INDIANA
JOURNAL OF LAW
AND
SOCIAL EQUALITY
VOLUME 5
## Indiana Journal of Law & Social Equality

### Volume 5

2016–17

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Indiana University Maurer School of Law – Bloomington
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FOREWORD

Samantha von Ende*

“In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.”
- Justice Thurgood Marshall

The *Indiana Journal of Law and Social Equality* started as an idea in the mind of young law students. Ideas can be quite powerful. The *Journal* has since grown into an interdisciplinary academic forum for scholars, practitioners, policy makers, and students with the goals of providing an outlet for scholarly discourse and contributing to society’s understanding of legal and policy issues concerning social equality.

By drawing on leading scholars from a variety of disciplines and practice backgrounds, the *Journal* seeks to transform the lens through which issues of social equality and equity are viewed by identifying new issues and offering new theoretical and pedagogical approaches. It also seeks to serve as a model for social equality in its composition, functioning, and community engagement. The importance of taking an interdisciplinary approach to issues of social equality is grounded in the understanding that identities and experiences are situated within socially constructed systems and organized around characteristics such as race, gender, class, sexuality, ability, and others. These identity systems interact, mutually shape, and reinforce each other. Consequently, they cannot be studied in isolation.

Although our journal is still in its early adolescence, it has continued to flourish this year under the leadership of Editor-in-Chief Melissa Logan and with tremendous institutional support provided by the law school administration, and, principally, our new and former faculty advisors, Professors Luis Fuentes-Rohwer and Deborah Widiss. We owe a significant debt of gratitude to each.

Starting an academic publication is never an easy feat, but it may be easier than sustaining it through its initial years. Doing so involves a continuous process of adaptation, collaboration, and cooperation, and a great deal of patience, forethought, and judgment. Undertaking such an endeavor takes a significant investment of time and emotional resources—but it proves worthwhile. How we spend our days, of course, as Annie Dillard reflected, is how we spend our lives. How better to do so then, than in the dedicated pursuit and promotion of elaborate

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* Indiana University Maurer School of Law, J.D./Ph.D. (expected 2020). I extend my deepest thanks to the three most recent Editors-in-Chief of the *Indiana Journal of Law and Social Equality*—Alyson Schwartz (Volume III), Nick Parker (Volume IV), and Melissa Logan (Volume V)—for their friendship, professionalism, and dedication to this Journal. I am indebted both to Katie Cullum and to Richard von Ende, without whose editing and support this piece would not have been produced. This Foreword is adapted from remarks given on April 7, 2016 at IJLSE’s Spring 2016 Symposium, Toward Justice: Turning Points in Social Movements Past and Future. All opinions and errors are my own.

and honest inquiry? How better than by building an institution steadfastly committed to the uniquely human pursuits of greater knowledge and greater justice? This work cannot be accomplished in any given year, nor by any particular board of editors, but rather is by its nature an unending and evolving process. That’s fine. Land Institute Founder Wes Jackson once pointed out, “if your life’s work can be accomplished in your lifetime, you’re not thinking big enough.”

So, working as a member of this journal has been meaningful, but it has also been fun. When confronted with a problem that our bylaws do not address, we often joke that we should resort to journal common law tradition, and try to ring up former EIC, Alyson Schwartz. It is incredible she still takes our calls. We joke that we should add comments to bylaw revisions, from the “advisory committee for the 2016 amendments.” So, yes, we flip through the bluebook a lot. But we make the best time of it.

Levity aside, though, academic publications are incredibly important. And this journal’s existence is important for three specific reasons. First, it provides space for meaningful, supported, and dynamic discourse. Second, it does the critical work of informing the public and generating an educated citizenry, an attribute of society that Thomas Jefferson emphasized as the cornerstone of our democracy. Third, the space for discourse provides an opportunity to offer solutions to injustice, and, more fundamentally, to identify and frame those issues. John Dewey put it best when he simply stated, “A problem well put is half solved.”

Law is a remarkable human construction, but is by necessity inherently conservative, reflective of social evolution but never itself revolutionary. It entrenches values and processes in order to ensure stability and the mechanisms for self-government. Existing understandings of these entrenched values can be characteristically difficult to change. Progress can be slow, engagement low, and distrust high. It can become all too easy to succumb to the frustration, to throw our hands up at the absurdity and network of obstacles and decide: not me, not today. But if not us, who? And if not now, when?

We are at once fortunate and burdened to live in such interesting times of upheaval and social transformation. We live in an age of unprecedented development and access to information, but our lives, perspectives, and work remain as divided as ever. We construct echo chambers in technological and social spaces and yell past each other from value sets that are incomprehensible to those on the receiving end of our often-legitimate rants and pleadings. Overspecialization, institutionalized oppression, and emerging illiberal tendencies pose legitimate threats to our public discourse.

Yet, public universities remain as one of the last commons—preserving a commitment to civil and reasoned discourse.Remarkably, these institutions, and in

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4  Here I am referencing the famous quotation from Hillel the Elder, “If I am not for me, who will be for me? And when I am for myself alone, what am I? And if not now, then when?” MISHNA, Pirkei Avot 1:14, http://www.sefaria.org/Pirkei_Avot.1.14?lang=en.
particular their student organizations and publications, stood at the forefront of revolutionary social movements throughout the 20th century and continue to do so today. At present, a contentious issue emerging on campuses and in discursive spaces asks who bears the burden of education in movements to identify and rectify oppression. I certainly do not have the answer to that question, but I can propose one answer. It is our job.

It is our job because the privilege of editorial boards to both represent and amplify the voices of others carries with it an immense responsibility: to do so fairly, accurately, swiftly, and with due regard for the pressing issues of the day. Likewise, the unique characteristics of universities, the empowerment of lawyers, and the secured position of academics imposes upon all of us an ethical imperative to publicly grapple with these issues, to admit the limitations of our knowledge and perspectives, to acknowledge the tense coexistence of multiple fundamental principles, and to embrace the uncertainty by committing to continuously reassess our values, the forms they take in society, and the impacts they have on the lived experiences of others. Our law counsels against the alternative, instructing, as Susan Sontag wrote, that “silence is inescapably a form of speech.”5

That, I submit, is one sure way toward justice. The facilitation of conversations about social issues and social movements is integral to this journal’s dual missions of transforming the lens through which issues of social equality are viewed and contributing to society’s understanding of the legal and policy issues concerning social equality. This work is a necessary but not sufficient condition to the envisioned and interdependent ends of social equality and an informed public. For, as Paulo Freire said, “we make the road by walking.”6 History is replete with examples of instances wherein the writing of scholars, politicians, reformers, and activists catalyzed major social transformations, identifying opportunities for and propelling turning points in justice movements. We can only ever move forward, but we can look backward and around for guideposts that signal the paths and the forks.

So, that is why I think we are here, why it is important that we are, and why we are honored to have the scholars featured in this volume on board with our endeavor. We are thrilled once again to hand over the torch to the incoming board of editors, a diverse group of qualified individuals who have committed to continuing this important labor. The hard work of informing, verifying, and advancing is never done. This we know but it does not dissuade us. As the Mishna advised, it is not upon any of us to finish the work, but neither are we free to ignore it.7

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6 Myles Horton & Paulo Freire, We Make the Road by Walking: Conversations on Education and Social Change (1990).
7 Here I am referencing a saying attributed to Rabbi Tarfon, “‘It is not incumbent upon you to complete the work, but neither are you at liberty to desist from it.” Mishna, Pirkei Avot 2:21, http://www.sefaria.org/Pirkei_Avot.2.16?lang=en.
Inefficient Inequality

Shi-Ling Hsu*

ABSTRACT

For the past several decades, much American lawmaking has been animated by a concern for economic efficiency. At the same time, broad concerns over wealth and income inequality have roiled American politics, and still loom over lawmakers. It can be reasonably argued that a tension exists between efficiency and equality, but that argument has had too much purchase over the past few decades of lawmaking. What has been overlooked is that inequality itself can be allocatively inefficient when it gives rise to collectively inefficient behavior. Worse still, some lawmaking only masquerades as being efficiency-promoting; upon closer inspection, some of this supposedly efficiency-driven legislation is only naked rent-seeking, enriching a small minority at the expense of social welfare. In pursuit of efficiency, injudicious lawmaking has created inefficient laws and institutions.

This Article lays out several ways in which inequality can be allocatively inefficient. This Article also lays out a simple normative principle, focusing on broad economic effects, by which efficiency rationales for lawmaking might be more rigorously considered. Importantly, while it is lawmaking and not economic policymaking that is the focus of this article, it is essential that lawmaking be adequately informed by serious economic analysis, and not the intellectually casual, ideologically-driven economics that has opened the door to rent-seeking over the past several decades. The resulting lawmaking creates inequality but does not even produce the promised efficiencies. Better lawmaking must be informed by better economics. After all, if inequality is objectionable because it is inefficient, then measures to reduce inequality should themselves be efficient.

INTRODUCTION

The problem of economic inequality in the United States has already roiled presidential politics, and still retains the potential to reshape, if not realign, both the Republican and Democratic parties. The temptation is to think of inequality as an economic problem with economic solutions. There is just enough truth in such a view to mask a more fundamental source: legal rules and institutions. After all, an economy is defined by the legal rules and institutions that allocate resources and govern transacting.

At the same time, American lawmaking has unmistakably taken on more of an emphasis on economic efficiency as a normative principle. Over the past fifty years or so, economic considerations have played an increasing role in lawmaking, helping to

* D'Alemberte Professor and Associate Dean of Environmental Programs, Florida State University College of Law. The author thanks and acknowledges the help and comments of Richard McAdams, Lee Fennell, June Carbone, Steve R. Johnson, workshop participants at Emory University School of Law, Loyola University Chicago School of Law, and at the Florida State University College of Law, and participants at the 2015 Midwestern Law and Economics Association meeting. The author would also like to thank Mary McCormick, Kat Klepfer, and the always outstanding library staff at the Florida State University College of Law for their assistance. Of course, the remaining shortcomings are the sole responsibility of the author.
establish the new field of Law and Economics.\textsuperscript{1} It is difficult to overstate the influence of Richard Posner’s *Economic Analysis of Law*,\textsuperscript{2} the first (of nine and counting) edition published in 1973,\textsuperscript{3} and Robert Bork’s *Antitrust Paradox*,\textsuperscript{4} both of which succeeded in dramatically reshaping the way that legal scholars and judges think about law. In *Reiter v. Sonotone*,\textsuperscript{5} the Court, citing Bork,\textsuperscript{6} brushed aside nearly seven decades of antitrust jurisprudence and policy that was oriented around the preservation of competition\textsuperscript{7} and substituted Bork’s prescribed economic efficiency orientation.\textsuperscript{8} Judge Posner’s textbook, in the meantime, is commonly thought to be one of the most influential works of the twentieth century, by one of the most influential scholars of his time.\textsuperscript{9}

The influence on law and economics scholars such as Judges Posner and Bork is perhaps most obvious in written judicial opinions, in which the reasoning is expected to be explicit, at least more so than any foray into legislative history. The influence of economic considerations on legislators is thus less obvious but just as profound. Major legislative initiatives in welfare reform,\textsuperscript{10} tax reform,\textsuperscript{11} financial

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6. *Id.* at 343 (citing Robert Bork, *The Antitrust Paradox: A Policy at War With Itself* (1978)).
7. See Barak Orbach, *How Antitrust Lost Its Goal*, 81 Fordham L. Rev. 2253, 2255 (2013); see also Eleanor M. Fox, *Against Goals*, 81 Fordham L. Rev. 2157, 2159 (2013) (“The operational goal ... is to let business be free of antitrust unless its acts will decrease aggregate consumer surplus.... But this is not the goal of antitrust unless the concept of ‘goal’ reads ninety years out of antitrust history.”).
8. Bork, *supra* note 4, at 90 (“Consumer welfare is the greatest when society’s economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation.”).
institution regulation, as well as deregulation of electric utilities, railroads, airlines, and even environmental law, have been justified as enhancing economic efficiency. At seemingly every turn, any legislative or regulatory proposal is touted as one that makes the American economy more efficient. To be sure, some of the economic claims made by lawmakers who lack even the most basic economic training lack credibility. But that has hardly stopped lawmakers from invoking economic efficiency, whether they know what it is or not.

Unfortunately, whether lawmakers are complicit or genuinely duped by rent-seeking industries, the result of efficiency-driven lawmaking is often inefficiency. If lawmakers do not have the tools or the training to strictly apply an efficiency standard espoused by economists, they have often used proxies, such as jobs, competitiveness, and cost-reduction for economic efficiency. But if these proxies are not a sleight of hand, they are an opening for rent-seeking. Jobs-counting is a numerical game, but it conveys no information about the value of jobs; job creation can be offered as justification for a subsidy to a dying industry. Helping domestic industries compete suggests greater domestic economic efficiency but fails to account for whether the domestic industry enjoys a comparative advantage over foreign industries.

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12 See, e.g., infra Part III.A.
15 Alfred E. Kahn, Surprises of Airline Deregulation, 78 AM. ECON. REV. 316, 321 (1988) (“The last ten years have fully vindicated our expectations that deregulation would bring lower fares, a structure of fares on average in closer conformity with the structure of costs . . . and great improvements in efficiency . . .”).
17 To take just one example of the abysmal economic ignorance in certain quarters of the U.S. Congress, such as Florida Congressman Ted Yoho, a large animal veterinarian, and Arizona Congressman David Schweikert, a real estate developer, who led calls to reject an increase in the U.S. debt ceiling on the grounds of fiscal thrift, but which would have triggered an unprecedented default with globally catastrophic consequences. See, e.g., Carmel Lobello, 3 Crazy Arguments From Debt Ceiling Deniers, THE WEEK (Oct. 10, 2013), http://theweek.com/articles/4589973-crazy-arguments-from-debt-ceiling-deniers. For a scholarly discussion of the implications of a default, see, for example, Steven L. Schwarz, Rollover Risk: Ideating a U.S. Debt Default, 55 B.C. L. REV. 1, 1–2 (2014).
18 Rent-seeking is the practice of seeking privately favorable government policy with negative social value. See, e.g., GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 43 (2002).
19 POSNER, supra note 2, at 24–25.
Reducing production costs seems like it must be efficient, except when it does so by allowing an industry to externalize its costs.

I hasten to emphasize that all of this Article is not a condemnation of economic efficiency as a public policy criteria. This Article is an effort to provide equal time for an under-appreciated counterweight to the prevailing views on efficiency and the law: that inequality itself is a source of inefficiency. Wealth or income inequality, if severe enough, gives rise to behavior which may be individually rational but collectively inefficient. This Article sets out several pathways in which this might be the case.

This Article is also an exposition of how an ill-informed invocation of economic efficiency can lead to bad lawmaking—unjust by any reasonable definition but, more prominently and ironically, inefficient lawmaking. The upshot of this exposition is that economics must play a more prominent role in lawmaking, not less. What is needed is a more exacting scrutiny of economic claims made in support of lawmaking initiatives invoking economic efficiency as one of its goals.

I emphasize that this Article does not argue that inequality is per se inefficient. Juxtaposed against the arguments raised in this Article are a countervailing set of arguments that inequality is not only something to be tolerated but even a necessary ingredient for prosperity. Circumstance and history dictate which arguments are more applicable, both sets of arguments playing a crucial role in ordering well-functioning societies but in different places and at different times. That said, I do argue that the debate over economic efficiency inequality has lost its balance, and that the suite of efficiency-maximizing, inequality-tolerating arguments have come to dominate public law and policymaking, and have become unhinged from sound economic theory. Part I of this Article describes the sometimes fraught relationship the economics profession has had with inequality. Part II sets out how, as a result of this ambivalence, a set of arguments for de-emphasizing or even ignoring inequality has held too much sway over public law making and economic policymaking. Part III sets forth several reasons why inequality may be allocatively inefficient. In so doing, Part III draws upon economic research that examines the linkages between inequality and economic growth as a proxy for allocative efficiency. Part IV of this Article argues that the key to reducing inequality lies not in redistribution for its own sake but on policies that focus on economic growth. That is not to say that redistributions cannot spur economic growth; every law or policy affects a

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20 An “absolute advantage” is the greater technological ability of one country over another to produce some good. Of more relevance for international trade purposes, a “comparative advantage” is the greater economic ability of one country, given its factors of production, to produce some good. In other words, a country at an absolute disadvantage but a comparative advantage enjoys lower factors of production that can compensate for its lesser technological ability to produce the good. See, e.g., Shelby D. Hunt & Robert M. Morgan, The Comparative Advantage Theory of Competition, 59 J. MARKETING 1, 5 n.8 (1995).


22 See infra text accompanying note 46.
redistribution to some degree. Effective legal responses to inequality, however, should be informed by sound economic analysis.

