to provide women with adequate notice of what behavior is prohibited.⁷⁶ The statutes' vagueness and breadth

⁶⁹ See WGAD, *Report on Drug Control*, *supra* note 62, ¶ 59-60.

⁷⁰ As discussed *supra* pp. 6-7, human rights experts have rejected the notion that fetal interests can be considered separately from, or promoted to the detriment of, pregnant women. See *infra* notes 121-123.

⁷¹ American Medical Association, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990); *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 913 (D. Wis. 2017) (noting that some experts find that women may be dissuaded from seeking prenatal care by reporting of substance abuse during pregnancy).

⁷² ACOG Comm. on Health Care for Underserved Women, *Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Jan. 2011), <http://bit.ly/2dBtBo>.

⁷³ Regardless of any possible intentions by government officials to promote maternal and infant health through pregnancy criminalization laws, the women interviewed by Amnesty International reported that the effect of such laws was to deter them from seeking healthcare, prenatal care, and drug treatment. See AMNESTY INTERNATIONAL, *supra* note 51, at 9.

⁷⁴ CENTER FOR THE EVALUATION OF RISKS TO HUMAN REPRODUCTION, REPORT OF THE NTP-DERHR EXPERT PANEL ON THE REPRODUCTIVE & DEVELOPMENTAL TOXICITY OF AMPHETAMINE AND METHAMPHETAMINE 163, 174 (2005); *Loertscher*, 259 F. Supp. 3d at 913.

⁷⁵ *Loertscher*, 259 F. Supp. 3d, at 913.

⁷⁶ See discussion *supra* note 12. Similarly, civil commitment schemes in other states also contain vague and ambiguous terms. See, e.g., MINN. STAT. § 253B.02(2) (2016) (defining a chemically dependent person as "also mean[ing] a pregnant woman who has engaged during the pregnancy in habitual or excessive use, for a nonmedical purpose, of any of the following substances or their derivatives: opium, cocaine, heroin, phencyclidine, methamphetamine, amphetamine, tetrahydrocannabinol, or alcohol"). In South Dakota, being "pregnant and abusing alcohol or drugs" is grounds for involuntary commitment, but the term "abuse" is undefined. S.D. CODIFIED LAWS § 34-20A-70 (2016).

allow arbitrary and unreasonable enforcement by non-medical professionals.⁷⁷ For example, in Wisconsin, intake workers, without medical expertise or credentials, may initiate enforcement proceedings.⁷⁸ In *Loertscher's* case, this resulted in the state issuing an order of temporary custody and mandating treatment, even though her treating physician determined that she was not in imminent danger to herself or others and she did not have a substance use disorder.⁷⁹ *Loertscher* was never offered non-coercive medical treatment and services as an alternative.⁸⁰

In addition, these civil confinement laws often fail to provide the procedural safeguards required under international law, including immediate appointment of counsel and state-appointed experts to examine the individual and provide reliable scientific testimony. For example, under Wisconsin Act 292, a pregnant woman is only entitled to counsel if she is placed outside the home, even if the court order substantially infringes upon her liberty and medical decision-making.⁸¹ A woman who qualifies for appointed counsel is not entitled to representation at the initial plea hearing and may be held in custody for up to 30 days before counsel is appointed.⁸² Expert testimony is not required to prove that a woman “habitually lacks self-control” in the use of alcohol or controlled substances or that there is a substantial risk to the health of the fetus. Even if there were such a requirement, an expert would be able to provide little insight into whether an individual’s drug use is “habitual” or lacking in self-control. In *Loertscher*, the district court noted that Act 292 does not define these terms⁸³ and there was “no support for the notion that a qualified medical expert would understand and be able to apply the concept of ‘habitual lack of self-control.’”

Indeed, international human rights experts have expressed explicit concern that civil statutes that allow detention of pregnant women in order to prevent future substance use may result in arbitrary detention. In October 2016, at the conclusion of its official fact-finding visit to the United States, the U.N. Working Group on Arbitrary Detention highlighted the increasing use of civil laws that allow for the confinement

⁷⁷ The statutory scheme under Wisconsin Act 292 authorizes both law enforcement officers and others to take pregnant women into custody if, in that individual’s judgment, the unborn child is at substantial risk of significant physical harm at birth because of the mother’s habitual lack of self-control. *See, e.g.,* WIS. STAT. § 48.08(3) (authorizing anybody designated by the court to provide intake or dispositional services to act as a police officer or sheriff for the purpose of taking a pregnant woman into custody); *see also* WIS. STAT. § 48.193(1)(d)(2) (authorizing a law enforcement officers to take a pregnant woman into physical custody if they believe on reasonable grounds that this action is necessary to prevent an unborn child from being substantially physically harmed at birth). Other states mandate that certain professionals report pregnant women who are using substances and also allow any person to make voluntary reports. MINN. STAT. § 626.5561(1)(a) and (c) (2016) (mandating reports from certain professionals and allowing “[a]ny person may make a voluntary report” where the professional or the person “knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy”); N.D. CENT. CODE ANN. § 50-25.1-16(1) and (2) (West 2016) (authorizing mandatory and voluntary reporting of where there is knowledge or reasonable cause to suspect a woman is pregnant and “using controlled substances for a non-medical purpose during pregnancy.”); N.D. CENT. CODE ANN. § 50-25.1-18 (West 2016) (stating that a woman may be subjected to reporting if she has “abused alcohol after [she] knows of a pregnancy”).

⁷⁸ WIS. STAT. § 48.205(1m) (2016).

⁷⁹ *Loertscher*, 259 F. Supp. 3d at 911.

⁸⁰ *Loertscher* was not even present at the hearing at which temporary physical custody was ordered. *Id.* at 910-11.

⁸¹ WIS. STAT. § 48.23(2m) (2016).

⁸² WIS. STAT. §§ 48.30 (1) & (2), 48.305 (2016).

⁸³ *Loertscher*, 259 F. Supp. 3d at 919.

and forced medical treatment of pregnant women suspected of substance abuse, including Wisconsin Act 292.⁸⁴ It specifically expressed concern about key aspects of laws like Act 292, including the fact that the laws remove women “from their homes, families and employment” pursuant to procedures that “lack meaningful standards and provide few procedural protections” and “may take place without the mother having legal representation.”⁸⁵ The Working Group emphasized that statutory schemes such as Act 292 “should be replaced with alternative measures that protect women without jeopardizing their liberty.”⁸⁶ At the conclusion of its visit, the Working Group recommended that the U.S. ensure that any confinement of pregnant women takes place voluntarily and provides essential due process guarantees.⁸⁷

B. PROHIBITIONS ON FORCED MEDICAL TREATMENT

The *Loertscher* district court found that coerced medical treatment implicates constitutionally protected liberty interests in privacy and bodily autonomy.⁸⁸ International human rights standards also recognize that forced medical treatment violates an individual’s liberty interests in privacy and bodily integrity.

The right to personal integrity is a key concept of human rights law that is protected both by explicit provisions in human rights treaties and underlying principles of human rights, closely linked with human dignity.⁸⁹ Bodily autonomy and personal integrity, including informed consent for medical treatment, are protected under multiple provisions of human rights treaties, including the right to privacy, the right to health, and the right to be free from torture and cruel, inhuman and degrading treatment (“CIDT”).⁹⁰ In particular, the right to privacy and the right to be free from

⁸⁴ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, ¶ 72, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017).

⁸⁵ *Id.* ¶¶ 73, 74.

⁸⁶ WGAD, *Preliminary Findings on U.S.*, *supra* note 68.

⁸⁷ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, ¶ 94(b), U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017). Similarly, a recent report by Amnesty International examining the unique forms of regulation imposed on pregnant women suspected of substance abuse in the U.S. concluded that, rather than promoting the health and rights of pregnant women, forced state intervention violates women’s human rights and are a mistaken legal response to address individual and public health issues. AMNESTY INTERNATIONAL, *supra* note 51.

⁸⁸ *Loertscher*, 259 F. Supp. 3d at 916. *See also* *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (noting that “[b]ecause any medical procedure implicates an individual’s liberty interests in personal privacy and bodily integrity, the Supreme Court has indicated that there is a “general liberty interest in refusing medical treatment”) (quoting *Cruzan v. Dir., Mi. Dep’t of Health*, 497 U.S. 261, 278 (1990)).

⁸⁹ For instance, the European Court of Human Rights describes “respect for human dignity and human freedom and the notions of self-determination and personal autonomy” as the “very essence” of the European Convention on Human Rights. *Jehovah’s Witnesses of Moscow v. Russia*, App. No. 302/02 Eur. Ct. H.R. at ¶ 135 (2010).

⁹⁰ Because of the relationship between physical integrity and torture and CIDT, the American Convention on Human Rights contains provisions on physical integrity and torture and CIDT in the same article:

Art. 5(1): “Every person has the right to have his physical, mental or moral integrity respected.”