I. ECONOMISTS ON INEQUALITY

In attention to enabling rent-seeking, ignorance of basic economic principles has prevented lawmakers from appreciating the efficiency problems raised by inequality. It has not helped that most economists have, until recently, stayed out of the inequality discussion. 23 Nobel Laureate and University of Chicago economist, Robert Lucas, once opined in an essay, even while acknowledging that the world had become “a world of staggering and unprecedented income inequality,” that economists should nevertheless avoid trying to reverse inequality. 24 Lucas warned that “[o]f the tendencies that are harmful to sound economics, the most seductive, and in my opinion the most poisonous, is to focus on questions of distribution.” 25 On the subject of inequality per se, there would appear to be little for economists to say anyway. Without a principled way of aggregating individual preferences into a social welfare function that can serve as a maximand, 26 there is no obvious economic reason for choosing one distributional state of affairs over another. 27

Several prominent economists have ventured into the normative thickets of inequality work. 28 These scholars include Nobel Laureate Joseph Stiglitz; 29 Sir Tony Atkinson, the author of perhaps the most prominent and long-standing body of work on inequality and poverty; 30 and Thomas Piketty, the author of the sensationa

28 See, e.g., Atkinson & Bourguignon, supra note 23; Anthony B. Atkinson & Francois Bourguignon, HANDBOOK OF INCOME DISTRIBUTION, VOLUMES 2A–2B (2014) (which included prominent economists such as Amartya K. Sen, Agnar Sandmo, Daron Acemoglu, and Thomas Piketty.).
successful book *Capital in the Twenty-First Century.* Piketty’s *Capital* has forced inequality into public intellectual debate but has been broadly criticized, and most economists and economics-oriented legal scholars have still simply shrugged, “so what?”

So what, indeed? As many have pointed out, the lives of so many people in the world have improved vastly over the past several decades, even as inequality has increased, so really, is there anything wrong with inequality *per se?* From a perspective that focuses on overall wealth rather than its distribution, it might seem a bit petty to begrudge the fact that while the poor are better off, the rich are *so much* 

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33 See, e.g., Saul Levmore, Inequality in the Twenty-First Century, 113 U. Mich. L. Rev. 833, 836 (2015) (“Is there a problem? If r > g were embedded in a larger pattern in which g was relatively impressive—or even perhaps where g increased with the inequality—then for many observers there would be no problem to solve.”); N. Gregory Mankiw, Yes, r > g. So What? 105 AM. Econ. Rev. 43 (2015); Richard Epstein, The Piketty Fallacy, REALCLEARPOLITICS (May 6, 2014), http://www.realclearpolitics.com/articles/2014/05/06/the_piketty_fallacy_122547.html (“One of the most striking defects of the Piketty analysis is its flawed understanding of the relationship between social wealth and income inequality. . . . [A]n economic matter, the increase of the wealth of some without a decline of wealth in others counts as a Pareto improvement, which is in general to be welcomed, even if it increases overall levels of inequality.”); Eric A. Posner & Glen Weyl, Thomas Piketty is Wrong: America Will Never Look Like a Jane Austen Novel, THE NEW REPUBLIC (July 31, 2014), https://newrepublic.com/article/118925/ pikettyss-capital-theory-misunderstands-inherited-wealth-today (“The real danger is not inequality per se but bad policy that suppresses growth and thus the accumulation of wealth . . . .”); Kenneth Rogoff, Where is the Inequality Problem?, PROJECT SYNDICATE (May 8, 2014), https://www.project-syndicate.org/commentary/kenneth-rogoff-says-that-thomas-piketty-is-right-about-rich-countries—but-wrong-about-the-world.

34 See, e.g., Angus Deaton, The Great Escape: Health, Wealth, and the Origins of Inequality 1 (2013) (“Life is better now than at almost any time in history. More people are richer and fewer people live in dire poverty. Lives are longer and parents no longer routinely watch a quarter of their children die.”); Lucas, supra note 24 (“of the vast increase in the well-being of hundreds of millions of people that has occurred in the 200-year course of the industrial revolution to date, virtually none of it can be attributed to the direct redistribution of resources from rich to poor. The potential for improving the lives of poor people by finding different ways of distributing current production is *nothing* compared to the apparently limitless potential of increasing production.”); Rogoff, supra note 33.
better off. A policy preference for allocative efficiency would seem to have at least played a large part in decades of global economic growth.

But the so-what response clearly does not sit well, even among the “One Percent”—the top percentile of wage-earners or wealth-holders. Even if it could be said that the poor are better off in absolute terms in an unequal society, there is a nagging, growing unease that inequality does matter, and not just in a visceral sense of unfairness. Rather, the broad concern is that excessive inequality produces a society that in its totality is less well-off in some sense. In other words, inequality might not only be unfair but inefficient as well. So to those who shrug “so what?” there is a retort: a blind devotion to allocative efficiency as a norm at the expense of distributional concerns may generate laws and policies that are, ironically, allocatively inefficient.

The reticence of the economic profession is exasperating because it is clearly within the economic mainstream to study the effects of inequality on indices such as economic growth, crime, and educational outcomes. What is missing is the short leap from a descriptive and empirical account of these linkages to the normative claim made in this Article: inequality, if extreme enough, can lead to outcomes that are societally undesirable and allocatively inefficient.

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37 The thesis of this Article includes, but is not limited to, the claim that inequality can be inefficient from a purely neoclassical economic view. But this Article also makes the claim that inequality can make a society worse off in a way that is not captured by neoclassical economic models. For example, subjective well-being is increasingly considered a valid measure of societal welfare. See, e.g., Alberto Alesina, Rafael Di Tella, & Robert MacCulloch, Inequality and Happiness: Are Europeans and Americans Different?, 88 J. PUBL. ECON. 2009, 2011 (2004); Matthew D. Adler, Well-Being and Fair Distribution (2012) (setting out a theoretical framework for comparing distributions in a social welfare function).

38 Another article, and important precursor to this one, that has surveyed the literature is Paul L. Caron & James R. Repetti, Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth, 40 PEPP. L. REV. 1255 (2012). The current article seeks to further disaggregate the mechanisms by which inequality may be allocatively inefficient, and to add to the list compiled by Caron and Repetti.

39 See infra Part III.A.

40 See infra Part III.C.

41 See infra Parts III.A., III.B.
II. COMPETING NARRATIVES

To a great extent, differences in opinion over inequality stem from different ideologies. The ideologies derive from opposing economic theories, but with empirical evidence somewhat spotty, political partisans have been left to fill in the blanks with their own ideological, often specious interpretations of theory and evidence. Seemingly academic economic debates thus matter because economic theory has come to play an enormously influential role in public law and policymaking, which has in turn played a central role in alleviating or exacerbating inequality. 42 Tax policy alone allocates trillions of dollars among Americans.

One set of competing narratives draws upon fairly simple microeconomic notions. Every undergraduate student in Economics learns of the law of declining marginal utility of money: the more money someone has, the less each additional increment of money adds to that person’s happiness or utility. 43 The first one hundred dollars a person has will be spent on absolute essentials, such as food and shelter, while subsequent one hundred increments are spent on things that are less and less important. The familiar graph of the declining marginal utility of money is shown in Figure 1.

Figure 1

The implication of this truism is a very general proposition that all other things being equal, a more equal distribution of money will place more people on a steeper part of the utility curve, achieving a higher level of utility for a greater number of people, as opposed to concentrating the money in one individual. Money means more to poor people than it does for rich people.

There are equally simple, equally powerful competing narratives, however. For one thing, people have different preferences for wealth and trade wealth off differently against other tangible and intangible goods, such as material goods or


leisure time, so that not everyone has the same declining marginal utility of money. Another counterargument is that it is important to preserve incentives for hard work. Some inequality exists because individuals are rewarded for productive effort and individuals differ in their ability and willingness to produce, so unequal allocations are to some extent just a natural outcome in a world where productive effort is rewarded. Noble Laureate Simon Kuznets propounded a theory that inequality was a necessary incident of economic growth. Market factor prices would cause unequal factor prices to converge and equilibrate at a higher level of wealth. By Kuznets’ account, inequality is ultimately self-correcting and nothing to worry about.

Another pair of competing narratives draws from macroeconomic theory. John Maynard Keynes’ General Theory of Employment, Interest and Money ranks as one of the most influential writings of all time, having been vindicated (rightly or wrongly) by expansionary fiscal policy that pulled the world out of the Great Depression. A core tenet of Keynesian economic theory is that in recessionary times, when spending is low, government spending can take the place of private spending, which would boost aggregate demand for goods, spur employment, and boost economic activity. Keynesian economics has implications for inequality because government spending is likely to have the greatest effect on the poor. Because poor individuals generally have a higher marginal propensity to consume (i.e. spend), money in the hands of poor people have a greater stimulative economic effect than if it were in the hands of rich people.

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44 See, e.g., Richard Layard, Guy Mayraz & Stephen Nickell, The Marginal Utility of Income, 92 J. PUBL. ECON. 1846, 1846 (2008) (“[I]t is crucial to know how fast the marginal utility of income declines as income increases. . . . A natural way to do this is to weight each person’s changes in income by his or her marginal utility of income.”).
46 Simon Kuznets, Economic Growth and Income Inequality, 45 AM. ECON. REV. 1 (1955).
47 Id.
48 JOHN MAYNARD KEYNES, A GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936).
49 President Roosevelt was not apparently convinced of Keynes’ theory, nor was his New Deal inspired by Keynes. However, the military spending that was necessitated by World War II was, in fact, the kind of stimulus that Keynes advocated. ROBERT S. McELVAINE, THE GREAT DEPRESSION: AMERICA, 1929-1941 329 (1993).
51 Christopher Carroll, Jiri Slacalek, Kiichi Tokuoka & Matthew N. White, The Distribution of Wealth and the Marginal Propensity to Consume 1 (Mar. 6, 2015), http://www.econ2.jhu.edu/people/ccarroll/cstwMPC.pdf. Moreover, spent money becomes income to the seller, who in turn spends some of that same money on her own needs, and so on, resulting in the same money being counted as income several times, or creating a multiplier effect of money, an empirically-derived factor that is used to evaluate the
But government spending is not free. One of several responses to Keynesian was “supply side economics,” which posits that long-term economic growth is affected not only by demand but also supply. Governments running huge, unsustainable deficits are likely to crowd out private investment and retard future growth. Supply side economics would argue for government policies to promote the formation of capital to produce goods that people supposedly demand. After all, money not spent is invested, which is also a predicate for production and consequent economic productivity.

A sensible synthesis of these two sets of competing narratives would acknowledge that none are universal; some situations call for redistribution and some call for government austerity, but government fiscal policy must be dictated by circumstance, not ideology. No self-respecting, modern Keynesian economist would deny that supply is irrelevant, a topic not even covered by Keynes. By the same token, during the depths of the 2008–09 global financial crisis, even prominent supply-side theorists advocated for strong fiscal action to stimulate aggregate demand.

Unfortunately, a sensible synthesis has not prevailed upon government fiscal policy. It has not even been true supply-side economics that has driven fiscal policy. Fiscal policy has been driven by a wayward faction of self-described supply-siders, ones that make much more aggressive and speculative claims than credible supply-side economists. Prominent among them is Arthur Laffer, who famously propounded on a cocktail napkin his “Laffer Curve,” a putative relationship between tax rates and effectiveness of fiscal policy.

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53 See Carmen M. Reinhart, Vincent R. Reinhart & Kenneth S. Rogoff, *Public Debt Overhangs: Advanced-Economy Episodes Since 1800*, 26 J. ECON. PERSP. 69 (2012). This paper has been controversial, as a graduate student found an error in Reinhart et al.’s spreadsheet, which affected some of quantitative claims made in the paper. Reinhart and Rogoff argue that the errors did not change their conclusions.
55 Income is commonly defined by the accounting identity \( Y = C + I + G \) showing that for a closed economy without exports or imports, income is the sum of consumption, investment, and government expenditures. See, e.g., WALLACE C. PETERTSON & PAUL S. ESTENSTON, *INCOME, EMPLOYMENT, AND ECONOMIC GROWTH* 172–76 (7th ed. 1992).
56 Blinder, * supra* note 50.
revenues, and argued that tax cuts would actually increase tax revenues.\footnote{58} At some level this is true. But at current levels of income taxation in the United States, this idea is fantasy. Martin Feldstein, President Reagan’s Chief Economic Advisor and an architect of major federal income tax cuts of 1981 and 1984, has called the Laffer Curve the “height of supply-side hyperbole”\footnote{59} and Laffer himself “a supply-side extremist.”\footnote{60} Neither Laffer nor his supporters have marshalled any empirical evidence that high, personal income taxes reduce labor supply.\footnote{61}

And yet, Laffer and his ilk remain extremely influential on fiscal policy.\footnote{62} Tax cuts introduced by President George W. Bush in 2001, the “Bush Tax Cuts,” have been justified on the grounds that they would boost growth by creating jobs,\footnote{63} a claim

\begin{itemize}
\item 59 Feldstein, supra note 52, at 27. Feldstein continued: “I have no doubt that the loose talk of the supply-side extremists gave fundamentally good policies a bad name and led to quantitative mistakes that not only contributed to subsequent budget deficits, but also made it more difficult to modify policy when those deficits became apparent.” Id. at 27–28.
\item 60 Id. at 29.
\item 61 See, e.g., Austan Goolsbee, Robert E. Hall & Lawrence F. Katz, Evidence on the High-Income Laffer Curve from Six Decades of Tax Reform, BROOKINGS PAPERS ON ECON. ACTIVITY 1, 2 (1999) (“As a testable hypothesis, however, the Laffer curve has not fared well. . . . More careful econometric analysis has not been any more supportive. An extensive literature in labor economics has shown that there is very little impact of changes in tax rates on labor supply for most people, particular for prime-age working men. This would seem to indicate that the central tenet of the Laffer curve is demonstrably false—marginal rates seem to have little impact on the amount that people work.”). It is true that more sophisticated theories have emerged that have the same implications as the Laffer Curve: Feldstein himself argues that high personal income tax rates do not discourage labor so much as they encourage the shifting of income into non-taxable forms. Martin Feldstein, The Effect of Marginal Tax Rates on Taxable Income: A Panel Study of the 1986 Tax Reform Act, 103 J. POL. ECON. 551 (1995). This, however fares little better as an empirical matter than the original Laffer Curve. Austan Goolsbee, Robert E. Hall & Lawrence F. Katz, Evidence on the High-Income Laffer Curve from Six Decades of Tax Reform, BROOKINGS PAPERS ON ECON. ACTIVITY 1, 2 (1999).

because they are still poor. This fact would call for a Keynesian injection of money, but that notion has been completely supplanted by the rubbish that supply-side charlatans are peddling and conservative politicians are disseminating—that is, the idea that giving money and regulatory breaks to “job creators,” such as finance institutions, will produce economic growth.

As another example of faux economics driving law and policy, deregulation of the finance and banking industries had been justified on the grounds that liberalization was needed so that American banks and financial firms could compete in a global finance industry and continue to create wealth and jobs domestically. A series of deregulations of the banking and finance sector, at the very least, played an important part in creating the worst financial crisis since the Great Depression. At the same time, deregulation had the effect of amplifying compensation in the finance industry. The top 0.1%—dominated by individuals in finance—now hold 22% of the nation’s wealth, which is about the same level as it did in 1929. All this regressive mayhem occurred because the banking and finance industries were able

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74 See, e.g., THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R42729, TAXES AND THE ECONOMY: AN ECONOMIC ANALYSIS OF THE TOPS TAX RATES.Since 1945, at 1 (2012) (“The plan advocated by House Budget Committee Chairman Paul Ryan that is embodied in the House Budget Resolution . . . the Path to Prosperity, also proposes to reduce income tax rates . . . . Advocates of lower tax rates argue that reduced rates would increase economic growth, increase saving and investment, and boost productivity.”); TRANSCRIPT: Fox News-Google GOP Debate, Fox News (Sep. 22, 2011), http://www.foxnews.com/politics/2011/09/22/fox-news-google-gop-2012-presidential-debate.html (“Americans want a leader who’s got a proven record of job creation. Number one, we get rid of Obamacare. Secondly, we pull back all of those regulations that are job-killing today, whether it’s Dodd-Frank or whether it’s the EPA.”) (quoting Texas Governor and Republican Presidential candidate Rick Perry).


to argue that less regulation would preserve their competitiveness and that their greater profits would mean more jobs.\footnote{A central figure driving deregulation was former Senator Phil Gramm, co-sponsor of the Gramm-Leach-Billey Act, which removed regulatory barriers between retail banking and finance. Gramm has said of the Dodd-Frank Act, which re-regulated some banking and finance activities, that it “has undermined a vital condition required to put money and America back to work — legal and regulatory certainty.” Michael J. de la Merced, \textit{Deregulator of Banks Set to Testify Before House}, \textit{N.Y. Times} (July 26, 2015), http://www.nytimes.com/2015/07/27/business/dealbook/deregulator-of-banks-set-to-defend-his-actions.html.}

It is clear that a wide variety of legislative and administrative actions that have led to increased inequality have been justified by something quite beyond what is credibly considered supply-side economics. Current levels of inequality have come about in large part because of the rhetorical power of an ideology of low taxes and economic deregulation, which has increased inequality and failed to deliver promised economic growth.\footnote{See, e.g., Hungerford, \textit{supra} note 74, at 8–10 (“The statistical analysis . . . does not find that either top tax rate has a statistically significant association with the real GDP growth rate. . . . These results are generally consistent with previous research on tax cuts. Some studies find that a broad based tax rate reduction has a small to modest, positive effect on economic growth. Other studies have found that a broad based tax reduction, such as the Bush tax cuts, has no effect on economic growth. It would be reasonable to assume that a tax rate change limited to a small group of taxpayers at the top of the income distribution would have a negligible effect on economic growth.”).} But it has been an ideology that has clearly placed its stamp on economic law and policy, dragging the political spectrum so far to the right as to completely separate political ideology from economic reality. This Article seeks to restore economic reasoning to economic law and policy and strike a new balance between competing theoretical narratives concerning the need (or lack of need) to address economic inequality.

### III. How Inequality Can Be Inefficient

Inequality may be allocatively inefficient (and therefore produces suboptimal welfare states) in a variety of ways that are completely consistent with a strictly welfare maximization viewpoint. Welfare maximization, correctly done, thus requires that \textit{some} attention be paid to distribution so as to avoid some inefficiencies and pathologies that arise out of inequality itself. This section sets forth several such ways in which inequality might generate inefficiency.

This Article does not treat the related but separate problem of poverty. Poverty tends to be defined in absolute terms, such as an income level for a given number of dependent household members.\footnote{See \textit{How the Census Bureau Measures Poverty}, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html (last updated Apr. 19, 2016).} This Article speaks to the need to address inequality, a relative state of affairs measuring differences among groups, not absolute levels of life quality. And again, this Article only seeks to present arguments.
that inequality can produce inefficient outcomes. I acknowledge that economic theory is replete with accounts of how inequality can be a natural and efficient aspect of an effective free market.

A. Inequality Suppresses Capital Investment

Atkinson, Piketty, and a group of economists led a re-engagement with the economic implications of inequality in the 1990s after a period in which it was commonly accepted that income or wealth inequality was either irrelevant to economic growth or was a positive factor for economic growth. Three arguments were offered in support of the view that inequality was associated with economic growth: (1) that the rich had a higher marginal propensity to save and therefore invest, and that providing more wealth to the rich increased the supply of investment funds, spurring economic growth; (2) some growth-enhancing investments tended to be large and indivisible so that some concentration of wealth was necessary for those investments to be made; and (3) the presence of inequality provided incentives for individuals to increase their effort and also to innovate. These arguments rested on pivotal assumptions—for example, that a growth economy is limited by investment funds, not skilled labor—which seem not to have been seriously challenged. Nor did economists seem to obsess much over the omission of other crucial growth determinants, such as education and infrastructure. However, in the 1990s, with the rise of the study of human capital (education and informal

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84 A standard identity in macroeconomic theory is that savings, the difference between income and consumption, is necessarily investment. See JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 63 (1936). There is sometimes confusion whether this is an accounting identity (true by definition) or an assumption of equilibrium conditions. See, e.g., A. Asimakopulos, Finance, Saving and Investment in Keynes’ Economics: A Comment, 9 CAMBRIDGE J. ECON. 405, 405 (1985). But almost any growth theory would posit that at least the vast majority of savings would be invested in some productive manner, contributing in some way to economic growth.
86 Aghion et al., supra note 83, at 1620.
88 Id. at 129.
learning)\(^89\) and the emergence of development economics, a renewed interest in growth theory took root.\(^90\) Recognition that growth could be modeled endogenously and could be strongly affected by government policy seemed to raise new research and modeling questions and force a re-examination of prevailing notions about inequality.\(^91\) As economists looked at the difference between developed countries and developing countries, they could not help but notice vast inequalities of wealth among the former and began to ask questions about whether inequality played some role in determining growth.\(^92\)

Growth theory has typically focused on production, and more particularly on the capital investment required for production.\(^93\) It was thus natural to wonder, at some point, if inequality might impede economic growth because it meant that large swaths of a population might be too poor to invest in potentially productive capital. Lenders in an unequal society face borrowers that have sufficient collateral (rich people) and those who don’t (poor people), and lenders would therefore loan at different interest rates.\(^94\) An unequal society misses a huge opportunity by making it harder for the poor to borrow and invest.\(^95\) This constraint might hinder ordinary productive investments, like opening a small business, but might be even more unfortunate (and more inefficient) if it discouraged, as economic scholars suspect it

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91 Stern, supra note 87, at 122–23.


93 Conventional economic theorizing and empirical analysis has tended to view capital as the limiting factor, since much of the under-developed world has so much inexpensive labor. See, e.g., Adrian Wood, Openness and Wage Inequality in Developing Countries: The Latin American Challenge to East Asian Conventional Wisdom, 11 WORLD BANK ECON. REV. 33, 34 (1997) (“The belief that increased openness reduces wage inequality in developing countries rests on an apparently indisputable fact—that the supply of unskilled labor, relative to the supply of skilled labor, is larger in developing than in developed countries.”); Michael P. Todaro, A Model of Labor Migration and Urban Employment in Less Developed Countries, 59 AM. ECON. REV. 138, 138 (1969) (“[E]ven the most casual observer of these countries cannot help but be overwhelmed by the proportion of the urban labor force which is apparently untouched by the ‘modern’ economy.”).


does, investment in education.\textsuperscript{96} Inequality thus has a dynastic effect in that poorly-educated families have little capacity to invest in education and improve their lot.\textsuperscript{97} This dynastic effect is exacerbated because poorer families are more likely to be larger; to augment income and pool risks of family misfortune (such as illness), poorer families are likely to have more children, in turn making it more difficult for those children to invest in education.\textsuperscript{98} Even without considering the cost of maintaining a safety net for unproductive individuals, the lack of productivity is an enormous opportunity cost for society.

Some economists with Keynesian inclinations also wonder if inequality reduces capital investment from the demand side. It is true that economic growth might be stunted by insufficient production caused by lack of investment. But it might also be true that economic growth might be stunted by insufficient demand. A person with 3,000 times the personal wealth of an average individual does not consume 3,000 times as much as the average individual.\textsuperscript{99} Wealth inequality implies that fewer consumers can afford to purchase goods, which would suppress demand for goods and services, which would in turn suppress capital investment.\textsuperscript{100} Why invest in producing goods if there aren’t enough consumers out there with sufficient wealth to buy them? Moreover, an inefficiently small consumer base creates second-order inefficiencies: a smaller domestic goods market reduces product diversity and

\begin{itemize}
  \item \textsuperscript{99} For a study showing that income inequality leads to consumption inequality, see Mark Aguiar & Mark Bils, \textit{Has Consumption Inequality Mirrored Income Inequality?}, 105 \textit{AM. ECON. REV.} 2725 (2015).
\end{itemize}
competition in goods provision, and it consequently dampens the incentives to innovate and in turn dampens the economic growth that comes along with innovation.

It should not be surprising that inequality creates economic losses by suppressing consumption as well as production. If severe enough, inequality disenfranchises large parts of a population. To the extent that countries with high levels of inequality are leaving substantial groups of people behind, they are not just ill-serving those groups; they are ill-serving their entire populace by failing to capitalize on human resources.

B. Loss of Positive Human Capital Externalities

Like other forms of capital, human capital—formal education or informal learning—is a factor of production and a key driver for economic growth. But human capital confers benefits that other forms of capital do not. Human capital helps drive the adoption of new technologies, as higher-skilled workers with richer human capital generate better ideas and are more able to adapt to changes in technology. Better still, human capital can produce knowledge spillovers as interactions among skilled individuals generate mutually beneficial enhancements to human capital. This is especially true if one examines the stock of human capital in a specific locality, where interactions are likely to take place, such that one explicitly considers the returns of education to a local economy.

The empirical evidence strongly suggests that inequality is negatively correlated with investment in human capital and thereby dampens economic

Economists have long intuited the importance of education to economic growth.107 Claudia Goldin and Lawrence Katz, in their book *The Race Between Education and Technology*,108 argue that the economic dominance of the United States for the latter half of the twentieth century was largely due to its broad public schooling system, which created an educated workforce able to adapt to technological changes and increase productivity.110 Young women,111 as well as young African Americans,112 benefited broadly and greatly. But more importantly for our purposes, the dissipation of inequalities in education did not place white males at a relative disadvantage; rather, the breadth of education in the American populace lifted up an entire populace, creating economic growth in excess of what could have been achieved without compulsory schooling.113 And by contrast, Goldin and Katz argue, the American failure to maintain that educational advantage after 1970 largely explains the country’s economic underperformance over this same period.114 In the United States, inequality that stratifies schooling into one system for haves and another for have nots is not only unjust but grossly inefficient.115

**C. Inequality and Crime**

Crime has long been studied as a sociological problem.116 Nobel Laureate Gary Becker modeled crime as a purely economic problem, opening up a new and entirely

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110 Id. at 29.
111 Id. at 78 (Table 2.5 showing higher returns for education for women in college and business school, but not high school).
112 Goldin & Katz, supra note 109, at 21–23.
113 Id. at 29.
114 Id. at 320–23.
different literature, one that tended to view criminals, law enforcement agents, and potential victims all as rational actors, in stark contrast to sociological models of culture and norms.\(^{117}\) Again, this Article does not address the effects of poverty on efficiency, and so does not address the effects of poverty on crime. If poverty is the result of a lack of legal economic opportunities, then illegal opportunities become an increasingly rational alternative even in the face of potential sanctions. Inequality, by contrast, is not concerned with the situation of the potential criminal herself but her position relative to others. A potential criminal may not even be particularly poor but may be moved to crime by her relative position to others.

Inequality may cause crime by breeding resentment, but for our purposes, it is more relevant that inequality can make crime, even violent crime, a rational course of action. Consider two individuals of equal age, size, and strength, but one is wealthier than the other. The wealthier individual, with more opportunities for wealth acquisition, would have more to lose from a violent encounter. The opportunity costs of violence are higher for the wealthier individual, and the poorer individual can exploit that asymmetry and threaten violence. In fact, the wealthier individual may even be larger, stronger, and quicker, and have an absolute advantage over the poorer one; but the poorer individual who has less to lose may still have a comparative advantage in violence.\(^{118}\)

Extrapolating from this two-person example, it is not hard to imagine that inequality creates a dangerous situation because of the asymmetry of opportunity costs. In societies with vast inequalities, some individuals will have very small opportunity costs of crime, perhaps even violent crime, with the result that they will enjoy a comparative advantage in violence. The rich can of course purchase some security with their vast wealth, obtaining an absolute advantage in violence, but that will not be enough to prevent those with little left to lose from initiating violence.\(^{119}\) Even if the poor lose more in a violent clash, in the context of what can be gained and lost by violence, a clash will be more costly to the rich than the poor, which is exactly what the rich fear.

Empirical validation of this phenomenon does face some data challenges. For one thing, crime underreporting is not only commonplace in all jurisdictions but


\(^{119}\) An illustration of the difference between an absolute advantage and comparative advantage in violence is provided in Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J. LAW & ECON. 39 (1994), and in D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEGAL STUD. 41 (1986). Professor Johnsen argues that property rights among aboriginal groups of the Pacific Northwest emerged which provided a substantial amount of customary sharing, in part to avoid the wealth imbalances that would give rise to a comparative advantage in violence.
varied in its extent, making cross-sectional analyses difficult. For another, there is the question of what geographic unit of measurement is relevant: is it inequality within a country, state, county, city, or neighborhood? For yet another, measurement of inequality can be challenging. Measuring inequality by income elides the difficulty that individuals commonly have different incomes at different points in life that do not accurately represent lifetime earning potential. For example, graduate students may have low incomes but high future earnings potential and may consume more than the average low-income individual. Most researchers have simply tried their best to address data problems and disclose shortcomings.

But while data issues merit an asterisk, it is accurate to assert that a positive link exists between inequality and crime, violent and non-violent. At the end of the day, most studies have found a statistically significant relationship between inequality and crime. This relationship, where it is found, is usually distinguishable from the effect of poverty on crime. For our purposes, it seems sufficient to say that the link between inequality and crime serves as another economic justification for reducing inequality.

121 Steven Messner & Kenneth Tardiff, Economic Inequality and Levels of Homicide: An Analysis of Urban Neighborhoods, 24 CRIMINOLOGY 297 (1986).
123 The theory is that consumption patterns follow expectations of lifetime, or “permanent,” earnings, rather than current-year income. See, e.g., MILTON FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION 20–21 (1957).
124 One study measured inequality and homicide within countries, reasoning that homicide is a crime that is not under-reported, and fleeing criminals are mostly likely to be constrained by national borders than any other. Pablo Fajnzylber, Daniel Lederman & Norman Loayza, Inequality and Violent Crime, 45 J. L. & ECON. 1, 7–9 (2002). Others focus on the neighborhood, on the theory that it is the proximity of inequality that matters, not the systemic advantages and disadvantages. See generally Steven Messner & Kenneth Tardiff, Economic Inequality and Levels of Homicide: An Analysis of Urban Neighborhoods, 24 CRIMINOLOGY 297 (1986).
126 Blau & Blau, supra note 125; Daly et al., supra note 125; Kelly, supra note 125.
D. Inequality and Political Instability

There is enough of Karl Marx in Thomas Piketty for him to drop some dark hints of a grand clash between classes if wealth gaps continue to expand. Just a remote threat of violence or social unrest is enough to send investors fleeing for safer shores and thereby reducing economic growth. Worse still, the threat of social unrest raises borrowing costs for the government, further reducing the resources available in that country for public spending. Relatedly, the threat of violence or social unrest may induce executive action that infringes upon private property rights, again sending investors fleeing. A strand of political economy research thus examines the effects of inequality on political stability and consequently on economic growth.

Using cross-country and time-series analyses, researchers have found that robust and statistically significant relationships exist between inequality and political instability and between political instability and economic growth over time. Political instability is operationalized by measuring the frequency of large political demonstrations and political assassinations, the number of fatalities stemming from incidents of mass violence, the number of serious attempts to overthrow a sitting government, and the frequency of actual changes in government. High levels of inequality have even been shown to be correlated with higher levels of terrorist activity.

127 Piketty, supra note 31, at 263, 422.
The existence of legal rights and a strong foundation in the rule of law have always been recognized as essential to economic prosperity and growth. But perhaps even more important is the existence of economic rights and opportunities to strive. What this research seems to highlight is the importance of the latter as a complement to the former.

E. The Erosion of Social Capital

Since the publication of Robert Putnam’s book *Bowling Alone,* the study and measurement of “social capital” has occupied a prominent place in social science research, even among economists. Social capital is most commonly thought of as the variety of interpersonal and intra-organizational bonds that are formed for purposes of cooperation. Putnam defines social capital as “features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.”

Putnam’s normative focus, and that of most sociologists, has been civic or community well-being. Putnam’s thesis was that social capital enhances political and civic life without consciously having these outcomes as objectives. Membership in bowling leagues, churches, and a variety of groups apparently made people better citizens without their knowing it. Conversely, a breakdown in social capital brings...

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140 See PUTNAM, supra note 136, at 184–88.
141 See id. at 42–46.
on a variety of social ills, including poorer health, lower educational levels, and increased violent crime.

But in addition to social benefits, social capital confers important economic benefits. Significant efficiencies can be realized by cooperation within a social group or community that has built up a reservoir of trust. A well-known example is found in the Jewish diamond merchant business in New York City. In order to obtain a second opinion on the value of diamonds, merchants will entrust competing merchants with bags of diamonds with enormous value—tens or hundreds of thousands of dollars. Amazingly, stealing in this community is virtually non-existent because the social capital resident in this community is even more valuable; stealing or substitution would result in ostracism. But note the economic significance: the ability to obtain a reliable second opinion on diamonds worth thousands and tens of thousands of dollars is a huge benefit. Moreover, being able to do so without having to resort to formal enforcement mechanisms is a cost savings. Of course, it is possible for social capital to be marshalled for unproductive, even immoral purposes, such as organized crime or the Ku Klux Klan, or for rent-seeking; but this is also true of physical or human capital. The economic perspective is analogous to Putnam’s argument: social capital enhances economic productivity without consciously having economic productivity as its goal.