Art. 5(2): “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

American Convention on Human Rights, *supra* note 46, at art. 5.

torture and CIDT are protected by Articles 7 and 17(1) of the ICCPR and Article 16 of CAT. Regional human rights treaties also specifically guarantee these rights.⁹¹

Because the right to decide whether to undergo medical treatment goes to the heart of privacy and bodily integrity,⁹² human rights law prohibits forced medical interventions and requires informed consent for medical treatment, with very narrow exceptions. Thus, ICCPR, Art. 7 explicitly prohibits nonconsensual medical experimentation, and the U.N. Human Rights Committee has repeatedly recognized that nonconsensual medical treatment violates the ICCPR.⁹³ Cases decided by the European Court of Human Rights and the Inter-American Court of Human Rights have also held that forced medical treatment violates the right to privacy and to be free from torture and CIDT,⁹⁴ and that informed consent is essential to respect a

⁹¹ See European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3, 8, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, ETS 5 [hereinafter European Convention on Human Rights] (prohibiting torture and CIDT in Article 3, addressing privacy and family life in Article 8); see also American Convention on Human Rights, *supra* note 46, at arts. 5, 11 (addressing personal integrity in Article 5 and granting a right to privacy in Article 11)). The U.S. has signed (though not yet ratified) the ICESCR and CEDAW, two human rights treaties that recognize the right to health, including a right to autonomous health care decisions. ICESCR, *supra* note 45, at art. 12; CEDAW, *supra* note 44, at art. 12; see also U.N. Comm. on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, GC 14] (stating that right to health includes “the right to control one’s health and body... and the right to be free from interference, such as the right to be free from... non-consensual medical treatment...”); U.N. Comm. on Economic, Social and Cultural Rights, *General Comment 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 10, U.N. Doc. E/C.12/GC/22 (May 2, 2016); U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 24: Article 12 of the Convention (Women and Health)*, ¶ 31(e), U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter CEDAW, GR 24] (stating that women’s health services must respect the “rights to autonomy, privacy, confidentiality, informed consent and choice”).

⁹² The U.N. Special Rapporteur on Health has explained that “guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity.” Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 18, U.N. Doc. A/64/272 (Aug. 10, 2009) [hereinafter SR on Health, Informed Consent Report], see also Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 28, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) [hereinafter SR on Torture Health Care Settings Report] (“Guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services...”).

⁹³ U.N. Human Rights Comm., *Concluding Observations of the Fourth Periodic Report of France*, ¶ 20, U.N. Doc. CCPR/C/FRA/CO/4 (Aug. 17, 2015) (stating that DNA testing should be subject to informed consent); U.N. Human Rights Committee, *Concluding Observations on the Third Periodic Report of Latvia*, ¶ 16, U.N. Doc. CCPR/C/LVA/CO/3 (Apr. 11, 2014) (expressing concern about forced medication in high dosages for adults with mental disabilities); Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of Ireland*, ¶ 11, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014) (expressing concern about performance of symphysiotomy on women without their free and informed consent); Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, ¶ 10, U.N. Doc. CCPR/C/ESP/CO/6 (Aug. 14, 2015) (expressing concern about forced sterilization of persons with disabilities).

⁹⁴ See, e.g., *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. A) No. 329 ¶¶ 256, 270 (Nov. 30, 2016) (holding forced sterilization violates the right to personal integrity, privacy and to be free from torture or cruel, human and degrading treatment under American Convention on Human Rights, Arts. 5.1, 5.2 and 1); *V.C. v. Slovakia*, App. No. 18968/07, Eur. Ct. H.R. ¶¶ 120, 155 (Feb. 8, 2012) (holding forced sterilization violates European Convention on Human Rights, Arts. 3 and 8); *G.B. v. Moldova*, App. No. 16761/09, Eur. Ct. H.R. ¶ 29 (1999) (administering medical treatment against patient’s will interferes with rights under European Convention on Human Rights, Art. 8).

patient's autonomy and dignity.⁹⁵ International treaties and consensus documents on bioethics similarly recognize that human dignity, integrity, and personal autonomy require informed consent for any medical intervention.⁹⁶

Human rights bodies and international health experts have also explicitly found that forced drug treatment violates human rights. The U.N. Special Rapporteur on Torture has stated that "subjecting persons to [drug] treatment or testing without their consent may constitute a violation of the right to physical integrity."⁹⁷ World Health Organization (WHO) guidelines require that drug treatment should not be compulsory and should only be undertaken with informed consent.⁹⁸ The U.N. Special Rapporteur on Health has emphasized that compulsory testing for purposes of drug treatment is counter-productive and that drug dependence should be treated like other health care conditions.⁹⁹ Pregnancy does not change or diminish a woman's right to be free from forced drug treatment. Indeed, the WHO's guidelines on the identification and management of substance use in pregnancy requires prioritizing prevention, ensuring access to affordable prevention and treatment services, respecting patient autonomy, and safeguarding against discrimination and stigmatization.¹⁰⁰

Given the importance of the right to bodily integrity and privacy, forced medical interventions are only justified under human rights law in very limited circumstances. ICCPR, Art. 17 protects against "arbitrary or unlawful interference" with the right to privacy. The Human Rights Committee has emphasized that any state interference with an individual's privacy must be consistent with the "aims and objectives" of the ICCPR and "reasonable in the particular circumstances."¹⁰¹ Similarly, Art. 8 of the European Convention on Human Rights provides that interference with the right to privacy is only justified if it is "in accordance with the law" and "necessary in a democratic society [including] for the protection of health or morals."¹⁰² According to the European Court of Human Rights, necessity implies "interference that corresponds to a pressing social need and ... is proportionate to

⁹⁵ *I.V. v. Bolivia*, *supra* note 94, ¶ 159; *Jehovah's Witnesses of Moscow v. Russia*, *supra* note 89, at ¶136 (stating that "The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to principles of self-determination and personal autonomy").

⁹⁶ The Universal Declaration on Bioethics and Human Rights, Article 6 provides that "Any preventative, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information." UNESCO, *Universal Declaration on Bioethics and Human Rights* arts. 2(c), 3, 5 (2005). Similarly, the Convention on Human Rights, Biology and Medicine, Art. 5 states that "Any intervention in the health field may only be carried out after the person concerned has given free and informed consent to it." Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, art. 1, 4 ETS 164 (Jan. 12, 1999) [hereinafter Convention on Human Rights, Biology and Medicine].

⁹⁷ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/10/44, ¶ 71 (Jan. 14, 2009) [hereinafter SR on Torture Drug Treatment Report].

⁹⁸ WORLD HEALTH ORGANIZATION, GUIDELINES FOR THE PSYCHOSOCIALLY ASSISTED PHARMACOLOGICAL TREATMENT OF OPIOID DEPENDENCE, 9, 15. (2009)

⁹⁹ See SR on Health, Informed Consent Report, *supra* note 92, at ¶ 32.

¹⁰⁰ WORLD HEALTH ORGANIZATION, GUIDELINES FOR THE IDENTIFICATION AND MANAGEMENT OF SUBSTANCE USE AND SUBSTANCE USE DISORDERS IN PREGNANCY (2014), <http://bit.ly/2ejmU2A>.

¹⁰¹ U.N. Human Rights Committee, *General Comment No 16: Article 17 "The Right to Privacy"*, ¶ 4, U.N. Doc. INT/CCPR/CEC/662.E (1988) [hereinafter HRC, GC 16].

¹⁰² European Convention on Human Rights and Fundamental Freedoms, art. 8, *as amended by protocols Nos. 11 and 14*, Nov. 4, 1950, ETS 5.

the legitimate aim pursued.”¹⁰³ In addition, because of the importance of personal integrity and bodily autonomy, the European Court of Human Rights has made clear that due process protections must be provided.¹⁰⁴

Medical treatment without consent cannot be justified even if authorities view treatment as being in the patient’s best interests. In *Jehovah’s Witnesses of Moscow v. Russia*, the European Court of Human Rights rejected an argument that a ban on the activities of Jehovah’s Witnesses was justified because of the group’s adherence to religious beliefs that prohibited blood transfusions. The court emphasized that for freedom to make one’s medical decisions to be meaningful, “patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others.”¹⁰⁵ The court stated that:

In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably lead to a fatal outcome, yet the imposition of medical treatment, with the consent of a mentally competent adult patient, would interfere with a person’s physical integrity in a manner capable of engaging [the right to privacy].¹⁰⁶

To the extent that a state claims an interest in the health of an “unborn child” separate from the pregnant woman, civil confinement laws such as Wisconsin Act 292 are neither reasonable nor proportionate measures to protect that interest and do not provide adequate due process protection. As a threshold matter, and as explained more fully, *infra*, from both a rights and public health perspective, fetal interests cannot be separated from the interests of the women who carry them.¹⁰⁷ Moreover, the U.N. Special Rapporteur on Health has stated that in the public health context, “[a]ny limitations of informed consent must be substantiated by scientific evidence and implemented with participation, transparency and accountability to the principles of gradualism and proportionality.”¹⁰⁸ As discussed in the prior section, Wisconsin, Act 292 is not a reasonable or proportionate approach to further the state’s purported goals of promoting maternal and fetal health. The Act is not substantiated by scientific evidence and does not require expert testimony in specific cases. The statute creates a presumption that all women who use drugs have a substance use disorder, and that inpatient treatment is the most effective means of addressing it. Further, the Act is not reasonable because, rather than promoting healthy pregnancies, it is likely to have the opposite effect since women will be

¹⁰³ *Pretty v. United Kingdom*, App. No. 2346/02, ¶ 70, Eur. Ct. H.R. (Apr. 29, 2002); *V.C. v. Slovakia*, *supra* note 94 at ¶ 139.

¹⁰⁴ *V.C. v. Slovakia*, *supra* note 94 at ¶ 141.

¹⁰⁵ *Jehovah’s Witnesses v. Russia*, *supra* note 89 at ¶ 135. Although this case only involved evidence of adults’ refusal of blood transfusions, a state law designed to protect a minor’s health would be distinguishable from the instant situation for a number of reasons, including: 1) it would involve a separate person (as opposed to a fetus) and 2) overriding a mother’s choice not to consent to treatment for a minor does not infringe upon her own bodily integrity. *See also V.C. v. Slovakia*, *supra* note 94 at ¶ 105.