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144 Fajnzylber et al., supra note 120, at 19; Sandro Galea, Adam Karpati & Bruce Kennedy, Social Capital and Violence in the United States, 1974–1993, 55 SOC. SCI. & MED. 1373, 1378 (2002).


147 Coleman, supra note 138, at S99.

148 The New York Diamond Dealers Club has its own arbitration system for resolving disputes. See Bernstein, supra note 146, at 124–30.


151 See, e.g., ARROW, supra note 137, at 3 (“There is considerable consensus also that much of the reward for social interactions is intrinsic—that is, the interaction is the reward—or at least that the motives for interaction are not economic. People may get jobs through networks of friendship or acquaintance, but they do not, in many cases, join the networks for that purpose.”).
Inequality imposes costs because it erodes trust and social capital. Trust and social capital are unfortunately likely to be low when parties are from different racial or ethnic groups. Economic inequality creates a similar sociological distance so that the greater the inequality, the lesser the trust. A Pew survey conducted in 2014 asked respondents about their views on whether government should help the poor and whether they thought the poor “have it easy.” The results are reproduced in Figure 2 below.

### Figure 2

**Views of the Social Safety Net By Levels of Financial Security**

<table>
<thead>
<tr>
<th>% who say ...</th>
<th>Government should do more for the needy, even if it means more debt</th>
<th>Government can’t afford to do more for the needy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>44</td>
<td>51</td>
</tr>
<tr>
<td><strong>Most secure</strong></td>
<td>34</td>
<td>62</td>
</tr>
<tr>
<td><strong>Least secure</strong></td>
<td>50</td>
<td>85</td>
</tr>
<tr>
<td>Poor people think they can get government benefits without doing anything in return</td>
<td>45</td>
<td>47</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>45</td>
<td>47</td>
</tr>
<tr>
<td><strong>Most secure</strong></td>
<td>36</td>
<td>36</td>
</tr>
<tr>
<td><strong>Least secure</strong></td>
<td>59</td>
<td>54</td>
</tr>
<tr>
<td>Poor people think the benefits don’t go far enough to help them live decently</td>
<td>39</td>
<td>45</td>
</tr>
</tbody>
</table>


**Putnam, in later research, has argued that “the correlation between economic equality and social capital is virtually ubiquitous, both across space and across time, both in the United States and around the world.” Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 156 (2007).**


The stark differences in attitude between the richest and the poorest are striking. It is shocking that more than half of people in the two richest quintiles actually believe that “poor people today have it easy,” when the average Supplemental Nutrition Assistance Program benefit (food stamp benefit) is about $125 per month, or a little over $4 per day. In the United States, there is quite apparently a great sociological distance between rich and poor when it comes to how comfortably the poor live.

Lower levels of trust and social capital are unfortunately costly. Clearly, one implication of the Pew study is that greater inequality has the ironic effect of discouraging giving from rich to poor. But it is not just that rich people are less charitable in their giving habits to help the poor, but that people of all income levels are less willing to contribute to civic engagement of all sorts. A general erosion of trust and social capital affects people’s view of policy and causes people to withdraw from social transacting. Cross-sectional studies show that the erosion of social capital caused by inequality causes a policy to disfavor public spending on all kinds of government programs and services, but most notably and most unfortunately, public education. The quality of government services is poorer in states where there is less reported trust.

For our purposes, it is most useful to consider how inequality erodes social capital and impinges on economic growth. Extrapolating from case studies, like that of the Jewish diamond merchant industry, up to a macro level, it is natural to hypothesize that economies with more social capital, and concomitantly more trust, were more economically productive. It is not difficult to imagine why: commercial

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156 U.S. DEP’T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP), PARTICIPATION AND COSTS, 1969–2014 (2015), http://www.fns.usda.gov/sites/default/files/pd/SNAPsummary.pdf (showing the average for the entire program, which benefits over 45 million Americans and disburses benefits of about $70 billion, and therefore masks wide variation in benefits. Recipients are not actually expected to survive on $4 per day, as the program is meant to supplement other sources of aid).


160 See Gradstein, supra note 143.


transactions are the stuff of economic growth, and as Nobel Laureate Kenneth Arrow once said, “Virtually every commercial transaction has within itself an element of trust.”\(^1\)\(^{163}\) Trust can displace the need for costly formal enforcement mechanisms, and the smaller the transaction costs, the more transactions.\(^1\)\(^{164}\) More trust requires less litigation, fewer defensive expenditures, and more innovation because of the more trustworthy environment.\(^1\)\(^{165}\) More trust leads to more accumulation of capital, especially human capital,\(^1\)\(^{166}\) which is perhaps the most critical growth determinant.\(^1\)\(^{167}\)

Note that this thesis has two stages: (1) that inequality erodes social capital and (2) loss of social capital reduces economic growth. Empirically validating this thesis thus requires establishing linkages for both stages. There are two approaches to empirical research in this area: (1) cross-sectional studies and (2) laboratory experiments. While data limitations and definitional questions warrant some caution, the totality of the research offers reasonably robust support for the thesis that inequality reduces social capital, which consequently reduces economic growth.

Both cross-sectional studies and experiments offer support for the first stage of the thesis that inequality erodes social capital. There is the long-standing problem of how exactly to operationalize social capital: is it associational activity, such as belonging to clubs and civic organizations, or is it simply trust, as reported in general attitudinal surveys? Researchers examine both possibilities, mostly reporting both that inequality reduces associational activity\(^1\)\(^{168}\) (although ethnic heterogeneity plays an unfortunately stronger role)\(^1\)\(^{169}\) and reduces reported levels of trust.\(^1\)\(^{170}\) Experimentally, as well, researchers have used inequality as a treatment effect and found that subjects placed in situations of inequality were less willing to contribute

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\(^1\)\(^{164}\) See Knack & Keefer, *supra* note 162, at 1252.
\(^1\)\(^{165}\) Id. at 1252–53.
\(^1\)\(^{166}\) Id. at 1253.
\(^1\)\(^{170}\) See Zak & Knack, *supra* note 162, at 312.
to public good provisions, indicating a lower level of trust.\textsuperscript{171} Most troubling, inequality caused “richer” subjects to undercontribute, confounding a previously prevalent expectation that the rich contribute more so as to achieve a more equal allocation.\textsuperscript{172}

Validating the second stage—that erosion of social capital reduces economic growth—can only be accomplished with cross-sectional analysis, as no experiment can realistically model economic growth in a lab (though some researchers experimentally ask subjects to contribute to a public good that will lead to a higher future payoff, thus simulating economic growth).\textsuperscript{173} On this score, as well, more researchers have found a link than not. Working from well-established economic growth models,\textsuperscript{174} cross-sectional studies attempt to control for other growth determinants (most notably education) and then attempt to find a statistical relationship with some measure of social capital—most commonly associational activity or trust—and economic growth.\textsuperscript{175} A variety of reasons could exist for social capital being a determinant of growth. Some researchers have identified a specific pathway: social capital as a stimulant of innovative activity by facilitating productive collaborations and by instilling some faith and trust in institutions through associational activity.\textsuperscript{176}

On the whole, researchers have linked the loss of social capital to losses in economic growth. In retrospect, this thesis should have been obvious. Widening wealth gaps reduce the commonalities of experience between rich and poor, increasing alienation. Under such circumstances, it would be natural to expect less trust, less generosity, more suspicion, and a generally less collaborative and productive society. Similarity within a population in wealth, education, and


\textsuperscript{172} See Anderson et al., supra note 158.

\textsuperscript{173} See Abdolkarim Sadrieh & Harrie A.A. Verbon, \textit{Inequality, Cooperation, and Growth: An Experimental Study}, 50 EUR. ECON. REV. 1197 (2006).


employment, help to create some assurance that certain social norms are shared and that transactions are likely to be undertaken with these social norms serving at least as a coordinating principle. All of this is frittered away with increasing inequality.

F. Inequality Increases Incentives for Rent-Seeking

Why do nations fail? That is the very big question asked by Daron Acemoglu and James Robinson in their book of the same title.\(^\text{177}\) In their book, Acemoglu and Robinson document the economic and political histories of a variety of countries and societies, and show how the rise of exploitive, economically “extractive” institutions simultaneously thwart economic growth and enrich a small elite group (or even an individual).\(^\text{178}\) The book does not offer a fundamental explanation of why the extractive institutions arise in the first place, nor does it truly define “extractive institution.” The reader is asked to recognize an extractive institution when she sees it. Slavery,\(^\text{179}\) monopoly,\(^\text{180}\) and suppression of free speech\(^\text{181}\) are examples.

It is true that extractive institutions produce unequal societies. But a critical lesson from *Why Nations Fail* has to do with the self-perpetuation of inequalities brought on by extractive institutions. As it turns out, once “inclusive” institutions—ones that foster economic growth, acting as the opposite of extractive institutions—are ruined and replaced by extractive institutions, they are extremely hard to reconstruct. Once extractive institutions have succeeded in enriching the few and imposing misery on the many, the quest for power becomes all-important and rent-seeking becomes a default option. As opposed to creating a “virtuous circle” constructed from inclusive institutions and the rule of law, a “vicious circle” of poverty, misery, and concentration of wealth and power becomes entrenched.\(^\text{182}\) With so much at stake and with an inevitable weakening of the rule of law, rent-seeking becomes an indispensable option.

The frightening upshot of *Why Nations Fail* is that it is dangerously easy for a country to slip down the greasy slope of rent-seeking down to the black hole of autocracy. The story, as told by Acemoglu and Robinson, of how so many nations failed in the past is the story of how some critical level of inequality raised the stakes for government policy, and ushered in a new political equilibrium that was predicated on the naked pursuit of power. Even after an autocratic, kleptocratic government is

\(^{178}\) Id. at 112–13.
\(^{179}\) Id. at 225.
\(^{180}\) Id. at 171.
\(^{181}\) Id. at 332–33.
\(^{182}\) Id. at 364–65.
toppled, the inequality remains, and the incentives for rent-seeking and disincentives for the rule of law remain. While rent-seeking is costly and harmful, the real danger may be that it creates inequalities that are extremely difficult to reverse.

G. Inequality Reduces Subjective Well-Being

Economists concede that indices such as Gross Domestic Product (GDP) are very crude approximations for social welfare. The most compelling case for continued reliance on measures such as GDP for social welfare and on income and wealth for individual welfare seems to be that we can measure it. Those arguments have been influential as far as they go, but a growing unease about some critical shortcomings have intensified doubts about the accuracy of these metrics.

Rising concerns about inequality have cast a particularly dark cloud over traditional, aggregate economic indices, fueling skepticism. United States GDP rose from 1999 through 2008 (up to the Financial Crisis), even while most Americans experienced a decline in real income. Over the past forty years, mean household income in real dollars has risen by thirty-three percent while real median household income has been stagnant, rising only twelve percent. Over the same period, the share of income by the top one percent has risen from below ten percent to over twenty percent. By breaking down aggregate measures of statistics like income, economists such as Piketty and Saez have helped to erode the misplaced faith in

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183 Edward D. Kleinbard, We Are Better Than This: How Government Should Spend Our Money 19 (2014) (“To summarize, GDP and similar metrics are poor surrogate measures of welfare.”); Daniel Kahneman, Peter P. Wakker & Rakesh Sarin, Back to Bentham? Explorations of Experiences Utility, 112 Q. J. Econ. 375, 375 (1997); See, e.g., Andrew J. Oswald, Happiness and Economic Performance, 107 Econ. J. 1815, 1815 (1997) (“Economic performance is not intrinsically interesting. No one is concerned in a genuine sense about the level of gross national product last year or about next year’s exchange rate . . . . The relevance of economic performance is . . . not the consumption of beefburgers, nor the accumulation of television sets, nor the vanquishing of some high level of interest rates, but rather the enrichment of mankind’s feeling of well-being. Economic things matter only in so far as they make people happier.”); Peter H. Huang, Happiness 101 for Legal Scholars: Applying Happiness Research to Legal Policy, Ethics, Mindfulness, Negotiations, Legal Education, and Legal Practice, in 2 Research Handbook of Behavioral Law and Economics (K. Zeiler & J.C. Teitlebaum eds., 2015, forthcoming), http://ssrn.com/abstract_id=2562746 (“Economists have long known that GDP is a crude, imperfect, and incomplete proxy for social welfare.”).

184 See, e.g., Joseph E. Stiglitz, Amartya Sen & Jean-Paul Fitoussi, Mis-Measuring Our Lives: Why GDP Doesn’t Add Up 23 (2010); Kleinbard, supra note 183, at 20 (“Because [GDP] is ubiquitous, easily described in news reports, comparable across different countries and relatively uncontroversial in its measurement, GDP tends to frame our sense of progress.”).

185 Stiglitz et al., supra note 184, at 3–5.

186 Id. at xix.


188 Fernando Alvaredo, Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez, The Top 1 Percent in International and Historical Perspective, 27 J. Econ. Persp. 3, 4 fig.1 (2013).
aggregate indices, giving a data-driven voice to those straining against the misplaced satisfaction in seeing gains in aggregate statistics. Inequality is in large part driving re-examination of faith in GDP and economically-based welfare analysis.

At the same time, notable advances in alternative measurements have reinvigorated calls to at least include some alternative measurements to go alongside the traditional economic indices as supplemental indicators. Happiness, or subjective well-being (SWB), has emerged as a serious alternative to traditional economic indices. Happiness, or SWB indices, are constructed using self-reported data, typically collected through very broad surveys, such as the Behavioral Risk Factor Surveillance System administered by the U.S. Centers for Disease Control and Prevention or the General Social Survey administered by the National Opinion Research Center.

Indices constructed from SWB data suffer from some of the same problems as economic indicators. Are measures of individual SWB additive, cardinal, or interpersonally comparable? How does one actually construct a social measure from individual responses? Is happiness all that matters? Maybe “meaningfulness” is more important to people than pure hedonic happiness or anything measured by reported measures of SWB. But even if alternatives are imperfect, rising concerns with inequality seem to provide an especially strong case for diversifying away from indicators such as GDP. GDP captures none of what is compelling about inequality: the mere volume of economic transactions says nothing about the parties to transactions, and what is troubling about inequality is the fact that many are being left out. In light of such glaring omissions, even an imperfect measure of the discontent brought on by inequality is likely to provide some information.

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194 Jeffrey L. Harrison, Regulation, Deregulation, and Happiness, 32 CARDOZO L. REV. 2369, 2372 (2011) (“It is ironic that the first problem happiness proponents confront is whether happiness is any different from utilitarianism and its problems. For example, if maximum experienced happiness (or utility) is the goal, is success measured by assessing the average or the total amount of happiness?”).

195 See MIKE W. MARTIN, HAPPINESS AND THE GOOD LIFE 183 (2012) (“The pursuit of any of those values, including moral values, contributed to happiness by sustaining a (subjective) sense of meaning...”).
SWB research using data on a national level generally finds that over time, increases in income (which might be measured by GDP) have failed to generate increases in SWB.\(^{196}\) Getting at the discontent caused by inequality requires that data be analyzed using the individual as the unit of analysis: Are individual people more likely to report unhappiness if they live in a situation of greater income or wealth inequality? SWB research suggests a negative correlation between SWB and inequality.\(^{197}\)

In thinking about why inequality might lead to unhappiness, one strong hypothesis rooted in a long line of psychological research is that individual happiness depends significantly on an individual’s comparison with local peers. Thus, if one lives in a city with large inequalities, then one might be more envious if one is poor, or one might be more suspicious if one is rich.\(^{198}\) Or, inequality might give rise to a perception of lack of fairness and a lack of trust.\(^{199}\) Overall, while the results are not unambiguous, the predominance of the research shows a negative link between SWB and income inequality.\(^{200}\) Having more money makes most people happier,\(^{201}\) as does marriage.\(^{202}\) Involuntary unemployment makes almost everyone very unhappy.\(^{203}\) But all other things being equal, living in a situation with inequality makes an individual less likely to be happy than otherwise.

This line of research comports well with intuitions about inequality and general happiness. In a sense, the propensity of inequality to generate unhappiness ties together all of the subsections preceding this one. Each of the subsections in this part describe how a divergence in wealth or income creates some social or economic problem. Individually, these deviations from some innate expectation might be unnoticeable. But inequality has become not only noticeable, it has become a source

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197 See infra notes 198–99.


201 Diener et al., supra note 200, at 859 tbl.4.

202 Alesina et al., supra note 200, at 2032 tbl.3.

203 Id.
of widespread concern. It is as if the accumulation of these small deviations have suddenly welled up and been brought into public consciousness.