¹⁰⁶ *Jehovah’s Witnesses v. Russia*, *supra* note 89 at ¶ 135.

¹⁰⁷ *See CTR. FOR REPRODUCTIVE RIGHTS*, *supra* note 51; *see also infra* text and accompanying notes 121-123.

¹⁰⁸ SR on Health, Informed Consent Report, *supra* note 92 at ¶ 31.

deterred from seeking prenatal care and drug treatment and because it fails to provide alternative, less coercive means to promote its objectives.

C. RIGHT TO CONFIDENTIALITY OF MEDICAL RECORDS

Women have a reasonable expectation of privacy in their medical information, and the Fourth Amendment protects the right to be free from nonconsensual searches without a valid warrant.¹⁰⁹ Human rights law and international standards, too, support a patient's right to maintain the confidentiality of medical information.

The World Medical Association's Declaration of Lisbon on the Rights of the Patient requires that "all identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death."¹¹⁰ The right to confidential personal information is protected by the right to privacy under ICCPR Art. 17(1).¹¹¹ The Human Rights Committee has specifically criticized laws that require doctors to report medical information about women, such as information regarding whether they have undergone abortions.¹¹²

In addition to privacy concerns, human rights norms recognize that medical confidentiality is an important component of the right to health because failure to protect patient confidentiality adversely affects patient health and well-being.¹¹³ The Special Rapporteur on Health has noted that "lack of confidentiality may deter individuals from seeking advice and treatment, thereby jeopardizing their health and well-being."¹¹⁴

Civil confinement laws allowing for the detention of pregnant women suspected of substance abuse violate these core human rights protections. Again, the facts of the *Loertscher* case are instructive. When Loertscher was sent to the Mayo Clinic hospital by the county health service to confirm her pregnancy and receive medical care, unbeknownst to her, the medical staff also conducted a drug test. Subsequently, without Loertscher's consent, hospital staff informed the authorities of her pregnancy and positive test for controlled substances, which was used as evidence against her to obtain a court order to detain her and force her into a drug treatment program.¹¹⁵ The county health service then obtained medical records from the clinic, and an obstetrician testified about Loertscher's confidential health information without her consent.¹¹⁶ These facts illustrate the ways in which confidentiality is violated by the civil confinement laws targeting pregnant women suspected of substance abuse.

¹⁰⁹ *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000).

¹¹⁰ World Medical Association, *Declaration of Lisbon on the Rights of the Patient, as revised in 2005 and reaffirmed in 2015*, ¶ 8.

¹¹¹ HRC, GC 16, *supra* note 101 at ¶ 7.

¹¹² HRC, GC 28, *supra* note 52 at ¶ 20.

¹¹³ See CESCR, GC 14, *supra* note 91 at ¶ 12(c) ("All health facilities, goods and services must be... designed to respect confidentiality.").

¹¹⁴ SR on Health, Informed Consent Report, *supra* note 92 at ¶ 40.

¹¹⁵ *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 909 (D. Wis. 2017).

¹¹⁶ *Id.* at 911.

D. WOMEN'S RIGHTS TO EQUAL ENJOYMENT OF FUNDAMENTAL RIGHTS AND NON-DISCRIMINATION

Rather than respecting the dignity, liberty, privacy, and rights to personal integrity of women, civil confinement laws such as Act 292 impose a unique burden on these rights because of women's capacity to become pregnant and because of stereotypical ideas surrounding women's ability to make their own health care decisions. These discriminatory attitudes result in state laws and policies that violate women's fundamental rights to liberty, privacy, and personal integrity and may also give rise to equal protection violations based on gender discrimination.

The U.N. Working Group on Arbitrary Detention has described civil laws that detain pregnant women as a "form of deprivation of liberty [that] is gendered and discriminatory . . . , as pregnancy combined with the presumption of drug or other substance abuse, is the determining factor for involuntary treatment."¹¹⁷ U.N. human rights bodies and experts have repeatedly warned that gender discrimination—and in particular stereotyped views about women—can lead to violations of a woman's rights to make autonomous health decisions and to have the confidentiality of her health information respected.¹¹⁸ They have cautioned that this is particularly the case in reproductive health contexts¹¹⁹ and emphasized that a woman seeking health care "is entitled to be treated as an individual in her own right, the sole beneficiary of the service provided by the health-care practitioner and fully competent to make decisions concerning her own health."¹²⁰

The likelihood of rights violations increases when states adopt the view that fetal interests can be separated from the interests of the women who carry them. This view is flawed from both a rights and public health perspective.¹²¹ The Special Rapporteur on Health has expressed concern that pregnant women can be improperly denied full autonomy in health care settings when states purport to be acting in "the best interests of the unborn child."¹²² Rather than assuming a conflict between a pregnant woman and her fetus, the Special Rapporteur recommends that health care initiatives designed to protect fetal health emphasize counseling and support

¹¹⁷ Report of the Working Group on Arbitrary Detention on its visit to the United States of America, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017), ¶ 74.

¹¹⁸ Committee on the Elimination of Discrimination Against Women, *General Recommendation 34: On the Rights of Rural Women*, ¶¶ 22, 31(e), U.N. Doc. CEDAW/C/GC/32 (Mar. 4, 2016); see also HRC, GC 28, *supra* note 52 at ¶ 20; see also SR on Health, Informed Consent Report, *supra* note 92 at ¶ 54 ("Gender inequities reinforced by political, economic and social structures result in women being routinely coerced and denied information and autonomy in the health-setting").

¹¹⁹ HRC, GC 28, *supra* note 52 at ¶ 20 (expressing concern about spousal authorization laws, requirements that women have a certain number of children before sterilization, and laws requiring doctors to report abortions).

¹²⁰ U.N. Working Group on the issue of discrimination against women in law and practice, *Rep. of the Working Group on the issue of discrimination against women in law and practice*, U.N. Doc. A/HRC/32/44, ¶ 86 (Apr. 8, 2016).

¹²¹ See American College of Obstetricians & Gynecologists, *Refusal of Medically Recommended Treatment During Pregnancy*, ACOG Comm. Op., No. 664 (June 2016) (citing H. Minkoff & M.F. Marshal, *Fetal Risks, Relative Risks, and Relatives' Risks*, 16 AM. J. BIOETHICS 3 (2016) (stating that "questions of how to care for [a] fetus cannot be viewed as a simple ratio of maternal and fetal risks but should account for the need to respects fundamental values, such as the pregnant woman's autonomy and control over her body")); Lisa H. Harris, *Rethinking Maternal-Fetal Conflict: Gender and Equality in Perinatal Ethics*, 96 OBSTETRICS & GYNECOLOGY 786 (2000) (stating that "clinically sound medical practices focus on the mutual interests of pregnant women and their fetuses").

¹²² SR on Health, Informed Consent Report, *supra* note 92 at ¶ 54.

services to “mitigate restrictions of autonomous decision-making of the woman and any potential harmful effects to the child.”¹²³

Human rights law also emphasizes that pregnant women must have appropriate health care services and be treated with dignity.¹²⁴ For example, human rights bodies prohibit solitary confinement of pregnant women.¹²⁵ Yet, rather than promoting pregnant women’s access to health care, civil commitment laws undermine women’s access to prenatal care, by creating a strong disincentive for pregnant women who have used alcohol or controlled substances to seek medical care, and result in punitive and coercive treatment that violates pregnant women’s right to be treated with dignity and respect for their humanity. The *Loertscher* case illustrates how such laws are counter-productive and are implemented in a manner that imposes real harm on women and their pregnancies. Rather than supporting Loertscher’s efforts to have a healthy pregnancy by offering access to appropriate non-coercive, out-patient services, Wisconsin ordered her into the most restrictive treatment option, an inpatient drug treatment facility which would have required her to leave her home and family during her pregnancy. When Loertscher refused to report to the inpatient facility, a court ordered that she serve 30 days in jail. While in jail she was placed in solitary confinement and denied access to prenatal care.

CONCLUSION

Civil commitment laws authorizing states to detain pregnant women to prevent future substance use improperly and unconstitutionally restrict a woman’s right to liberty, privacy, personal autonomy, and non-discrimination. Detention and forced treatment have real-world consequences on pregnant women who are forced to leave their homes, families, and jobs, and thus are also deprived of family and community support and the ability to earn a livelihood.

Under human rights law, any involuntary detention and forced medical treatment scheme must be necessary, reasonable, proportionate, imposed as a last resort, and satisfy due process. Because involuntary detention and forced treatment are inconsistent with the stated goal of promoting maternal and fetal health, statutes such as Wisconsin Act 292 are *per se* unnecessary and unreasonable. To the extent that a state claims it seeks to promote maternal and fetal health, human rights law emphasizes that the state must provide pregnant women with adequate opportunities and resources to obtain appropriate voluntary treatment prior to considering coercive methods.¹²⁶

Further, human rights standards require that pregnant women be treated with dignity and respect, and not subjected to discrimination. Rather than considering

¹²³ *Id.* at ¶ 60.

¹²⁴ CEDAW, *supra* note 44 at art. 12; *see also* HRC, GC 28, *supra* note 52 at ¶15.

¹²⁵ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

¹²⁶ In the U.S., there is a shortage of substance abuse programs, especially outside of large urban areas. Liz Szabo, *Addiction Treatment Hard to Find, Even as Overdose Deaths Soar*, USA TODAY (May 24, 2015, 2:16 PM), <https://www.usatoday.com/story/news/2015/05/24/addiction-treatment-shortage/27181773/>. Fewer than 2,000 of the 11,000 treatment facilities listed by the Substance Abuse and Mental Health Services Administration include services for pregnant women. *Shortage of Drug Treatment for Pregnant Women Can Endanger Fetuses*, NAT’L COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE (July 14, 2015), <https://www.ncadd.org/blogs/in-the-news/shortage-of-drug-treatment-for-pregnant-women-can-endanger-fetuses>.

fetal interests separately from the women who carry them, human rights bodies emphasize that states seeking to promote healthy pregnancies should adopt measures that maximize maternal well-being and support autonomous health care decision-making by providing meaningful access to health care, including prenatal care and voluntary, non-coercive drug treatment and counseling. Thus, a human rights lens illuminates the fundamental rights violations resulting from Wisconsin Act 292 and other state civil confinement laws targeting pregnant women suspected of substance use.

ABOUT THE AUTHORS

Cynthia Soohoo is a law professor at the City University of New York Law School and co-directs the Human Rights and Gender Justice Clinic. She is an expert on women's human rights, the human rights of youth in conflict with the law, and human rights advocacy in the United States. She supervises the clinic's work on reproductive rights and health, trafficking and youth in the adult criminal justice system. Soohoo served as Director of the U.S. Legal Program for the Center for Reproductive Rights from 2008–2011. From 2001–2007, she was the Director of the U.S. Human Rights program at Columbia Law School's Human Rights Institute and a supervising attorney for the law school's Human Rights Clinic. She graduated from the University of Pennsylvania Law School and clerked for Judge Gerard L. Goettel in the U.S. District Court for the Southern District of New York.

Risa E. Kaufman is the Director of U.S. Human Rights at the Center for Reproductive Rights, where she is responsible for developing and implementing the Center's U.S.-based human rights advocacy strategies to advance the full spectrum of reproductive rights. From 2008-2017, she was the Executive Director of the Columbia Law School Human Rights Institute. She is the co-author of *Human Rights Advocacy in the United States* (with Martha F. Davis and Johanna Kalb) and a lecturer-in-law at Columbia Law School, where she teaches a seminar on U.S. human rights advocacy. Kaufman holds a J.D. from New York University School of Law, where she was a Root-Tilden-Snow scholar. She clerked for Judge Ira DeMent in the U.S. District Court in Montgomery, Alabama.

Preparing for the 2020 Census: Considerations for State Attorneys General*

John H. Thompson & Robert Yablon

State attorneys general must begin now to focus on the looming 2020 Census. Because this decennial event has major implications for every state, and because it presents complex legal and practical issues, it is vital for attorneys general to engage early and to remain engaged in order to represent their states effectively.

While the Census Bureau's last-minute attempt to add a citizenship question to the census, *see* discussion *infra*, has generated significant attention and controversy, it is important not to lose sight of other weighty census-related issues. These include the persistent challenge of reaching certain hard-to-count groups, the potential for technological snags, concerns about privacy and confidentiality, and the difficulty of staffing the census in a tight labor market. State attorneys general and other state and local officials must attend to these issues and work now to ensure that the census properly serves the interests of their jurisdictions.

I. BACKGROUND

A. THE BASICS

The U.S. Constitution requires an "actual Enumeration" of the country's population every decade.¹ The federal government conducted the first of these decennial censuses in 1790, and it is now gearing up for the twenty-fourth installment in 2020.

Counting 300-plus million Americans is no small feat. The census has been called "the federal government's largest and most complex peacetime operation."² Congress has delegated primary responsibility for the census to the U.S. Census Bureau, which resides within the Department of Commerce.³ The Bureau's overarching tasks include identifying all of the places where people may live, using that information to obtain household-level headcounts and other data, and then generating accurate and usable aggregate results. Accomplishing all this requires the Bureau to develop an enormous technological infrastructure; to establish a physical presence in every state and territory; to conduct an extensive integrated advertising and local partnership program; and to recruit, train, and deploy hundreds of thousands of census takers and other staff. The Bureau began planning the 2020 Census even before the 2010 Census was complete, and it has already conducted multiple test runs. Yet much uncertainty remains about exactly how the upcoming census will unfold.

* This Issue Brief was initially published in October 2018.

¹ U.S. CONST. art. I, § 2, cl. 3.

² COMM. ON NAT'L STATISTICS, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE 2000 CENSUS: COUNTING UNDER ADVERSITY 1 (Constance F. Citro et al. eds., 2004).

³ See 13 U.S.C. § 5 (2012).

B. THE STAKES

A lot rides on the census.

First, census results directly affect the distribution of political power at the federal, state, and local levels. The Constitution requires a census for the purpose of apportioning seats in the U.S. House of Representatives.⁴ After the 2010 Census, eighteen states gained or lost congressional representation as a result of changes to their relative populations. Similar shifts are likely after 2020.⁵ Relatedly, census results trigger decennial redistricting obligations for jurisdictions at all levels. To assure that electoral districts remain compliant with constitutionally rooted equal population requirements,⁶ states use census data to redraw the lines for their congressional and state legislative districts. Local governments do the same for their electoral districts. In short, the census is a cornerstone of our democratic system.

Second, census results drive the distribution of federal funds. According to a recent Census Bureau tally, 132 federal programs use census data to allocate funds totaling more than \$675 billion per year.⁷ This funding includes federal dollars that go to states and localities for Medicaid, food assistance, housing assistance, education, highway construction, and much more.⁸ State governments likewise look to census data when distributing state funds among local jurisdictions.

Third, federal, state, and local governments rely on census data as they develop and implement programs in a wide range of areas, including transportation, education, health care, and housing. Private businesses and other organizations use census data for similar planning purposes, including for determining where to invest and where to locate retail establishments, workplaces, and other facilities.

II. LOOKING AHEAD TO 2020—ISSUES AND CONCERNS

To date, one issue related to the 2020 Census has dominated headlines—namely, the Secretary of Commerce’s late-breaking decision on March 26, 2018 to ask all census respondents about their citizenship status.⁹ (The Bureau’s prior approach since 1950 had been to obtain information about citizenship through the American Community Survey, which the Bureau administers to a sample of the population

⁴ See U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

⁵ See KRISTIN D. BURNETT, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>. Arizona, Florida, Georgia, Nevada, South Carolina, Texas, Utah, and Washington each gained at least one representative. Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania each lost at least one representative. *Id.* Based on current population projections, the states most likely to gain congressional seats following the 2020 Census include Arizona, Colorado, Florida, North Carolina, Oregon, and Texas, while the states most likely to lose seats include Illinois, Michigan, Minnesota, Mississippi, New York, Ohio, Pennsylvania, Rhode Island, and West Virginia. See REBECCA TIPPETT, UNC, CAROLINA POPULATION CENTER, 2020 CONGRESSIONAL REAPPORTIONMENT: AN UPDATE (2017), <https://demography.cpc.unc.edu/2017/12/21/2020-congressional-reapportionment-an-update/>.

⁶ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁷ MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.

⁸ *Id.* at 3-7; see also U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE, app. A (“50 Ways Census Data Are Used”), available at <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccg-guide-d-1280.pdf>.

⁹ See Memorandum from Secretary Wilbur Ross to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.

each year.) There are widespread concerns that this citizenship question could drive down response rates among noncitizens. For areas with large immigrant populations, an undercount of noncitizens means losses of political representation and federal funding. In multiple lawsuits, litigants are challenging the inclusion of the citizenship question on both constitutional and statutory grounds.¹⁰

Because the citizenship question is already receiving significant public attention and pushback, it is not the primary focus of this Issue Brief. Instead, this Issue Brief seeks to identify other important issues that have not been as extensively aired. Some of these issues intersect with the citizenship question controversy, and they may become especially consequential if efforts to remove the citizenship question from the census are unsuccessful.

A. UNDERCOUNTING AND INACCURACIES

The controversy surrounding the citizenship question points to broader issues concerning the accuracy of the census. Some subsets of the population are more difficult to count than others. These include non-English speakers and those with limited literacy; the homeless and others with unconventional or unstable living arrangements; groups that tend to be particularly distrustful of the government, such as undocumented immigrants; and those displaced by natural disasters.¹¹

The Census Bureau has long recognized the existence of hard-to-count segments of the population, and it takes various remedial steps. Among other things, the Bureau prints census forms in numerous languages; it attempts to hire field staff with relevant local knowledge and language skills; it uses special protocols to try to reach individuals living in shelters and other group settings; and it engages in extensive community outreach efforts. Yet undercounts have persisted. In particular, past censuses have disproportionately missed racial and ethnic minorities and the economically disadvantaged, as well as urban dwellers and young children.¹²

Demographic shifts and changing societal norms are likely to create an especially challenging environment for the 2020 Census. The United States is more diverse than ever. More than 21 percent of U.S. residents speak a language at home other

¹⁰ See, e.g., *La Unión del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. filed Apr. 3, 2018); *California v. Ross*, 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018).

¹¹ See, e.g., NAT'L ADVISORY COMM. ON RACIAL, ETHNIC, AND OTHER POPULATIONS, ADMIN. RECORDS, INTERNET & HARD TO COUNT POPULATION WORKING GROUP, FINAL REPORT 2 (2016), https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf; Brendan Kearns, *Down for the Count: Overcoming the Census Bureau's Neglect of the Homeless*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 155, 156 (2012).