IV. TOWARDS REVERSING INEQUALITY: THE ROLE OF LAW, AND OF ECONOMICS

A second objective of this Article is to press the case for reversing inequality, but to do it in a way that is consistent with economic growth. If inequality is objectionable in part because it is allocatively inefficient, then measures to cure inequality should not themselves be inefficient. Piketty’s thesis that inequality is increasing because the returns to private capital exceed the rate of economic growth—expressed in his now-famous relation $r > g$—has been criticized for its universality, its relevance, and its underlying data, faultily handled by Piketty (according to his critics). But the relation usefully reframes inequality as at least partly a problem of economic growth, which meets no disagreements from any economist. If inequality increases because $r > g$, then at least one answer is to find ways to increase economic growth.

However, not all measures to stimulate economic growth are created equal. Enough harm has been wrought by, borrowing from Martin Feldstein’s words, “supply side extremists.” Economic growth policies have to be grounded in sound economics, not the snake oil economics that has insinuated itself into partisan politics and lawmaking. Unfortunately, snake oil economics often presents itself as a formula for job creation and economic growth. How can one tell the difference?

There is no magic spell that can distinguish between sound economics and snake oil economics, much less a way of holding legislatures accountable for economic belief systems that border on astrology. But it is possible to do some informal sorting of laws and policies that purport to contribute to economic growth but seem to produce outsized rents to particular industries or groups. The most useful way to attack inequality is to focus on specific laws and policies that seem to contribute much more to private returns to capital ($r$) than they do to economic growth ($g$). In other words, laws or policies in which $\Delta r \gg \Delta g$ should be carefully scrutinized and re-evaluated for its impacts on economic growth. First, when it can be said of a law or policy that $\Delta r \gg \Delta g$, there is a heightened possibility that it contributes to economic inequality,

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207 Piketty, supra note 31, at 25.
208 Feldstein, supra note 52, at 27–28.
since it is bringing about or exacerbating Piketty’s $r > g$ condition. Second, when there is a connection between a law or policy and a spectacularly high return on private capital, there is the distinct possibility that the law or policy in question is wealth-reducing, naked rent-seeking. In fact, the larger the returns to private capital, the more it is worth spending to obtain those rents. Few and far between are those economic laws and policies that miraculously create spectacular wealth in one sector or group that also redounds to the benefit of the larger polity. A third and related point is that when a law or policy dramatically and suddenly boosts returns to private capital in one sector or industry, it is potentially inducing a misallocation of resources, especially investment capital. As Eric Posner and Glen Weyl have argued, the finance sector has been shockingly well-paid, five times that of all academic research, a subset of which—medical research—has produced the equivalent of $3.2$ trillion of benefit every year since 1970. It is a fair bet that the finance sector has not produced $16$ trillion annually in wealth over that time period.

Granted, saying of a law or policy that $\Delta r >\Delta g$ is necessarily an informal observation, as there is never a counterfactual against which to measure economic growth or returns to private capital. Could we ever say such a thing? The answer is, in fact, yes: judgments about rent-seeking are made quite frequently and routinely, without necessarily resorting to empirical analysis.

To canvass the law and find all instances in which $\Delta r > 0$ and $\Delta g$ is either negative or very small is a task beyond the scope of this Article. Rather, in keeping with the general theme of this Article—that inequality in extreme forms can be allocatively inefficient—I discuss two cases to outline a growth-improving approach to reducing inequality. First, I discuss one case in which $\Delta r > 0$ and $\Delta g < 0$, the deregulation of over-the-counter (OTC) derivatives. The systemic risk of catastrophic loss created by unregulated trading of derivatives is a boon to traders and a clear case of government failure. As such, the re-regulation of OTC derivatives is exactly the kind of growth-improving measure that should be implemented to reduce inequality.

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209 See, e.g., David R. Henderson, Rent Seeking, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008), http://www.econlib.org/library/Enc/RentSeeking.html (“It has been known for centuries that people lobby the government for privileges. Tullock’s insight was that expenditure on lobbying for privileges are costly and that these expenditures, therefore, dissipate some of the gains to the beneficiaries and cause inefficiency . . . . Although such an expenditure [on lobbying] is rational from the narrow viewpoint of the firm that spends it, it represents a use of real resources to get a transfer from others and is therefore a pure loss to the economy as a whole.”).

210 See Posner & Weyl, supra note 33 (citing Kevin M. Murphy & Robert H. Topel, The Value of Health and Longevity, 114 J. POL. ECON. 871, 872 (2006)). Financial workers, meanwhile, contributing quite less than that, were paid five times that amount. Id. (citing Benjamin B. Lockwood, Charles G. Nathanson & E. Glen Weyl, Taxation and the Allocation of Talent, J. POL. ECON. (forthcoming 2016)).

211 See, e.g., GORDON TULLOCK, THE RENT-SEEKING SOCIETY 5 (2005) (“The problem here is one of definition. Should we regard the competitive research, competitive sales effort, and so on, as equivalent to rent seeking?”).
Second, I discuss a case in which $\Delta r < 0$ but it is likely that $\Delta g < 0$: an increase in the minimum wage. The economic analysis of minimum wage increases is surprisingly deep, but still inconclusive.\textsuperscript{212} But even if we were to accept that a minimum wage hike reduces inequality, it is potentially counterproductive in that it may impinge upon economic growth.\textsuperscript{213} Such a legal response might just be inadvisably blunt, given the plethora of alternative measures to raise economic growth more broadly.

\textbf{A. The Re-Regulation of Over-the-Counter Derivatives}

Banking and finance, previously separate industries, have undergone deregulatory changes through a series of legislative and administrative moves over two decades.\textsuperscript{214} The total effect of all of the moves has been spectacularly lucrative for the banking and finance sector as a whole, even if there have been individual casualties. Never mind the most notorious instances of banditry, such as Lehman Brothers CEO Richard Fuld’s $480 million payout for navigating Lehman into the largest bankruptcy in history (while seeking a government bailout);\textsuperscript{215} the banking and finance sector as a whole has done extremely well throughout the Financial Crisis and the recovery since. Thomas Philippon and Ariel Reshef estimate that the educational wage premium for those in the finance industry, vis-à-vis other industries, adjusting for skill intensity and job complexity, to be 250 percent that of comparable professions.\textsuperscript{216} Banking and finance have been, and have become even more so, extraordinarily over-compensated sectors.\textsuperscript{217} The private returns to capital have been spectacular. And while the Financial Crisis obviously visited enormous losses upon the finance industry, the recovery has been uneven, to say the least. The One Percent lost so much, just because they held so much of the lost wealth—thirty percent—\textsuperscript{218}—but those on the lower rungs of the wealth ladder lost a larger portion of their wealth and had a much smaller household buffer (if they had one at all) to absorb losses.\textsuperscript{219} Perhaps most stunning, ninety-five percent of total income gains in

\begin{itemize}
  \item \textsuperscript{212} See infra notes 268–72 and accompanying text.
  \item \textsuperscript{213} See infra notes 273–73 and accompanying text.
  \item \textsuperscript{214} See, e.g., Lynn A. Stout, Derivatives and the Legal Origin of the 2008 Credit Crisis, 1 HARV. BUS. L. REV. 1, 3 (2011); Wilmarth, supra note 74, at 1328–40.
  \item \textsuperscript{217} Posner & Weyl, supra note 33.
  \item \textsuperscript{218} Piketty, supra note 31, at 348.
  \item \textsuperscript{219} Whereas the net worth of the 95th percentile household lost over $200,000 but suffered only a 13% drop in net worth, the median household in the United States fell over $27,000 to $68,365—a 28% drop. Fabian T. Pfeffer, Sheldon Danziger & Robert F. Schoeni, Wealth Disparities Before and After the Great
the United States from 2009 to 2012 accrued to the top one percent of income earners.\textsuperscript{220}

And what of the effects of deregulation and consolidation for economic growth? Without a counterfactual, it is impossible to say, but even before the Financial Crisis laid bare the sharp contrast between compensation in the finance industry and its contribution to economic prosperity, studies suggested that the finance industry imposes shockingly large negative externalities.\textsuperscript{221} Certainly, in the wake of the Financial Crisis, in which $15 to $30 trillion of wealth was lost,\textsuperscript{222} no serious contention is made that the package of banking and finance deregulations over the past two decades have been positive for economic growth. Given the staggering wealth lost, if the contested assertions\textsuperscript{223} that the package of banking and finance deregulations caused the Financial Crisis are even partially correct, it would be implausible to argue that deregulation of the sector was economically beneficial.

One reason this crisis was particularly brutal on the less wealthy is because it produced a widespread withdrawal of credit. The Financial Crisis was an old-fashioned bank run,\textsuperscript{224} only on a new “securitized banking” system made possible by the combination of deregulations undertaken in the decades prior.\textsuperscript{225} Credit

\textit{Recession}, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 104 tbl.1 (2013). Moreover, so much of this loss resulted from the losses in housing equity, which accounted for a much larger fraction of household wealth of those not in the One Percent. \textit{Id.} at 104 tbl.1 (showing that in 2007, the median household had $95,472 in wealth, only $22,240 of which was non-housing wealth; by contrast, a household at the 95th percentile held $1.57 million in wealth, with more than $935,000 in non-housing wealth).


\textsuperscript{222} See, e.g., Tyler Atkinson, David Luttrell & Harvey Rosenblum, \textit{How Bad Was It? The Costs and Consequences of the 2007-09 Financial Crisis}, 20 FED. RES. BANK OF DALLAS STAFF PAPER 3 tbl.1 (July 2013), http://dallasfed.org/assets/documents/research/staff/staff1301.pdf. The authors’ $15–30 trillion estimate actually does not account for the costs of trauma and the opportunity costs of extraordinary government support offered in reviving economic activity.

\textsuperscript{223} A majority (six out of ten) of the Congressionally-commissioned body charged with analyzing the causes of the crisis, the Financial Crisis Inquiry Commission, found that banking and finance deregulation was a substantial cause of the Financial Crisis. \textit{FIN. CRISIS INQUIRY COMMISSION, FINAL REP. OF THE NAT’L COMMISSION ON THE CAUSES OF THE FIN. AND ECON. CRISIS IN THE UNITED STATES}, at xvii–xviii (2011), http://cybercemetry.unt.edu/archive/feic/20110310173617/http://www.fcic.gov/about. The four dissenting members of the Commission pointedly disagreed with the parts of the report that emphasized deregulation, and propounded their own view that global capital flows bore significant blame for the crisis. \textit{Id.} at 417–19.


\textsuperscript{225} Gary Gorton & Andrew Metrick, \textit{Securitized Banking and the Run on the Repo}, 104 J. FIN. ECON. 425, 425 (2012). Conservative scholars have laid the blame on government intervention in the form of Fannie Mae and Freddie Mac, which they claim were encouraged to inflate the housing market by expanding homeownership and supporting the risky mortgage-backed securities. See, e.g., John B. Taylor, \textit{The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong} 12, (Nat’l Bureau
disappeared for a wide swath of businesses, causing many to fail or contract and to lay off workers, which compounded itself as the newly unemployed (and even those hanging onto their jobs) dramatically cut back on spending. In 2008 and 2009, nearly nine million Americans lost jobs—eight hundred thousand in the single month of January 2009. The job losses were wide and deep enough to deposit nine million Americans into poverty from 2007 to 2010.

This catastrophic credit crisis, with its regressive effects on employment, can be traced in large part to the deregulation of OTC derivatives, the product of a decades-long lobbying effort. In 1989, the Commodities Futures Trading Commission (CFTC) was headed up by Wendy Gramm, the wife of Senator Phil Gramm, a central architect of banking and finance deregulation. The banking and finance industries sought and secured from Gramm’s Commission a safe harbor for one type of derivative, a “swap transaction,” used by banks to hedge risk from interest rates. Other liberalizations followed. The Futures Trading Practices Act of 1992 authorized the CFTC to exempt some derivatives in addition to swaps and also preempted any state laws purporting to regulate OTC derivatives. After a series of spectacular derivative-driven failures, including the bankruptcy of Orange County’s pension fund and a $4 billion bailout of the hedge fund Long Term Capital

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226 See, e.g., Gabriel Chodorow-Reich, *The Employment Effects of Credit Market Disruptions: Firm-Level Evidence From the 2008-9 Financial Crisis*, 129 Q. J. Econ. 1 (2013); Nancy Green Leigh & Edward J. Blakely, *Planning Local Economic Development: Theory and Practice* 2 (2013). Firms that borrowed from one of the failed firms were only able to borrow, if at all in the credit freeze up, at less favorable rates.


229 See, e.g., Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1, 3 (2011); Wilmarth, supra note 74. This was certainly the majority view of The Financial Crisis Inquiry Commission, a Congressionally-created panel charged with investigating the causes of the Financial Crisis. FIN. CRISIS INQUIRY COMMISSION, supra note 223. The four dissenting members of the Commission pointedly disagreed with the parts of the report that emphasized deregulation, and propounded their own view that global capital flows bore significant blame for the crisis. Id. at 417–19.

230 A historical summary is provided by Stout, supra note 229, at 11–20.


Management, talk of reigning in derivative trading resurfaced.\textsuperscript{233} CFTC Chair Brooksley Born sought to re-regulate OTC derivatives trading, but was shouted down by a “stampede” of lobbyists, Federal Reserve Chairman Alan Greenspan, and Treasury Secretary Robert Rubin.\textsuperscript{234} The culmination of this deregulatory effort was passage of the Commodity Futures Modernization Act of 2000,\textsuperscript{235} which completed deregulation of speculative financial products, including credit default swaps.\textsuperscript{236}

Following the CFMA, trade in derivatives increased more than sixfold, from $94 trillion in the first half of 2000\textsuperscript{237} to almost $600 trillion during the second half of 2007.\textsuperscript{238} The result can be (and was, in the case of the Financial Crisis) the development of a derivatives market much larger than the value of the underlying collateral asset itself. Speculation using OTC derivatives ran rampant because unregulated derivatives were so much easier to obtain for hedging than actually purchasing a countervailing position.\textsuperscript{239} Critically, OTC derivatives could be issued on the same event multiple times,\textsuperscript{240} allowing a $1.3 trillion market on subprime mortgages to wipe out $11 trillion of wealth.\textsuperscript{241}

It is not hard to understand why banking and finance companies lobbied so hard for so long to deregulate the trading of OTC derivatives. The zero-sum gambling\textsuperscript{242} introduced by derivatives is not zero-sum for banks at all. Derivatives are a subsidy. Trading in derivatives increases risk, but much of the downside risk is insured in case of default.\textsuperscript{243} Also, for finance firms trading on behalf of clients, OTC derivatives are lucrative business: reporting of OTC-derived income is not mandated.

\begin{thebibliography}{99}
\bibitem{234} \textsc{Partnoy, supra} note 233, at 229–30; \textsc{Stout, supra} note 229, at 20–21.
\bibitem{236} \textsc{Stout, supra} note 229, at 3–4.
\bibitem{239} \textsc{Stout, supra} note 229, at 7–8.
\bibitem{240} \textsc{Gary Gorton & Andrew Metrick, Regulating the Shadow Banking System, 2010 Brookings Papers on Econ. Activity} 261, 277 (2010).
\bibitem{241} \textsc{Stout, supra} note 229, at 28–29 (explaining how a market in subprime mortgages worth a total of $1.3 trillion necessitated government infusions of over $3 trillion, and wiped out wealth in excess of $11 trillion).
\bibitem{242} This is the term used by Eric Posner and Glen Weyl to describe derivatives, as well as Lynn Stout, to describe the zero-sum nature of derivatives trading. No risk hedging is accomplished by most derivatives, only speculation with no net gains, and lots of commissions for derivatives trading companies. Eric A. Posner \& E. Glen Weyl, \textit{An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets}, 107 NW. U. L. REV. 1307, 1316 (2012); \textsc{Lynn A. Stout, Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives, 48 Duke L.J.} 701, 712 (1999).
\bibitem{243} \textsc{Posner \& Weyl, supra} note 242, at 1316.
\end{thebibliography}
but Goldman Sachs estimated that from 2006 to 2009, twenty-five percent to thirty-five percent of its revenues were generated from derivatives trading. Goldman Sachs net revenue for 2007 was about $46 billion dollars, so twenty-five percent to thirty-five percent of that is a lot of money.

Worst of all, the nature of the risk created by speculation using OTC derivatives was *systemic*. Even the fractious Financial Crisis Inquiry Commission agreed that among those speculators that failed, there was “appallingly bad risk management.” While some of those guilty of speculating recklessly were, in some sense, punished (such as Lehman Brothers), the breadth of the risk created enveloped nearly the entire American economy. Credit drying up for speculators was also credit drying up for the vast majority of American businesses that depended on credit for cash flow to conduct their business and employ workers. So the risk happened to be much more widespread than that assumed (unwittingly) by wealthy managers taking risks on behalf of their wealthy clientele. The breadth of that risk, affecting all debtors, is an externality.