¹² See, e.g., Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount & Overcount in the 2010 Census (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html (estimating that the 2010 Census undercounted 2.1 percent of the black population, 1.5 percent of the Hispanic population, and 4.9 percent of the population of Native Americans living on reservations, while overcounting the white non-Hispanic population by 0.8 percent); U.S. CENSUS BUREAU, INVESTIGATING THE 2010 UNDERCOUNT OF YOUNG CHILDREN – A NEW LOOK AT 2010 CENSUS OMISSIONS BY AGE 1 (2016), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-report-2010-undercount-children-omissions.pdf> (estimating “a net undercount in the 2010 Census of about 4.6 percent for children aged 0 to 4”); JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 8 (2011), <https://www.census.gov/history/pdf/2010-background-crs.pdf>; Note, *Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, 114 HARV. L. REV. 2502, 2505–06 (2001). The Census Bureau estimates undercounts and overcounts based on post-enumeration surveys and data analysis. See *Coverage Measurement*, U.S. CENSUS BUREAU, https://www.census.gov/coverage_measurement/ (last visited Oct. 1, 2018).

than English (with at least 350 different languages being spoken), and nearly 9 percent of residents self-report that they speak English less than “very well.”¹³ Meanwhile, living arrangements have become increasingly varied.¹⁴ And public trust in government is at a historically low level.¹⁵

There are also concerns that the Census Bureau may be behind in its efforts to develop and implement the processes necessary to enumerate hard-to-count populations accurately in 2020. A recent report from the Government Accountability Office observed that, “[a]side from the inherent difficulties of counting such individuals, the Bureau faces certain management challenges related to its hard-to-count efforts,” including the need to coordinate and adequately staff important operations across the Bureau’s decentralized organizational structure.¹⁶

B. TECHNOLOGY-RELATED ISSUES

The 2020 Census will be far more technologically advanced than previous enumerations. From 1970 to 2010, the Census Bureau mailed paper questionnaires to all U.S. households and asked recipients to complete them and mail them back. Field staff then followed up in person and/or by phone with non-responding households.¹⁷ For 2020, the Census Bureau is shifting for the first time to an internet-first response system for most households. Households will receive a mailer from the Bureau with information about how to complete the census questionnaire online. Households that fail to respond will later receive paper questionnaires and in-person contacts from field staff as necessary.¹⁸

The Bureau is also incorporating new technologies into other aspects of its work. In the past, Bureau employees physically checked every census block to generate a master file of the U.S. addresses to be canvassed. For the 2020 Census, the Bureau is instead relying largely on databases and satellite imagery to carry out this key preparatory step.¹⁹ During the canvassing stage, Bureau field staff will use mobile devices to manage their workflow and collect data from households during in-person visits.²⁰ And the Bureau will use social media and microtargeting techniques as part of its effort to encourage participation.²¹

The Census Bureau’s technological upgrades have important benefits. The shift to an internet-first response system should make it easier for many households to

¹³ See CAMILLE RYAN, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS, LANGUAGE USE IN THE UNITED STATES: 2011 (2013), <https://www2.census.gov/library/publications/2013/acs/acs-22/acs-22.pdf>; Press Release, U.S. Census Bureau, Census Bureau Reports at Least 350 Languages Spoken in U.S. Homes (Nov. 3, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-185.html>.

¹⁴ See JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012 (2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

¹⁵ See *Public Trust in Government: 1958-2017*, PEW RESEARCH CENTER (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

¹⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, 2020 CENSUS: ACTIONS NEEDED TO ADDRESS CHALLENGES TO ENUMERATING HARD-TO-COUNT GROUPS, REPORT TO CONGRESSIONAL REQUESTERS (2018), <https://www.gao.gov/assets/700/693450.pdf>.

¹⁷ See Williams, *supra* note 12, at 3.

¹⁸ See U.S. CENSUS BUREAU, 2020 CENSUS OPERATIONAL PLAN 95-97 (2017) [hereinafter “Operational Plan”], <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>. In areas with low internet connectivity, paper questionnaires will be provided in the first instance, along with information about how to respond online. See *id.*

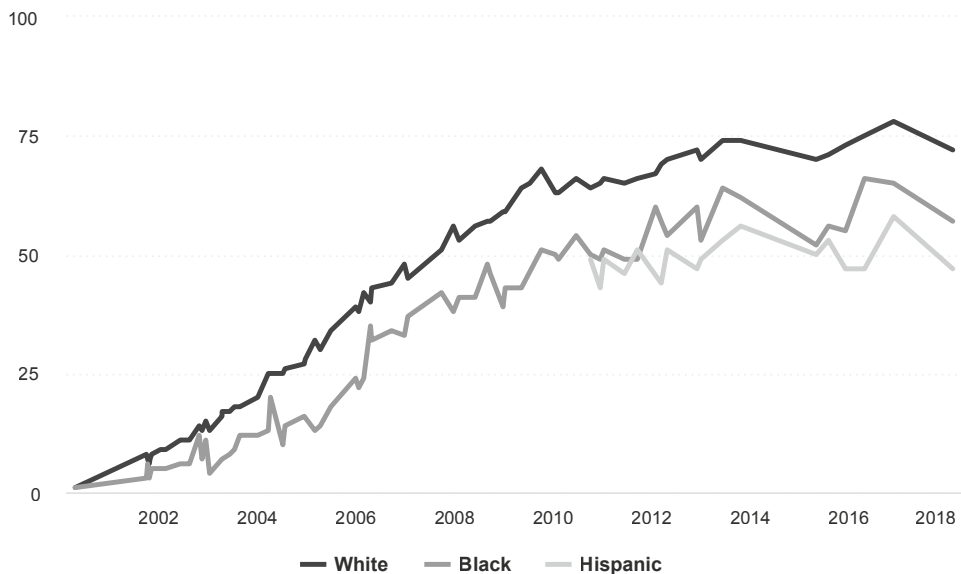
¹⁹ See *id.* at 15-16, 74-79.

²⁰ See *id.* at 26.

²¹ See *id.* at 92-93.

complete the census, and it has the potential to increase efficiency and reduce costs. But that change also gives rise to several concerns. First, it may place those who lack internet access or skills at a disadvantage. In many instances, these will be individuals who are already among the hard-to-count segments of the population. The charts below from the Pew Research Center highlight the significant racial, economic, education, and age disparities in home broadband internet access. Second, as the Bureau has recognized, many people may be reluctant to share data online.²² Their misgivings could reduce overall response rates, which would require more follow-up from the Bureau than anticipated, potentially jeopardizing count quality if employees are stretched too thin. Third, there is the danger that one or more technologies will malfunction with disruptive effect. According to the Government Accountability Office, the Bureau plans to use fifty-two IT systems during the 2020 Census, and some may not be fully tested before being deployed.²³

% of U.S. adults who are home broadband users, by race



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018.

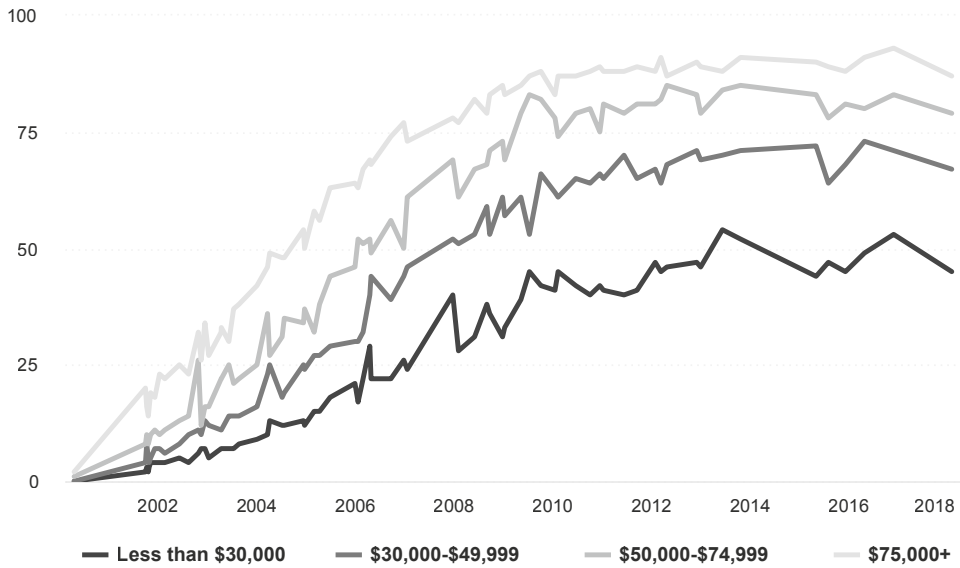
Source: Surveys conducted 2000–2018. Data for Hispanics includes only surveys that included Spanish-language interviews.

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²² See *id.* at 162.

²³ See ROBERT GOLDENKOFF & DAVID A. POWNER, U.S. GOV'T ACCOUNTABILITY OFFICE, 2020 CENSUS: CONTINUED MANAGEMENT ATTENTION NEEDED TO MITIGATE KEY RISKS JEOPARDIZING A COST-EFFECTIVE AND SECURE ENUMERATION, TESTIMONY BEFORE THE SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES, COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES 5-16 (2018), <https://www.gao.gov/assets/700/691316.pdf>.

% of U.S. adults who are home broadband users, by income

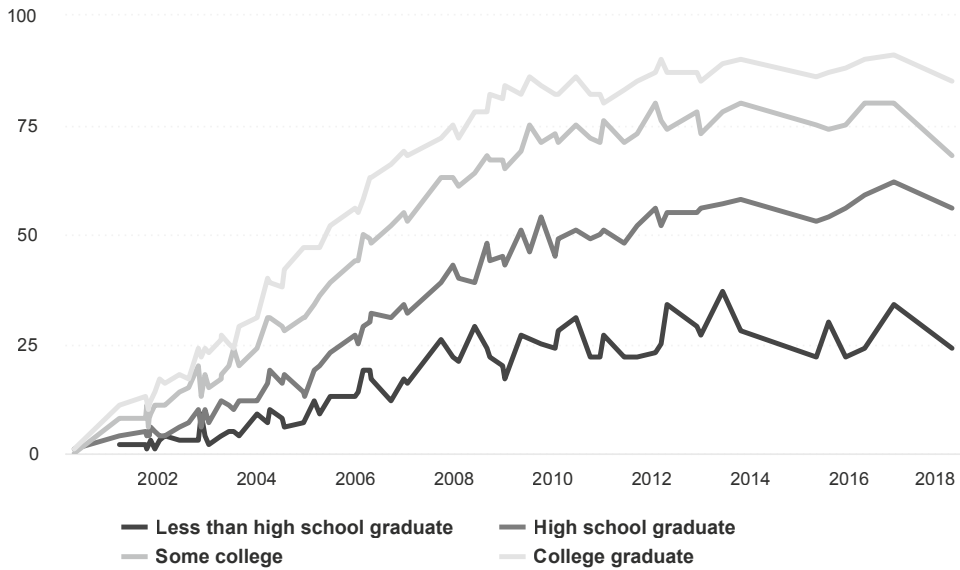


Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018.

Source: Surveys conducted 2000–2018.

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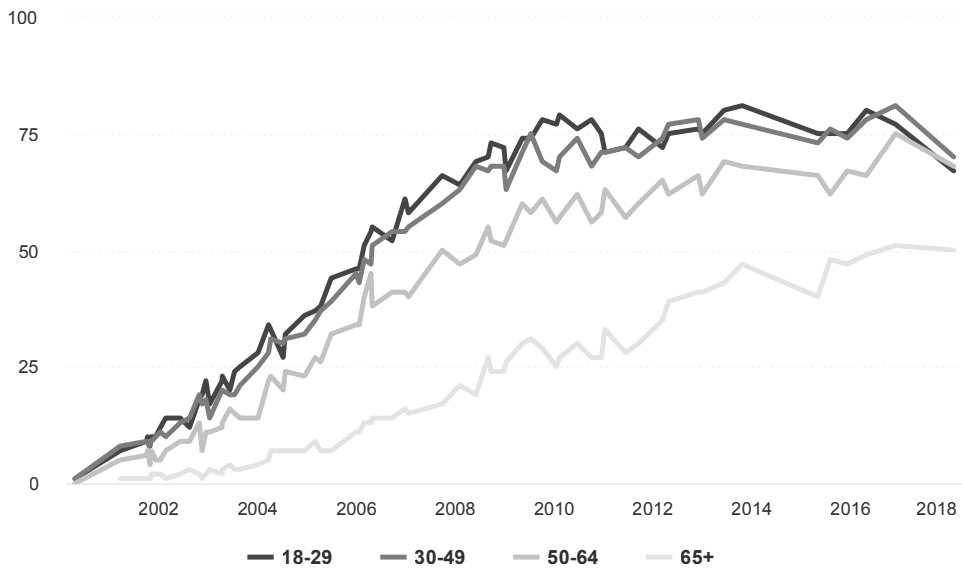
% of U.S. adults who are home broadband users, by education level



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018.

Source: Surveys conducted 2000–2018.

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% of U.S. adults who are home broadband users, by age

Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018.

Source: Surveys conducted 2000–2018.

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C. CONCERNS ABOUT PRIVACY AND CONFIDENTIALITY

The Census Bureau's increasing reliance on technology raises questions about whether the Bureau can and will respect personal privacy and maintain the confidentiality of the information it collects. This is of particular concern given waning public trust in government. These privacy and confidentiality concerns fall into at least two distinct categories. First, some worry that the government itself will misuse census information. Second, there are fears that census data will be vulnerable to hacking and other security breaches. For the Census Bureau and other stakeholders, the challenge is partly about assuring that information is indeed protected and partly about building public confidence. As the Bureau has recognized, even if its systems are secure, a contrary public perception could discourage participation in the census and threaten its accuracy.²⁴

As a formal matter, federal law does establish stringent rules against government misuse of census data. The Commerce Department is barred from using census data "for any purpose other than the statistical purposes for which it is supplied," from releasing information that allows individuals to be personally identified, and from sharing individual-level responses with anyone outside the Department.²⁵ Other

²⁴ See Operational Plan, *supra* note 18, at 134.

²⁵ 13 U.S.C. § 9 (2012).

federal laws, including the Privacy Act of 1974²⁶ and the Confidential Information Protection and Statistical Efficiency Act,²⁷ further constrain the use of personally identifiable census data. Consistent with these enactments, the Bureau pledges that it “will never share a respondent’s personal information with immigration enforcement agencies, like ICE; law enforcement agencies, like the FBI or police; or allow it to be used to determine their eligibility for government benefits.”²⁸ Meanwhile, laws such as the Federal Information Security Modernization Act of 2014²⁹ and the Federal Cybersecurity Enhancement Act of 2015,³⁰ require the Census Bureau to take various steps to minimize cybersecurity risks.³¹

Practically speaking, however, doubts remain about whether the Census Bureau will indeed protect confidentiality and privacy and, as importantly, whether it can assure members of the public that their information is secure. With dozens of IT systems in use and hundreds of thousands of mobile devices deployed to collect data in the field, there will be real risks of loss, theft, or employee misuse.³² Meanwhile, foreign governments and others could target census infrastructure in the same way they have sought to infiltrate and disrupt other systems.³³ And federal agencies could step on each other’s toes. If ICE, for instance, were to conduct immigration enforcement operations proximate to census-related activities, that could well undermine confidence in the privacy of the census and reduce response rates.³⁴ In 2010, the Bureau had an informal understanding with ICE about steering clear of census events, but it is not clear that such an understanding exists this time around.³⁵

Ultimately, the success or failure of the 2020 Census will depend in large part on whether the Bureau, through its advertising and partnership programs, can convince the public—and especially hard-to-count populations—that their information is secure.

²⁶ An Act To Amend Title 5, United States Code, By Adding A Section 552A To Safeguard Individual Privacy From The Misuse Of Federal Records, To Provide That Individuals Be Granted Access To Records Concerning Them Which Are Maintained By Federal Agencies, To Establish A Privacy Protection Study Commission, And For Other Purposes, Pub. L. No. 93-579, 88 Stat. 1896 (1974); 5 U.S.C. § 552a.

²⁷ E-Government Act of 2002, Pub. L. No. 107-347, Title V, 116 Stat. 2899, 2962 (2002); 44 U.S.C. § 3501 note.

²⁸ U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE 3, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccg-guide-d-1280.pdf>.

²⁹ Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 (2014); 44 U.S.C. § 101 note.

³⁰ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division N, Title II, Subtitle B, §§ 221 et seq., 129 Stat. 2242, 2935-2936 (2015); 6 U.S.C. § 1501 note.

³¹ See generally JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., CONFIDENTIALITY PROVISIONS FOR THE 2020 DECENNIAL CENSUS (2018).

³² See Goldenkoff & Powner, *supra* note 23, at 32 (observing that the Bureau “faces considerable challenges and uncertainties in...managing the development and security of IT systems”).

³³ See, e.g., Abby Vesoulis, *Why These Former Cybersecurity Officials Are Worried About the Census*, TIME (July 19, 2018), <http://time.com/5341881/2020-census-cybersecurity-concerns/>.

³⁴ Cf. Maria Sacchetti, *Amid Crackdown, Advocates for Immigrants Say Citizenship Question Will Spook Census-Takers*, WASH. POST (Apr. 16, 2018), https://www.washingtonpost.com/local/immigration/amid-crackdown-advocates-for-immigrants-say-citizenship-question-will-spook-census-takers/2018/04/16/ca2996c4-339d-11e8-8abc-22a366b72f2d_story.html?noredirect=on&utm_term=.82bfead6916d.

³⁵ We have submitted a FOIA request for information about the Census Bureau’s arrangements with immigration officials but have not received a response.

D. STAFFING ISSUES

Notwithstanding the Census Bureau's increased reliance on technology, the Bureau's field staff and other employees remain indispensable to the counting process. In 2010, the Bureau employed more than 600,000 census takers and maintained a dozen regional census centers and nearly 500 area census offices.³⁶ For 2020, the Bureau plans a more streamlined operation, but it will still need to fill hundreds of thousands of positions with qualified workers.³⁷

The current labor market is likely to create staffing challenges. When the 2010 Census was staffed, the United States was recovering from a recession, and the unemployment rate was nearly ten percent.³⁸ Today, the unemployment rate is around four percent. Recognizing this difference, the Bureau is planning an aggressive recruiting campaign, but it may still find itself with fewer qualified applicants than it did a decade ago. Indeed, Bureau officials have reported "smaller applicant pools, declined job offers, and early turnover" during the initial stages of 2020 hiring.³⁹

Making matters more difficult, the Census Bureau will apparently limit its 2020 Census hiring to U.S. citizens.⁴⁰ This marks a shift from the Bureau's past practice. Although most federal hiring is limited to citizens, the Bureau in recent decades requested and received waivers from the federal government's Office of Personnel Management, which allowed the Bureau to hire noncitizens, at least when no qualified citizen was available.⁴¹ In 2010, the Bureau hired nearly 3,500 noncitizens to fill office and field positions.⁴² Because noncitizens may be uniquely well positioned to reach out to immigrant groups and language minorities, the exclusion of noncitizens from the 2020 Census labor pool could hamstring the Bureau's efforts to achieve a complete count.