Finally, risk itself is a source of wealth inequality. The wealthier can better afford to take risks, and over the long run, a portfolio with more risk generates higher returns. Enabling risk-taking is the law’s way of inflating the returns to capital—Piketty’s $r$. Seen in that light, all of the deregulations sought and obtained by the financial industry appeared desirable to wealthy investors. Risk is good for those that can afford to take it, and OTC derivatives create risk.

The Financial Crisis was horrifying enough to result in passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) which, among other things, required banks to transfer their derivatives holdings to non-bank

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244 Financial Crisis Inquiry Commission, supra note 223, at 50–51. Banking and finance giants say they do not formally track revenues and profits from derivatives trading generally. Id.


247 Even the dissenters of the Financial Crisis Inquiry Commission wrote that “[a]n essential cause of the financial and economic crisis was appallingly bad risk management by the leaders of some of the largest financial institutions in the United States and Europe. Each failed firm that the Commission examined failed in part because its leaders poorly managed risk.” Financial Crisis Inquiry Commission, supra note 223, at 428. See also John C. Coffee, Jr., Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight, 111 Colum. L. Rev. 795, 822–23 (2011).

248 Id.


It is not as if Dodd-Frank re-regulated OTC derivatives, as Lynn Stout has called for. But by forcing federally-insured banks to transfer derivatives to non-banks, Dodd-Frank at least took the American taxpayer off the hook for speculating losses. Even this was too much for the finance industry, which used the occasion of a threatened government shutdown to insert a provision amending section 716 of Dodd-Frank, putting the American taxpayer back on the hook and allowing, once again, federally insured banks to trade in OTC derivatives.

Some of the risk associated with OTC derivatives has been alleviated by the mandate under Dodd-Frank for a “swaps clearinghouse,” so that most non-commodity swaps must be carried out through a “derivatives clearing organization that is registered under this Act.” The idea is that the regulated clearinghouses can—and are required to—better ascertain the robustness of the proffered collateral than the likes of AIG. However, as Mark Roe and others have argued, clearinghouses do not actually reduce the kinds of systemic risk that befell markets during the Financial Crisis and do not actually alleviate the risk; there is no reason to believe that the “derivatives clearing organizations” will have the incentives or the tools to spot poorly priced assets any better than the failed institutions. At the end of the day, with section 716 effectively repealed, trading in OTC derivatives is still legalized gambling with the downside risk implicitly assumed by the American taxpayer, and the fruits of such risk-taking accruing to those that have the means to take it.

Obviously, if Congress is willing to do Wall Street’s bidding to amend section 716 of the Dodd-Frank Act—which was not even a regulation of derivatives—then a push to re-regulate OTC derivatives would face considerable political headwinds in the near-term. The purpose of this Article, however, is to re-engage efficiency arguments for reducing inequality and to identify opportunities to reduce inequality in a manner that is consistent with economic growth, laying the groundwork for a longer-term initiative. Along those lines, the idea of re-regulating OTC derivatives,

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251 Id. § 716.
254 Dodd-Frank § 723.
257 See, e.g., Levitin, supra note 256, at 448.
which serve no purpose other than to further enrich wealthy financiers at a huge net cost to the economy and to the non-wealthy, is low-hanging fruit.

B. An Increase in the Minimum Wage

With the rise in concern over inequality, one obvious solution is to raise the minimum wage, automatically raising the income of some of the lowest-wage workers. The current federal minimum wage is $7.25 per hour, which is where it has been since 2009.258 Some cities in which protest over inequality has been noisiest—Seattle, Los Angeles, Washington, and Chicago—have passed minimum wage laws, with Seattle and Los Angeles mandating a minimum wage of fifteen dollars per hour, and Washington and Chicago lower amounts.259 Voters in San Francisco and Oakland have approved similar measures, and proposals are underway in New York and San Diego.260 The minimum wage hike idea is simple and has been gaining popularity in recent years, as concerns of inequality intensify.261

Apart from a handful of scholars that have grappled with the nuances of a minimum wage increase,262 the debate over minimum wage hikes has been driven by two competing, simplistic, and ideological ways of thinking about the minimum wage: (1) that inequality can be reduced by lifting up poor wage workers by blunt legal force263 and (2) that raising the minimum wage increases labor costs and causes

260 Id.
261 Patrick McGeehan, Push to Lift Minimum Wage is Now Serious Business, N.Y. TIMES (July 24, 2015), http://www.nytimes.com/2015/07/24/nyregion/push-to-lift-hourly-pay-is-now-serious-business.html. Polls are generally conducted by organizations supporting minimum wage increases. Their results are nevertheless difficult to dismiss out of hand. The National Employment Law Project found that 75% of Americans, including 53% of Republicans, support increasing the federal minimum wage to $12.50 per hour. NAT’L EMP. L. PROJECT, NEW POLL SHOWS OVERWHELMING SUPPORT FOR MAJOR MINIMUM WAGE INCREASE (2015), http://nelp.org/content/uploads/2015/03/PR-Federal-Minimum-Wage-Poll-Jan-2015.pdf; more muted results were obtained by the Pew Research Center, which found that 71% of all Americans favored an increase from $7.25 to $9.00, including 50% of Republicans. PEW Res. Ctr, If No Deal is Struck, Four-in-Ten Say Let the Sequester Happen (2013), http://www.people-press.org/files/press.org/files/legacy-pdf/02-21-13%20Political%20Release.pdf.
employers to reduce the number of jobs available. Both of these ideological assertions contain just enough truth to be plausible. But the economic truth is, as it always inconveniently seems to be, dependent on unknowable specifics. On the one hand, it is not clear that a minimum wage hike would help those that one would consider “needy.” The minimum wage work force is small to begin with—3.8 million in 2011, representing only 5.2% of all hourly-wage workers. Of those, half are under the age of twenty-five, indicating that the lower end of the pay scale is crowded by younger workers, as we might expect, but not necessarily the most needy. It is true that significant increases in the minimum wage would boost the wages of not only those working at or below the minimum wage, but also those making slightly more; among those might be people that are targeted for relief: the working poor that are struggling to stay above the poverty level, including those with dependent children. But low-wage employment situations are so heterogeneous that it is difficult to say definitively who would benefit from a minimum wage hike. The effect of a minimum wage hike on poverty remains uncertain.

On the other hand, the opposition to a minimum wage hike is based on unclear empirical support as well. In a seminal and still-controversial 1994 article, David Card and Alan Krueger studied the effect of a minimum wage increase in New Jersey, comparing employment dynamics in New Jersey with that of neighboring Pennsylvania. Card and Krueger failed to find the predicted contraction of employment in New Jersey, confounding what had been strong conventional economic theory at the time. Moreover, Card and Krueger found a small positive effect on employment in New Jersey, which they attributed to lower turnover and


265 Id.


270 Id. at 792.

271 Id. at 772 (“The prediction from conventional economic theory is unambiguous, a rise in the minimum wage leads perfectly competitive employers to cut employment.”).
savings in retraining new employees and to possible monopsonist behavior by employers.272

Many critiques and a few affirmations of this landmark study followed,273 but over time, most economists seem to have accepted that a minimum wage hike might reduce employment but that the effects are small.274 It is also more widely accepted among economists that a minimum wage hike would have only modest effects on inequality, only helping some of those at the lowest income levels.275

A 2013 survey of top American economists at Harvard, Stanford, MIT, Berkeley, Yale, Stanford, and Chicago was mixed in terms of their support for a raising of the federal minimum wage to nine dollars per hour.276 When asked whether they agreed with the statement “[r]aising the federal minimum wage to nine dollars per hour would make it noticeably harder for low-skilled workers to find employment,” thirty-four percent agreed, thirty-two percent disagreed, and twenty-four percent were uncertain. Some of the world’s top labor economists, such as David Cutler of Harvard and Austan Goolsbee of Chicago (once President Obama’s Chief

272 Id. at 792.
274 Scott Adams & David Neumark, Living Wage Effects: New and Improved Evidence, 19 ECON. DEVELOPMENT Q. 80 (2005); see, e.g., David Neumark, Who Really Gets the Minimum Wage, WALL ST. J. (July 6, 2014, 5:49 PM), http://www.wsj.com/articles/who-really-gets-the-minimum-wage-1404683348 (It is noteworthy that David Neumark is perhaps the leading critic of the Card and Krueger study, and a prominent opponent of minimum wage increases).
276 University of Chicago Booth School of Business IGM Forum, Minimum Wage (Feb. 26, 2013, 10:56 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_br0IEq5a9E77NMV.
Economic Advisor) replied “[u]ncertain.”277 Proposals at the state level, even in liberal states, have been greeted with unease, even by those who advocate for greater economic equality.278 In light of the prevalence of fifteen dollars-per-hour proposals, however, the same economists were surveyed about the minimum wage hike up to that higher amount; that seemed to garner some more negative reactions, with more expressing the belief that unemployment would increase and aggregate output would contract.279

So it turns out that in addition to providing top-notch political theater, minimum wage hikes make for lively and animated academic debate as well. But at the end of the day, even economists who support a minimum wage seem unenthusiastic. Neither Stiglitz nor Piketty have had much to say recently about a minimum wage hike.280 In Inequality: What is to be Done?, Atkinson compiled a list of fifteen proposals for reducing inequality; a “statutory minimum wage set at a living wage” is one,281 but he devotes little text to this proposal and expresses doubt:

Does the Minimum Income Standard provide a foundation for defining a low-pay standards? Doubts must arise. If we examine the details of the wage requirement derived from the Minimum Income Standard, we see that it varies across family types. . . . The minimum wage cannot do all the work on its own.”282

The verdict on a minimum wage increase as a legal tool to address inequality seems to be that it is blunt and probably not very effective. A Congressional Budget Office study found that raising the federal minimum wage to $9 would lift 300,000 out of poverty but would cost 100,000 jobs, with larger figures for a hike to $10.10.283 These numbers are not trivial, nor are they worth the inordinate attention and political posturing surrounding this idea. The problem with a minimum wage hike is that, while it may reduce the returns to private capital, there is some risk that it would

277 Autor, supra note 275.
281 Atkinson, supra note 23, at 303.
282 Id. at 150.
also reduce economic growth. In Piketty’s parlance, it does no good to implement a policy for which $\Delta r < 0$ if it also imposes $\Delta g < 0$. If the problem of inequality is that it is inefficient, then the answer cannot be to impose more inefficiencies, however modest they may be.

**Conclusion**

Distributional issues have efficiency implications. To be sure, the relationship between distribution and efficiency is complicated, but it is no longer tenable to take Robert Lucas’ position that economics should *never* concern itself with inequality. At certain levels of inequality and under certain circumstances, an increase in inequality in either wealth or income will reduce social welfare. That reduction may or may not be measurable by traditional economic metrics, but it is widely accepted that welfare changes can occur without being reflected in such metrics.

Not only should economists concern themselves with inequality, but the cautionary tale stemming from the bogus supply-side economics still taking up residence on Capitol Hill and the equally speculative claims about the benefits of a minimum wage hike is that economists also have a crucial role to play in setting legal policy that implicates inequality. If Piketty is just heuristically correct—that $r > g$ characterizes the dynamics of inequality, then much work is to be done, and sound economic analysis must be a crucial component of any legal policymaking that implicates inequality. Given the multitude and complexity of factors that affect returns to private capital and that affect economic growth, there is no quick and easy way to undo decades of inequality-producing law and policy. The $r > g$ formula suggests structural changes are required.

Some care must be taken to find ways to narrow the gap between $r$ and $g$. There are certainly ways to reduce returns to private capital, but many of them would run against the grain of a legal system that instinctively protects legal expectations.\(^{284}\) The most egregious enrichments of wealth should eventually be susceptible of reform—compensation in the banking and finance industry, the re-regulation of OTC derivatives, and an increase in the estate tax\(^{285}\)—but others might be undertaken more gingerly. The complexity is that measures promoted as growth enhancing are rarely so.

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284 For example, the ubiquitous legislative and administrative practice of grandfathering is a product of a reluctance to reduce expectations of a return on capital. See, e.g., Shi-Ling Hsu, *The Rise and Rise of the One Percent: Considering the Legal Causes of Wealth Inequality*, 64 EMORY L.J. ONLINE 2043, 2058–62 (2015).

285 See Caron & Repetti, supra note 38.
The harder, but surer path to reducing inequality is to focus on laws and policies which more broadly and clearly stimulate economic growth and which redound to the benefit of the non-wealthy. There are certain fundamental widely accepted drivers to economic growth—quality education accessible to the entire populace, a physical and electronic infrastructure that is sufficient to support trade, a reasonable investment environment free of confiscatory regulation or policy, and the minimization of environmental and health hazards that threaten human development. As between knocking down r or boosting g, it is most constructive to find ways to increase g, the rate of economic growth, with an emphasis on how to ensure that the non-wealthy participate meaningfully in economic growth and receive the benefits of doing so. So, for example, focusing on broadly accessible education as a “force of convergence” in Piketty’s parlance is one way to address both economic growth and reducing inequality. That educational reform has proven to be so vexing, speaks to the magnitude of the challenge, not its desirability, as no economist disputes the importance of education in fostering economic growth.

Reducing inequality is likely to require a long, sustained effort. In large part, current levels of inequality have come about because of rent-seeking, enabled by specious claims of economic benefits generated by some pet industry. There are no magic bullets. If reducing inequality were simple, the world would be nearly free of it.

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286 For a widely praised book on the role of education in economic growth, see CLAUDIA GOLDIN & LAWRENCE KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY (2008); see also Lionel Artige & Laurent Cavenaile, Public Education Expenditures, Growth and Income Inequality (May 12, 2016).


288 ACEMOGLU & ROBINSON, supra note 177.


290 See Hsu, supra note 294, at 2068–71.

INTRODUCTION

Coinciding with the Supreme Court’s consideration of a significant challenge to affirmative action,1 campus racial unrest across the United States during the 2015–16 academic year drew national attention. Encompassing elite institutions such as Yale, Harvard, and Princeton and sometimes aligning with broader movements for racial justice such as Black Lives Matter, protests over hostile racial climates on campus challenged the status quo of unwelcoming environments for students of color.2 I moderated the Society of American Law Teachers’ annual Cover Workshop, held in early 2016 at Fordham University School of Law. This workshop engaged these racial protests as entry points for improving race relations on campus.3 Racial activism on campus, of course, is not a new development, as campus protest reaches back throughout the 1900s as it coincided and connected with broader racial unrest confronting entrenched segregation and discrimination.4

While achieving some short-term victories,5 the current wave of campus protests also prompted backlash and even threats of violence from some White students, as well as media attacks, such as Fox News’ labeling of university protestors as anarchists.6 This backlash exposes the sinister and sobering

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1 Fisher v. Univ. of Tex., 758 F.3d 633 (5th Cir. 2014), aff’d, 136 S. Ct. 2198 (2016).
2 Alia Wong & Adrienne Green, Campus Politics: A Cheat Sheet, THE ATLANTIC (Apr. 4, 2016), http://www.theatlantic.com/education/archive/2016/04/campus-protest-roundup/417570/ (detailing some of the high-profile protests including the most newsworthy outcome when University of Missouri President Tim Wolfe resigned in response to a strike of the university’s football team and mass student demonstrations protesting his response to racial incidents on campus).
3 2016 SALT Cover Workshop, Race Matters: Creative Entry Points for Impacting Race Relations on Campus. Panelists included a Yale law student and other presenters who addressed the role of oppressive symbols, contextualized the current struggles within a history of racialized oppression, and connected the protests to Black Lives Matter and other movements. SALT Cover Workshop, Jan. 9, 2016, Fordham Law School, SOCY OF AM. LAW TEACHERS, https://www.saltlaw.org/events/salt-cover-workshop/ (last accessed Sept. 13, 2016).
4 See Stefan M. Bradley, Black Activism on Campus, N.Y. TIMES (Feb. 1, 2016), http://www.nytimes.com/interactive/2016/02/07/education/edlife/Black-History-Activism-on-Campus-Timeline.html (supplying a timeline of significant Black activism on campus since 1900).
5 See Wong & Green, supra note 2 (detailing the aftermath of high-profile protests).
6 Olivia Kittel, Fox News: Where Protests Against Racial Discrimination Are Anarchy but Armed Protests Against Federal Law Are “Patriotic,” MEDIA MATTERS FOR AM. (Nov. 12, 2015, 3:02 PM), http://mediamatters.org/blog/2015/11/12/fox-news-where-protests-against-racial-discrimi/206819 (comparing negative characterizations on Fox News of racial justice protestors with its praise for White rancher protesters in Nevada: “Only on Fox News are armed militia members protesting federal law ‘patriotic,’ while university students and faculty speaking out against racism are labeled as anarchists.”); See also Wong & Green, supra note 2 (reporting threats of murder and violence in the aftermath of racial protests at the University of Missouri).
foundations of racism on college campuses that connect to the seeming permanence of racism embedded in U.S. institutions and law. In this Article, I suggest that despite the window dressing of diversity that claims to open the campus doors to racial minorities, society fears an educated and activist minority population that sets out to change the status quo of systemic racism. As I posit, activist minority students, whether in law or other disciplines, have violated their covenant of admission and tolerance on the college campus. So long as activist minority students are subservient students who stick to the classroom, honor campus legacies, and, once educated in mainstream Anglo-centric curriculum, enter the job market well-dressed and with cultivated accents intending to support the university financially in producing the next crop of graduates, university officials will talk the talk of diversity and its fruits. But should the students, as angry products of working-class families of color, learn the nature of their oppression and its sources and aim to change that world, starting with their own campus, they violate their tacit bargain, long enforced by a variety of policies and strategies detailed below.