III. THE ROLE OF STATE ATTORNEYS GENERAL AND OTHER STATE/LOCAL OFFICIALS

Because the stakes are so high, attorneys general cannot afford to ignore the 2020 Census. Instead, they must work proactively to promote their state's interests before, during, and after the count. Given the scale and complexity of the census, the uncertainty surrounding it, and the likelihood of litigation, such engagement is crucial. As an initial step, attorneys general should immediately identify staff members who will become their inside experts on census-related matters—individuals who will make the census a top priority.

Some attorneys general offices are already monitoring and responding to census-related developments, especially with regard to the citizenship question. Attorneys general should similarly monitor other aspects of the Census Bureau's work to ensure

³⁶ Operational Plan, *supra* note 18, at 26.

³⁷ *Id.*; see also Robert Bernstein, *U.S. Census Bureau Needs Hundreds of Thousands of Workers*, U.S. CENSUS BUREAU (July 17, 2018), <https://www.census.gov/library/stories/2018/07/recruiting-for-2020-census.html>.

³⁸ Bernstein, *supra* note 38.

³⁹ U.S. Gov't Accountability Office, *supra* note 16, at 24.

⁴⁰ See Tara Bahrapour, *Non-Citizens Won't Be Hired as Census-Takers in 2020, Staff Is Told*, WASH. POST (Jan. 30, 2018), https://www.washingtonpost.com/local/social-issues/non-citizens-wont-be-hired-as-census-takers-in-2020-staff-is-told/2018/01/30/b327c8d8-05ee-11e8-94e8-e8b8600ade23_story.html?noredirect=on&utm_term=.4150c223d0b7.

⁴¹ *Id.*

⁴² See *id.*

compliance with relevant constitutional, statutory, and regulatory requirements. If the Bureau's conduct appears to run afoul of the law, attorneys general should seek correction from the Bureau and ultimately pursue legal action if the Bureau fails to change course.

Beyond performing these familiar watchdog and litigation functions, attorneys general can pursue their census-related goals through a variety of lesser-known mechanisms. The remainder of this memorandum focuses on these options. It first discusses actions that can be taken through formal Census Bureau channels. It then addresses steps that officials can take independently of the Bureau.

A. PARTICIPATING IN CENSUS BUREAU PROCESSES

The Census Bureau formally invites state and local governments to participate at various stages of the census process. Much of this invited participation is cooperative, with the Bureau looking to state and local stakeholders to assist with census-related activities. In addition, there are opportunities for states and localities to pursue their interests through procedures that are somewhat more adversarial.

At the preparatory stage, the Bureau seeks state and local assistance as it works to generate the address lists and maps that it will use to conduct the census. The Bureau has already invited state and local governments to review the Bureau's initial lists and maps and offer updates or corrections.⁴³ Later, at the data collection stage, the Bureau will give states a further opportunity to supply and review address data and to identify group housing units, such as nursing facilities and dormitories.⁴⁴ By keeping tabs on this process, attorneys general and other state officials (who are often "clients" of the attorney general) can help to ensure that the Bureau has the information it needs to conduct a full count in their jurisdictions.

As the census itself approaches, states and localities can support the Bureau's counting efforts through State Complete Count Commissions and Complete Count Committees (collectively, CCCs).⁴⁵ CCCs are volunteer organizations that states and localities (as well as tribal governments and private citizens) establish to raise awareness of the census and encourage participation.⁴⁶ During the 2010 census, more than 10,000 CCCs operated around the country in partnership with the Bureau.⁴⁷ CCCs can harness local knowledge and identify local issues that the Bureau might

⁴³ See Operational Plan, *supra* note 18, at 80-83. This process is conducted pursuant to the Census Address List Improvement Act of 1994. Census Address List Improvement Act of 1994, Pub. L. No. 103-430, 108 Stat. 4393 (1994).

⁴⁴ See Operational Plan, *supra* note 18, at 131-34. This review occurs through the Federal-State Cooperative for Population Estimates (FSCPE). Each state's governor designates an FSCPE point-of-contact, and the Bureau works with that designee. *Id.*; see also *FSCPE Contacts*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/popest/about/fscpe/contacts.html> (last updated Aug. 22, 2018).

⁴⁵ State Complete Count Commissions (CCCs), which are new for the 2020 census, are similar to but somewhat more formalized than Complete Count Committees, which have existed in prior censuses. Specifically, CCCs enter into formal partnerships with the Census Bureau pursuant to state executive order or legislation. See U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE TRAINING MANUAL (DRAFT) 5, https://uploads-ssl.webflow.com/59fb4f76691c1b000103c309/5ac690b856b2db257820afb2_CCC%20Training%20Manual%20D-1255--draft.pdf.

⁴⁶ U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf>.

⁴⁷ *Id.* at 5; see also, 2020 Census: Complete Count Committees, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/complete_count.html (last updated July 25, 2018).

otherwise overlook. CCCs are already forming to prepare for 2020, and some jurisdictions are directing significant resources toward census outreach.⁴⁸ California's latest state budget allocates more than \$90 million to census-related activities.⁴⁹ Attorneys general and other officials are well positioned to encourage the formation and funding of CCCs. Once CCCs are up and running, officials can seek to support their outreach efforts (or they can participate directly as CCC members). By supplementing the Census Bureau's work in this way, jurisdictions can minimize the likelihood of a damaging undercount.

Once the Bureau's initial enumeration is complete, the Bureau gives states and localities an opportunity to review data and raise challenges to the count. Specifically, the Bureau has a Count Question Resolution process, the details of which have not yet been finalized for 2020.⁵⁰ Attorneys general may want to participate in the Bureau's finalization of this process.

After the 2010 Census, more than 200 post-count challenges were brought, and many resulted in count adjustments.⁵¹ This mechanism, however, is principally a way to correct discrete tallying errors, not to remedy systemic undercounts. Jurisdictions have sometimes brought lawsuits in an effort to address systemic undercounts, but they have had little success.⁵² The reality is that undercounts are difficult to fix after the fact, which is why it is vital for states and localities to try to prevent them from occurring in the first place.

B. ADDITIONAL OPTIONS

Attorneys general and other stakeholders are, of course, free to act independently of CCCs and the Census Bureau. This could simply mean speaking out about the census and coordinating with public and private stakeholders to encourage participation. In addition, attorneys general should consider taking or facilitating at least two other discrete census-related actions.

First, states can adjust their employment laws through legislation or regulation to spur residents to apply to work for the Census Bureau. Attorneys general can draft such measures and counsel governors and lawmakers about them. In 2010, thirty-four states adopted rules allowing Medicaid recipients to take temporary census jobs without having their census wages adversely affect their Medicaid eligibility.⁵³

⁴⁸ See, e.g., Cal. Exec. Order B-49-87 (Apr. 13, 2018), <https://census.assembly.ca.gov/sites/census.assembly.ca.gov/files/4.13.18-Census-Executive-Order.pdf> (establishing the California Complete Count Committee); Ill. Public Act 100-0390 (2017) (establishing the Illinois Complete Count Commission); N.Y. Assembly Bill A9505D, Part OO (enacted Apr. 12, 2018) (establishing New York State 2020 Complete Count Committee); see also *CA Census 2020*, STATE OF CALIFORNIA, <https://census.ca.gov/>; *2020 Census*, NEW YORK STATE, <https://www.ny.gov/programs/2020-census>.

⁴⁹ *Notable Expenditures in \$139 Billion California Budget*, U.S. NEWS & WORLD REPORT (June 27, 2018), <https://www.usnews.com/news/best-states/california/articles/2018-06-27/notable-expenditures-in-139-billion-california-budget>; see also Patrick R. Potyondy, *The Census Is Coming and States Are Preparing*, NATIONAL CONFERENCE OF STATE LEGISLATURES BLOG (Apr. 26, 2018), <http://www.ncsl.org/blog/2018/04/26/the-census-is-coming-and-states-are-preparing.aspx>.

⁵⁰ See Operational Plan, *supra* note 18, at 134-35.

⁵¹ U.S. CENSUS BUREAU, 2010 CENSUS COUNT QUESTION RESOLUTION, CHALLENGING JURISDICTIONS AS OF 01/31/2014, <https://www2.census.gov/programs-surveys/decennial/2010/program-management/5-review/cqr/cqr-gu-status-rpt-01-31-14.pdf>.

⁵² See, e.g., *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (rejecting New York City's efforts to cure an undercount after the 1990 census).

⁵³ KAREN S. SEEBOLD, U.S. CENSUS BUREAU, THE 2010 CENSUS RECRUITING AND HIRING ASSESSMENT 7 (2011), https://www.census.gov/content/dam/Census/library/publications/2011/dec/2010_cpex_155.pdf.

Similar numbers of states acted to allow those receiving aid under Temporary Assistance for Needy Families (TANF) and the Supplemental Nutritional Assistance Program to work for the Census Bureau without jeopardizing their benefits.⁵⁴ Thousands of state and local governments also entered into agreements with the Bureau in 2010 to allow individuals to be simultaneously employed by state or local jurisdictions and the federal government.⁵⁵ According to the Bureau, these measures “enabled many well-qualified individuals to work on the 2010 Census who otherwise might not have applied for jobs, particularly in some hard-to-enumerate areas.”⁵⁶ Attorneys general can seek to ensure that such accommodations are again made for 2020. Beyond this action, attorneys general might consider working with state employment offices to promote Census Bureau jobs, and they could encourage their jurisdictions, whether through CCCs or otherwise, to hire qualified noncitizens to perform census-related work, since such individuals will likely be ineligible to work directly for the Bureau.

Second, attorneys general can spur reflection and reform when it comes to how their jurisdictions use census data. Although the federal government must rely on the Census Bureau’s actual enumeration for purposes of congressional apportionment,⁵⁷ states often have more flexibility to use adjusted numbers or to decouple state programs from census data. By way of example, the Census Bureau counts prisoners at their incarceration site rather than at their prior place of residence. This practice, which some dub “prison gerrymandering,” has long been controversial because it serves to shift political representation and public funding toward communities with correctional facilities and away from prisoners’ home communities.⁵⁸ Seeing this as inequitable, a handful of states have rejected the Census Bureau’s approach and reallocate prisoners to their communities of origin when counting their populations for redistricting and other purposes.⁵⁹ Other states could consider making similar adjustments. Along these lines, if states conclude that particular geographic regions or population groups have been undercounted, they could seek to modify state funding allocation formulas in ways that produce more equitable outcomes.

⁵⁴ *Id.* at 8-9.

⁵⁵ *Id.* at 45.

⁵⁶ *Id.* at 27.

⁵⁷ See *Dep’t of Commerce v. U.S. House of Reps.*, 525 U.S. 316 (1999) (holding that the Census Act prohibits the use of statistical sampling to determine population numbers for congressional apportionment).

⁵⁸ See, e.g., Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 *STAN. L. REV.* 1473 (2017); Sean Suber, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 *VA. J. SOC. POL’Y & L.* 471 (2014); Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland’s Test Case*, 43 *U. BALT. L.F.* 35 (2012); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 *WM. MITCHELL L. REV.* 1241, 1242 (2012); David Hamsher, *Counted Out Twice—Power, Representation & the “Usual Residence Rule” in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 *J. CRIM. L. & CRIMINOLOGY* 299, 300 (2005); Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 *PACE L. REV.* 587, 588 (2004).

⁵⁹ See *Solutions*, PRISON POLICY INITIATIVE, <https://www.prisonersofthecensus.org/solutions.html#states> (last visited Oct. 1, 2018).

IV. RESOURCES AND EXPERTS

Numerous nonprofit organizations are already preparing for the 2020 Census in a variety of ways, including by monitoring Census Bureau activities and conducting census-related public outreach. In addition to the Bureau itself, they can provide valuable information and partnership opportunities. The list below offers a starting point. Many additional resources are available.

U.S. CENSUS BUREAU RESOURCES

Census Bureau Regional Offices. The Census Bureau has six regional Offices each with a permanent Regional Director. The Regional Offices will be an excellent contact point for 2020 Census activities including the partnership program.⁶⁰

The Regional Directors are located in the following cities:

- Atlanta
- Chicago
- Denver
- Los Angeles
- New York
- Philadelphia

2020 Census State Complete Count Commission Guide. This document contains information on the importance of state level Complete Count Commissions, and Census Bureau regional contacts to assist in launching a Complete Count Commission.⁶¹

Census Bureau Response Outreach Area Mapper. This interactive mapping system will assist in identifying small areas that may be hard-to-enumerate for the 2020 Census. It is a very useful tool for targeting local efforts.⁶²

Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations. The committee, known as NAC, consists of up to 32 members appointed by the Director of the Census Bureau. The NAC is an important source of information regarding national and local concerns about the 2020 Census. The NAC members are also a valuable resource for the states where they reside.⁶³

State Data Center Program. Each state has a State Data Center that is a valuable resource for accessing Census Bureau data and providing current insights into the status of the 2020 Census. The link to the network contains more information about this program as well as a contact point for each state.⁶⁴

NON-PROFIT AND PRIVATE RESOURCES

The Census Project. This organization is a broad-based network of national, state, and local organizations that supports a fair and accurate 2020 Census. The Census Project is a good source of up-to-date information on the status of the 2020 Census.

⁶⁰ *Regional Offices*, U.S. CENSUS BUREAU, <https://www.census.gov/regions> (last visited Oct. 1, 2018).

⁶¹ *2020 Census State Complete Count Commissions*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/sccc.pdf> (last visited Oct. 1, 2018).

⁶² *Response Outreach Area Mapper*, U.S. CENSUS BUREAU, <https://www.census.gov/roam> (last visited Oct. 1, 2018).

⁶³ *Census Advisory Committees*, U.S. CENSUS BUREAU, <https://www.census.gov/about/cac/nac.html> (last visited Oct. 1, 2018).

⁶⁴ *State Data Center (SDC) Program*, U.S. CENSUS BUREAU, <https://www.census.gov/about/partners/sdc.html> (last visited Oct. 1, 2018).

In addition, the Census Project has prepared a toolkit to educate state and local stakeholders on the importance of the Census to their communities.⁶⁵

The Leadership Conference on Civil and Human Rights. This organization represents a coalition of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. One of their key issues areas is a 2020 Census that is fair and accurate. They are a good source of information regarding the 2020 Census, as well as a source of state and local organizations that could be of help in planning for the 2020 Census.⁶⁶

Brennan Center for Justice. This organization participates in litigation and public education on an array of democracy-related issues, including the 2020 Census. They have a number of census resources available on their website.⁶⁷

Funders Committee for Civic Participation 2020 Census Funders Toolkit. This toolkit was prepared with the support of a number of foundations concerned with an accurate 2020 Census. The toolkit contains useful information to develop community programs to support an accurate Census.⁶⁸

Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, George Washington University Institute of Public Policy. This research documents the distribution of approximately \$600 billion in annual federal fund distributions to states as well as the effects of Census undercounts on these distributions.⁶⁹ In addition, a supplemental report extends this research to rural areas by state.⁷⁰

Terri Ann Lowenthal, consultant. Ms. Lowenthal is one of the most knowledgeable experts on all aspects of the conduct of decennial censuses. Ms. Lowenthal would be pleased to assist the State Attorney Generals in preparations for the 2020 Census.⁷¹

CONCLUSION

For state attorneys general charged with protecting the public interests of their states and residents, the census must be a top priority. The upcoming enumeration will have enormous implications for democratic representation and major economic and social impacts as well. As 2020 approaches, attorneys general should act now to develop and implement a holistic strategy aimed at ensuring that their jurisdictions are fully and fairly counted.

⁶⁵ THE CENSUS PROJECT, <https://thecensusproject.org/> (last visited Oct. 1, 2018).

⁶⁶ 2020 Census, THE LEADERSHIP CONFERENCE, <https://civilrights.org/census/> (last visited Oct. 1, 2018).

⁶⁷ 2020 Census, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/issues/2020-census> (last visited Oct. 1, 2018).

⁶⁸ 2020 Census Funder Toolkit, FCCP, <https://funderscommittee.org/2020-census-funder-toolkit/> (last visited Oct. 1, 2018).

⁶⁹ *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds*, GEORGE WASHINGTON INSTITUTE OF PUBLIC POLICY, <https://gwipp.gwu.edu/counting-dollars-2020-role-decennial-census-geographic-distribution-federal-funds> (last visited Oct. 1, 2018).

⁷⁰ *Census-Guided Financial Assistance To Rural Areas*, GEORGE WASHINGTON INSTITUTE OF PUBLIC POLICY, <https://censusproject.files.wordpress.com/2018/09/gwururalamericasept2018.pdf> (last visited Oct. 1, 2018).

⁷¹ <https://terriannlowenthal.com/>.

ABOUT THE AUTHORS

John H. Thompson is a longtime leader in the social science research community. He most recently served as the Executive Director of the Council of Professional Associations on Federal Statistics. Prior to that, Thompson served as the 24th Director of the U.S. Census Bureau from August 2013 through June 2017. A statistician and executive, Thompson was President and CEO of NORC at the University of Chicago from 2008 through July 2013. He served as the independent research organization's Executive Vice President from 2002 to 2008. From 1975 through July 2002, Thompson served in various roles at the U.S. Census Bureau including as the career executive with management responsibilities for all phases of the 2000 Census. Thompson is an elected fellow of the American Statistical Association and past chair of the association's Social Statistics Section and Committee on Fellows. He served as a member of the Committee on National Statistics at the National Academy of Sciences. He holds bachelor's and master's degrees in mathematics from Virginia Tech.

Robert Yablon is an Assistant Professor of Law at the University of Wisconsin Law School. Yablon teaches Civil Procedure, Federal Jurisdiction, and the Law of Democracy. His research interests include political and election law, constitutional law, federal courts, and statutory interpretation. Yablon received his bachelor's degree in economics and political science from the University of Wisconsin-Madison and his master's degree in social policy from the University of Oxford, where he was a Rhodes Scholar. He then earned his J.D. at Yale Law School, where he was an Articles Editor of the *Yale Law Journal*. Following law school, Yablon served as a law clerk for Judge William Fletcher of the U.S. Court of Appeals for the Ninth Circuit and for U.S. Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor.



1899 L Street, NW, 2nd Floor
Washington, D.C. 20036
www.ACSLaw.org
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