I. DIVERSITY’S BARGAIN

Colleges now routinely celebrate and trumpet their commitment to diversity. Corporate America also champions the virtues of a diverse workforce and, concomitantly, a diverse and educated supply chain of student bodies. Best evidencing this support, more than sixty major companies signed an amicus brief in the University of Michigan affirmative action litigation before the Supreme Court in the early 2000s. But the implementation of affirmative action admission policies and, more broadly, the tolerance of racial minorities on campus, whether or not admitted through affirmative action, are constrained by the terms of the diversity bargain of assimilation and complicity. To honor this bargain requires minority students to accept that the numbers of their diverse classmates will be few and

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7 See also Charles R. Lawrence III, Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 25 (2015) (describing the “I, Too, Am Harvard” play which addresses the campus racial environment that excludes Blacks while simultaneously granting admission to those Blacks whose academic credentials and articulateness allow access to the privileged club of assimilation and complicity in ongoing oppressions: “[T]his offer of admission requires black students’ silence, requires that they not speak of the continued ideology, institutions, and structures that injure their people, that require them to deny their own people and participate in their continued oppression.”).

8 Most White residents, however, oppose government efforts to diversify schools, at least at the K-12 level. See Rebecca Klein, Surprise! White People Really Don’t Care About School Diversity (Jan. 21, 2016), http://www.huffingtonpost.com/entry/racial-diversity-schools-poll_us_56830224e4b0b958f65ab2d6 (reporting result of new poll finding only 28 percent of White Americans thought government should increase school diversity, in contrast to 61 percent of Blacks and 55 percent of Latino/as).

9 Jonathan D. Glater, Affirmative Action: A Corporate Diary, N.Y. TIMES (June 29, 2003), http://www.nytimes.com/2003/06/29/business/affirmative-action-a-corporate-diary.html (discussing a brief supporting affirmative action joined by 65 companies such as Coca-Cola and Microsoft). The Supreme Court ultimately recognized the constitutional underpinning of affirmative action programs sourced in the compelling justification of diversity. See Grutter v. Bollinger, 539 U.S. 306 (2003) (finding law school had compelling government interest in attaining a diverse student body). Ironically, the corporatization of universities in recent decades does not suggest a breakthrough for racial justice, as corporations also value docility of their diverse workforce.
diluted even more by their respective majors, that most of their professors will not look like them and that their required and elective curriculum will not engage their own histories of oppression or their cultures of expression. Students must be willing to kiss the ring of slaveholders and segregationists when surrounded by buildings named for racial oppressors and by statues and other symbols honoring these leaders. Once minority students graduate, they must return the favor of their admission and tolerance of their presence on campus by tamping down impending racial insurrections and feeding the system that sends back donations to their alma mater to support another generation of docile students, who they commit to mentor to the same positions of grandeur and comfort.

The university is not the only venue where racial docility is prized—the workplace equally values submission. Poor and working-class Mexicans, for example, were long praised for their perceived subservience to the master’s orders. One writer lauded the shift to a Mexican labor force in the early-1900s United States as inviting “a great reservoir of the cheapest and most docile labor.” He went on to describe the Mexican “peon” as “a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent [Anglo] direction.” My point is that the university is no haven from the societal expectation of racial docility. Whether in the workplace, on campus, or on the streets, society expects minorities to know their place and be thankful for whatever scraps of the American dream are tossed their way.

Racial protests on campus in the last year shook the historic foundations of racism and assimilation, breaching the covenant of tolerance of minorities on campus by other students, university administration, and society in general. Evident in the demands articulated in many of the recent protests are common themes of developing a curriculum that better speaks to the students, recruiting minority faculty, and admitting a critical mass of minority students. Imagine what

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10 See generally Craig Stevens Wilder, Ebony and Ivory: Race, Slavery, and the Troubled History of America’s Universities (2013) (describing how universities used slave labor).
11 One of the tensions of affirmative action has been this duality of insisting on docility of recipients, while at the same time critiquing their supposed laziness. This critique is explained as one of the strategies deployed to keep minority entrants (whether or not admitted through affirmative action programs) in their place by communicating they are ill-deserving of the opportunity and best avoid causing any trouble. See infra notes 28–30 discussion and accompanying text.
13 Id.
14 Id. See Steven W. Bender, One Night in America: Robert Kennedy, César Chávez, and the Dream of Dignity (2008) (detailing the decades-long activism of César Chávez to bring decent working conditions to field workers).
15 We also expect them, as immigrants, to leave the country when their labor is no longer needed. See Gilbert Paul Carrasco, Latinos in the United States: Invitation and Exile, in The Latina/o Condition: A Critical Reader 77 (Richard Delgado & Jean Stefancic eds., 1998) (addressing our history of inviting Mexican labor, particularly under the wartime Bracero Program, and then forcibly ousting Mexicans during economic downturns).
16 See Wong & Green, supra note 2 (reporting students at 60 schools have submitted racial demands to their schools; also describing the demands of Claremont McKenna College minority students seeking greater faculty diversity and multicultural services funding, and the reaction of the since resigned dean of students who pledged to support these students who didn’t fit “our . . . mold,” prompting a campus-
university administrators and wealthy donors must think about the prospect of a faculty member of color teaching students of color about their oppression, with those students graduating and causing even more trouble for the status quo. These leaders no doubt anticipated the risk of an uprising by minority students at some point but relied on a variety of structures and pressures to temper any revolution. The Article’s next section briefly surveys those repressive strategies.

II. ENFORCING DIVERSITY’S BARGAIN

Current calls for meaningful curriculum, such as the demand in the fall of 2015 by petitioners at the University of Cincinnati for curriculum focusing on “racial awareness,” expose how current university courses serve the interests of assimilation into the prevailing norms of racial subordination. Reinforcing the settled expectations of White students and faculty, the existing college curriculum, and even whole academic disciplines, reifies white supremacy despite the diversification of the student body. Graduate programs inculcate the same culture of assimilation and suppression. Law schools, for example, failed to change their curriculum when affirmative action brought substantial numbers of Latino/as, Blacks, and Asian students to the classroom in the late 1960s. Instead, it was those law students who needed to adapt to the existing curriculum and its reliance on the classic cases. This reliance is akin to an undergraduate literature course teaching the same classics. In turn, as law school graduates, the minority students educated in the traditional classroom for the most part become lawyers with careers indistinguishable from White lawyers—handling the work-a-day representation of small business, procuring divorces, and writing wills for individuals—while reinforcing the existing social order.

To ensure minorities are not adequately educated in their oppressions requires complicity not just of the university and its graduate programs, but of K-
12 education as well. This complicity was one of the reasons (along with the rousing academic success of program participants) that Arizona legislators were threatened by the Tucson high school Ethnic Studies curriculum, which relied on critical race theory and race texts. With few such exceptions, K–12 curriculum has long stayed true to the classics, deploying watered-down versions of racial history or simply ignoring oppressions altogether. Even in predominantly minority districts, students must adapt to the curriculum rather than the reverse. Occasionally students see through the façade of a curriculum that aims not to startle, anger, or engage them, as did Chicano high school students in East Los Angeles in 1968 who walked out of their classrooms voicing demands for bilingual education and teachers more aware of the community’s pressing social and economic problems.

Given the role of White curriculum in protecting the status quo, it is not surprising that school officials and White faculty will argue for its preservation. Among the weapons used to attack any calls to racialize and diversify college curriculum is to dismiss those proposed courses and, more broadly, Ethnic Studies degrees, as marginal and lacking intellectual rigor. Some faculty will also attack the scholarly work of teachers of color in similarly dismissive tones. In the same way that racial justice curriculum is marginalized, assimilation and whiteness norms are enforced by reminding minority college students that they are guests in the master’s house, in some cases only present by the grace of affirmative action programs that are voluntary and not constitutionally compelled. Reminding minority students of their subordinate status and the bargain they struck can take several forms; for some of these strategies, university officials are the catalyst, while for others they are at least complicit. As an example, symbols

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23 See Richard Delgado, The Law of the Noose: A History of Latino Lynching, 44 HARV. C.R.-C.L. L. REV. 297 (2009) (supplying a history of Latino lynchings, particularly of Mexican Americans in the Southwest, that few schoolchildren learn); Emma Brown, Texas Officials: Schools Should Teach that Slavery was “Side Issue” to Civil War, WASH. POST (July 5, 2015), https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html (discussing the manipulation of history with Texas public schoolchildren learning states’ rights rather than slavery as primarily causing the Civil War).

24 BENDER, supra note 14, at 70, 198 (detailing demands that connected to the broader Chicano Movement and included more Mexican teachers and renaming the present schools from historic figures such as Garfield, Roosevelt, and Lincoln to names better establishing community identity); see also IAN F. HANEY-LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 22–27 (2003) (discussing the aftermath of the walkouts when trumped up criminal charges were brought against the strike organizers).

25 See Shih, supra note 19 (suggesting that the faculty in the academy making these attacks are the biggest beneficiaries of “a curriculum that reifies whiteness as logical, cultured, or professional.”).


27 Consider a more overt strategy to deter protest proposed and ultimately withdrawn by a Missouri legislator who introduced legislation to revoke scholarships of student athletes who support or participate in a strike. Rodger Sherman, Everything About that Missouri Bill to Ban College Athletes
reflected in campus statues, building names, seals, and other settings remind students of the White origins and influences at the school that still define the institution. Often these symbols are those of the wealthy who built their fortunes on the backs of slaves.28

So-called “microaggressions” work in concert with symbols to ensure minority students understand their subordinate position as barely tolerated outsiders. The term describes a host of incidents that comprise a hostile racial climate on many campuses, including hate speech and hostility toward minorities. For example, portraits of African American law professors at Harvard were defaced with black tape.29

Both scholars and White students will help quell any campus revolt by attacking the credentials of minority students as unworthy for admission and graduation at the particular school. Presumably their targets will think twice about speaking out, as their voices have been marginalized. Although university officials might reject or not join in these appeals to reduce minority admissions, these officials nonetheless benefit from this demeaning backlash, which helps diminish any pressure to admit more students of color, hire more faculty of color to teach them, or to change the curriculum. Examples of student attacks on affirmative action include a Harvard Crimson piece suggesting employers would justifiably regard all minority candidates with skepticism if their alma mater used affirmative action and arguing it would be better for society to refuse admission to race-based affirmative action students: “Helping those with primarily low academic qualifications into primarily academic institutions makes as much sense as helping affirmative act ion and arguing regard all minority candidates with skepticism if their alma mater used a

28 Recent campus activism has targeted these symbols of oppression, such as Harvard law school’s seal with the family crest of a “wealthy and ruthless slaveholder,” Wong & Green, supra note 2, and Yale’s Calhoun College, a residential housing complex named after a notorious slavery advocate and Yale graduate. Backlash from the Harvard protest, in which the law school’s seal was covered with black tape, resulted in a defacement of portraits of Harvard’s Black law professor portraits with similar tape. Symbols of racial oppression are far reaching, as in the case of school mascots mocking Native American culture, whether through commodification of Native American images, perpetuating derogatory stereotypes, or by glorifying oppressors. See id. (discussing Amherst College protest calling for changing unofficial college mascot who allegedly gave Native Americans smallpox-infected blankets).


professor, Lino Graglia, remarked on the formation of an anti-affirmative action student group:

Blacks and Mexican-Americans are not academically competitive with whites in selective institutions. It is the result primarily of cultural effects. They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace.31

Apparently, many students agree with this cultural assessment that connects to longstanding stereotypes of laziness and unintelligence. A study released in 2016 found White students in elite colleges lumped their Latino/a and Black peers together, believing they “need to work harder to move up.”32

Other academic critics of affirmative action take a deceptively more compassionate, tough-love approach, arguing that race-based affirmative action admittees are in over their heads and to their own detriment—they would be more successful attending a lesser ranked school. Written by a UCLA law professor and a Brookings Institution fellow, the book Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It,33 argues Black and Latino/a students are not competitive at the more selective schools they attend. Becoming bitter and overmatched, their personal struggles transform into collective, racialized campaigns. Pointing to the despair of these student “victims” of affirmative action, one of the authors argued in a separate piece that the resultant dissatisfaction explains “the over-the-top demands now roiling our campuses for still more racial admissions preferences; more preferentially hired, underqualified professors; more grievance-focused courses and university bureaucrats; more university-sponsored racial enclaves; and more apologies for ‘white privilege.’”34

Presumably racial minorities, if already enrolled, should blame themselves and accept their dissatisfaction on campus without protest, or better yet, they should have applied to some lesser-ranked institution more of their speed, reserving the elite institutions for White enrollees. This argument for the exclusion of racial minorities resonates with those who would deny angry minority students the right to protest racial injustices on campus and in broader society. In this way, the college

31 Leti Volpp, Blaming Culture for Bad Behavior, 12 YALE J.L. & HUMAN. 89, 97 (2000).
32 Natalie Gross, Do White College Students Believe Stereotypes About Minorities? ATLANTIC (Jan. 25, 2016), http://www.theatlantic.com/education/archive/2016/01/white-college-students-buy-in-to-stereotypes-of-minority-peers/426813/ (finding in contrast that White students at elite schools felt Asian American classmates were “cold but competent.”).
34 Stuart Taylor, Jr., A Little Understood Engine of Campus Unrest: Racial Admissions Preferences, AM. SPECTATOR (Nov. 23, 2015, 9:00 AM), http://spectator.org/64739_little-understood-engine-campus-unrest-racial-admissions-preferences/. Other scholars offer different explanations for the racial unrest on campus, connecting to the racist roots of most U.S. universities. See Kalpana Jain, Unsurprised by Missouri – Scholars on the Roots of Racial Unrest on Campus, THE CONVERSATION (Nov. 12, 2015, 9:08 PM), http://theconversation.com/unsurprised-by-missouri-scholars-on-the-roots-of-racial-unrest-on-campus-50636 (quoting argument of Emory University historian Leslie Harris that the roots of today’s racial unrest connect to the roots of universities in the slave trade: “[C]olleges and universities historically have supported hierarchies of race and other forms of difference from their founding in the colonial era through the civil rights struggles of the late-20th century.”).
campus continues as a venue where the right to exclude, as a common nucleus of both property and whiteness, controls.35

Yet another strategy to police compliance with the diversity bargain is to ensure that minority students act individually and not collectively in ways that can more readily connect to larger community and societal campaigns.36 In the austerity age of tight university budgets,37 campus officials routinely fend off requests to adequately fund minority groups, characterized disparagingly above as “university-sponsored racial enclaves.”38 Students also think twice about membership in racial identity-based organizations when they see how often those affiliations are attacked, as when California gubernatorial candidate Cruz Bustamante was vilified for his involvement with the Chicano student empowerment group, MEChA, while a student at Fresno State.39 For minority students, then, the campus is a venue for rugged individualism, rather than a place for bonding with the few others on campus who come from their background.

III. Faculty of Color’s Complicity in Diversity’s Bargain

Demands for improving the campus racial environment tend to be directed at university administration, but too often professors are complicit in the hostile climate. Richard Delgado remarked on the shift in aspiration of many law students of color from rebellious lawyering to conventional careers: “We did little to dissuade them; some of us might even have quietly cheered the prospect of minorities tracing conventional career paths, mirroring, perhaps, our own.” 40 Could the White curriculum most of us teach be serving the same function as campus symbols of slaveholders and segregationists to enforce the diversity bargain? Do law professors of color, and university professors generally, encounter similar pressures that students face to be docile and thereby honor the “classics” in their teaching and writing?41

35 See Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1714, 1789 (1993) (suggesting that affirmative action programs might dismantle the right to exclude applicants through identity by challenging the property interest of whiteness, thus breaking the link between White identity and property).

36 A historical example is the 1968 East Los Angeles school walkouts that connected to the Chicano Movement, see supra note 24 discussion, and current examples are those fusing campus racial activism to the Black Lives Matter movement.

37 Austerity can also be deployed to resist demands for new teachers of color and for new curriculum that requires new instructors to teach it. Even those faculty of color hired in response to student pressure are vulnerable to being the last hired, first fired if revenues dip.

38 Taylor, supra note 34.

39 See Steven Bender, Sylvia R. Lazos Vargas & Keith Aoki, Race and the California Recall: A Top Ten List of Ironies, 16 BERKELEY LA RAZA L.J. 11, 12 (2005) (noting even respected mainstream media questioned Bustamante’s fitness for office given his involvement with the student group, and that conservative media likened the organization to terrorist groups). As a long-time faculty advisor to the University of Oregon MEChA organization, I was routinely forced to defend an organization that cared little for excluding others, and most about diverse students surviving in an often hostile climate of higher education.

40 Delgado, supra note 20, at 293.

41 A current example of an activist professor, and the backlash that resulted, is University of Missouri’s Melissa Click, an assistant professor of communication. Indefinitely suspended after she tried to
Evident in the current tumult of student activism is the idea that professors can and should do more to actively promote an inclusive campus environment. Professors collectively wield considerable power in their academic freedom to shape the content of the courses they teach, in their role in the hiring process, and in promoting a favorable campus climate. The suggestions that follow connect to the most articulated demands of current campus racial activists in promoting courses and course content that relate to the struggles for racial justice, as well as critical masses of students of color and professors of color who teach them.\(^1\)

Law professors rarely take racial risks. Among those who did is Michael Olivas, who for years managed the Hispanic National Bar Association’s annual list, The Dirty Dozen, of law schools in areas with large Latino/a populations that nonetheless failed to hire a single Latino/a faculty member. Prompting backlash from deans, the list may have generated several Latino/a hires,\(^2\) but years after the list ceased publication, many law schools still lack any Latino/a tenure-track faculty, and just a handful are managed by Latino/a deans.\(^3\) Rather than shaming law schools, efforts such as the joint annual LatCrit/SALT junior faculty development workshop\(^4\) aim to mentor prospective and newly hired diverse faculty members in the academy. Although the reward system for law professors within their home institutions fails to fully appreciate the considerable time spent in mentoring junior

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\(^1\) Racial demands often include additional funding for campus diversity initiatives and organizations, as well as funding embedded in demands for additional minority students accomplished through need-based scholarships, and new faculty positions to immediately bring in faculty of color rather than through attrition over time of existing faculty. The suggestions below emphasize non-revenue dependent approaches, mindful that revenue-raising is often outside of individual faculty control and in the hands of law school (or other department heads) and main campus administration. See, e.g., Reclaim Harvard Law Demands, Reclaim Harvard Law Sch. (Dec. 4, 2015), https://reclaimharvardlaw.wordpress.com/demands/ (demanding, among other things, that the school: “Reform the existing mandatory legal curriculum at Harvard Law School, through meaningful student input and transparency, to ensure the integration of marginalized narratives and a serious study into the implications of racism, white supremacy, and imperialism in creating and perpetuating legal analysis and thought.”).


\(^3\) See Jennifer L. Rosato, 48 Cal. W. L. Rev. 445 (2012) (Latina dean situates herself as one of hour U.S. Latino/a law school deans at the time); see also Ediberto Roman, Whites Only . . . Perhaps More Than Just at the Oscars, HUFFINGTON POST: BLOG (Feb. 4, 2016, 4:30 PM), http://www.huffingtonpost.com/ediberto-roman/whites-onlyperhaps-more-t_b_9114768.html. Across campus things are litt.

\(^4\) See Ben Myers, Where Are the Minority Professors?, CHRONICLE OF HIGHER EDUC. (Feb. 14, 2016), http://chronicle.com/interactives/where-are-the-minority-professors/ (finding that of more than 400,000 U.S. professors, three-quarters were White, five out of one hundred were Black, and even fewer were Latino/a, and the more elite schools were even less diverse).

faculty, I am proud to have earned recognition for my mentoring by receiving the AALS Minority Groups Section C. Clyde Ferguson, Jr. award.46

Faculty can have the most impact in the curriculum they teach. Law professors can elect to teach law’s active role in creating and sustaining systemic racial injustice.47 They can write critical histories that link identity to unequal justice. These critical histories, when local or regional, are best written by those minority professors from local venues who gain a special credibility by their willingness to breach their own diversity bargain of hiring and tolerance by exposing the injustice rooted in their own institutions and states to both students in their classrooms and a scholarly audience.48

Faculty of color, both writing and teaching about subjects that engage students of color, can serve as a welcoming mat for those prospective students who feel that university curriculum does not respect their backgrounds or honor their struggles. As the author of texts used in college classes outside of law school, I aim to reach beyond college into high schools and earlier education to inform students that exposing and challenging systemic injustice is a shared goal, and that the educational assembly line can be recalibrated from the current bargain of tolerance and assimilation to a new environment of respect and honor.

Students of color49 protesting racial injustice on their own campus and in broader society are taking a risk by breaching their diversity covenant. Faculty members too must be willing to support and contribute to the campaign to improve the racial climate on campus. In so doing, we help build a better world for others instead of a comfortable haven for the fortunate academics of color who successfully navigated diversity’s bargain.

46 See Professor Steven Bender Recognized for Teaching and Service, SEATTLE U. SCH. L. (Jan. 10, 2014), https://law.seattleu.edu/newsroom/2014-news/professor-steven-bender-receives-ferguson-award-for-teaching-and-service (describing the AALS Minority Groups Section C. Clyde Ferguson, Jr. award as an annual award recognizing law professors who provide support and mentoring to students, colleagues, and aspiring educators).

47 As a current example of teachers connecting systemic injustice to their classroom, see Symposium, Ferguson and its Impacts on Legal Education, 65 J. LEGAL EDUC. 261–413 (Nov. 2015). I am part of a team of legal scholars developing a coursebook that includes and situates law among the instruments of systemic injustice. SOCIAL IMPACT ADVOCACY: POWER, IDENTITY, AND SYSTEMS IN LAW AND SOCIETY (forthcoming 2017).


49 In focusing on students of color, I do not mean to marginalize the experience and role of other initiators and supporters of campus protests, particularly those within the LGBT community who may be of any race and who often face a similar “don’t ask, don’t tell” expectation of campus silence and subordination.
Gerrymandering Revisited—Searching for a Standard

Theodore R. Boehm*

I. DISTRICTING IN A NUTSHELL

History is replete with examples of legislative districts created to assure the election or defeat of specific candidates or to preserve the domination of a majority party. By the time John Kennedy sought the Presidency in 1960, perpetuation of incumbent interests had taken the form of inaction as well as affirmative jiggering of district lines. Many states had not redistricted for decades despite massive shifts in concentrations of population, generally from small towns and rural areas to cities and their suburbs. In the most egregious example of malapportionment, Dallas’ Congressional district cast five times the votes of smallest Texas district.1 The 1960 election in Indiana was conducted using maps that had been created in 1921. Only half as many people voted in the largely rural Ninth District as did in Marion County, which included the pre-UniGov city of Indianapolis and was a single congressional district.2

Until the 1960s, the federal courts had heeded Justice Frankfurter’s caution against venturing into the “political thicket” and declared these practices, however objectionable, beyond judicial scrutiny.3 But in 1962 the Supreme Court opened the courthouse door to constitutional challenges to congressional districts.4 A nationwide frenzy of districting litigation ensued. Within two years, Wesberry v. Sanders5 imposed rough equivalence of district population in congressional races, and Reynolds v. Sims6 did the same for elections of both houses of state legislatures.

Equal population requirements proved to impose no restraint on the ability of legislators to keep a heavy thumb on the scale in their own elections. Manipulation of legislative districts for the benefit of a favored party or individual candidate is nothing new. But modern technology has substantially facilitated a temporary majority’s ability to perpetuate its dominance of a legislative body. This art has now advanced to the point that the legislators in dozens of states can join the North Carolina state senator who famously observed in 1998: “We are in the business of rigging elections.”7

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2 Id.
3 Colegrove v. Green, 328 U.S. 549, 556 (1946).
5 376 U.S. 1, 7–8 (1964).
Chief Justice Earl Warren considered the redistricting cases the most important of his time leading the Supreme Court because the effects of reshaped federal and state legislatures reverberated across every aspect of American life.\(^8\) We are potentially on the cusp of an equally significant ruling that gerrymanders violate the Federal Constitution.

II. **Gerrymanders: A Problem with Many Dimensions**

There are many reasons to adjust district lines to achieve some electoral result. For purposes of this discussion, a gerrymander is an attempt to assure a political party’s domination of a legislative chamber by creating as many districts as possible that are likely or certainly safe for the party. This means creating a majority of districts at least fifty-five percent favorable to the party and concentrating or “packing” the opposition’s voters into a minority of districts.\(^9\)

**Voter confusion.** Complaints about gerrymandering, including those from some courts, take a variety of forms. Early attacks, including the *Boston Globe*’s, which coined the term “Gerry-mander” in 1812, focus on “traditional” districting principles that essentially turn on the appearance of the district on the map.\(^10\) Even today, Justice John Paul Stevens advocates a federal constitutional amendment to constrain mapmakers by requiring districts to be compact and contiguous and to justify any deviation by adherence to existing political boundaries, such as county and municipal borders.\(^11\) There is merit in requiring district lines to follow boundaries that define units of municipal government. Districts that follow no pattern and have irregular shapes conforming to no widely understood demarcations are confusing and make it difficult for voters to identify their representative. But with today’s very sophisticated software and the ability to manipulate precinct level voting data, the constraints of compactness, contiguity, and adherence to other boundaries are not sufficient to prevent an effective gerrymander. And voter confusion is only one of the many reasons why gerrymanders are undesirable.

**Conflict of interest.** A more fundamental problem with a gerrymander is that it is a law passed by vote of the majority party and opposed by the minority members. Virtually all of the approving legislators have a blatant conflict of interest. Of course, many laws are voted upon by legislators with some self-interest at stake, and legislators are generally free to vote for legislation that may benefit them individually—for example, by favoring an industry in which they have an interest. Particularly in states with part-time legislatures, this practice is considered the necessary cost of a democratic form of government. In the case of most legislation, the judgment of disinterested legislators is considered a sufficient restraint on abuse of

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9 See infra note 35.
principle. But a gerrymander is qualitatively different from most other legislation. The majority-party legislators who support a gerrymander are precisely the favored few the law benefits. By perpetuating their majority party domination, it assures many of the majority a shot at a committee chair, and gives most of them a friendly district for reelection. In that respect, those few citizens, and only they, are the direct beneficiaries of the law they are imposing on all others.

Unrepresentative legislative bodies. A third obvious issue raised by a gerrymander is it unfairly skews election results as between the parties. The Supreme Court has repeatedly found no constitutional right to proportional representation—that is, elected representatives need not be in proportion to the votes cast for their respective candidates across the state. But a map that purposely packs voters of one party into a minority of districts is as pernicious in effect as patently unlawful practices such as intimidation of minority party voters at the polls or creating districts of substantially unequal population. In that sense a gerrymander is unfair to the minority party. But apart from any unfairness to a political group, a gerrymander produces a legislature that is not representative of the general voter population. Successful candidates in primary elections are predominantly those who appeal to their party’s most enthusiastic supporters who tend to positions many regard as extreme. The general election in most districts of a gerrymandered map merely ratifies the election of the winners of the majority party primary, resulting in a legislature that underrepresents the views of moderates and centrists.

Polarized legislative bodies. Fourth, a gerrymander produces a legislature composed of mostly safe districts for one party or the other. In those districts the primary election becomes the only significant event, and the successful candidate is one who runs to the center of his party’s voters. The result is a legislature with few centrists and with few who need to appeal to a broad range of constituents. Many argue that this in turn contributes to polarization and gridlock. Regardless of the validity of that charge, at a minimum the legislature does not reflect the attitudes of the electorate as a whole by, in effect, underrepresenting the vast political center.

Disenfranchised Independents and minority party adherents. Fifth, gerrymanders in many states, including Indiana, effectively disenfranchise Independents and third party candidates in most districts. By creating large numbers of districts as nearly impregnable fortresses of one of the two major parties, a gerrymander reduces the general election to a pro forma ratification of the primary. The result is that Independents and third party adherents in those safe districts have no meaningful role in the selection of the legislature. The extent of that consequence may depend on state laws and to some extent the voting practices of the state. Some

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12 See e.g. Vieth, 541 U.S. at 267; see also ANTHONY J. McGANN ET AL., GERRYMANDERING IN AMERICA (2004).
states have “open” primaries and experience significant crossover voting in the primary elections. Others, including Indiana, have some deterrent to adherents of a different party, or even genuinely undecided voters, participating in a party’s primary election. Even if there is no consequence to voting other than as permitted by statute, a voter’s choice of party in the primary is a matter of public record, and that alone undoubtedly deters many who do not want to appear to affiliate with a party that is not of their choice. The constitutional right of free association includes the right not to associate, and those who do not wish to identify themselves as Republican or Democrat have a right to do that.

**Voter alienation.** Sixth, gerrymanders discourage all voters from participation in the election. The extent to which gerrymanders contribute to voter apathy and distrust of government is for others to analyze. But the contribution of gerrymanders to the health of the body politic can’t be positive. Because the result in the general election is preordained by each district’s majority party primary, supporters of the district’s minority party have less incentive to bother to vote, and less interest in the strengths and weaknesses of the candidates. Gerrymanders produce a number of uncontested legislative races across the state. Reduced voter turnout is less felt in presidential years but nonetheless significant. To compound this problem, the spectacle of legislators choosing their voters rather than voters choosing their representatives only fosters cynical disrespect for the process.

In sum, a gerrymander produces a number of destructive and anti-democratic consequences, but it serves only the private interests of the dominant political party and, more specifically, its legislators.

### III. **Gerrymanders in the Supreme Court**

In a few states voters have taken these problems in their own hands and wrested the process from the legislature’s grasp, enacting a bipartisan approach to districting by direct voter initiative. But in the many states without voter initiatives and in those whose state constitution expressly vests districting power in the legislature, there is little evidence that the state legislatures will adopt any meaningful reform of state legislative districts. And because the state legislatures draw the Congressional maps, without reform of the state process, we can expect minimal progress in Congressional districting. When control of the General Assembly was divided, the two parties confirmed skepticism of legislative relief as to Indiana’s state maps. The majority in each house drew a map to its liking for itself

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14 In Indiana, any voter in the precinct may challenge an attempt to vote in a party’s primary. *Ind. Code Ann.* § 3-10-1-6 (LexisNexis 2011) provides that a voter is “eligible” to vote in the primary if the voter voted in the last general for a majority of the party’s candidates, or did not vote in the last general, but intends to vote for a majority of that party’s candidates in the upcoming general election. How this works in practice is not clear, and may vary across the state. In fact it seems clear that in some recent elections there was some crossover voting without any consequence to the voters who crossed party lines.

15 Indiana has a form of bipartisan districting for congressional elections if the legislature fails to agree on congressional districts. This was put in place in 1988 when the two major parties each controlled one house of the state legislature and a deadlock in passage of a congressional map was foreseeable. It has never been used. *Ind. Code Ann.* § 3-3-2-2 (LexisNexis 2011).
and approved the other house’s self-drawn plan. The result was a decade-long bipartisan gerrymander favoring Democrats in the House and Republicans in the Senate.

As explained in Part II, federal constitutional precedent offers some hope of judicial cabining of gerrymanders. And state legislatures create both their own and congressional maps, but they more directly labor under a conflict of interest in drawing their own districts. The odds seem good that reform of state legislatures will lead to fair congressional districting. All of the foregoing leads to the conclusion that a federal constitutional challenge to gerrymandering of state legislatures offers the most likely prospect of assuring that we have functioning state and federal legislative branches that are broadly representative of the electorate and not only the zealous adherents of the two major parties.

Redistricting cases are heard by three-judge courts and appeals go directly to the Supreme Court. Beginning in the 1980s and recurring sporadically since, challenges to the constitutionality of gerrymandering have been raised, but as of this writing none have been ultimately successful. Few would dispute the importance of the questions whether a court can strike down a legislative map that meets the population equality test and does not violate the Voting Rights Act, as well as what a successful plaintiff must show to achieve that result. Some likely critical issues, notably partisan intent to disadvantage a voting group, are essentially factual, so a successful trial court ruling will be a leg up; but the courts have yet to establish an attainable legal standard a plaintiff must meet. Nonetheless, it seems obvious that any attempt to analyze the prospects of a successful challenge must start and end with the Supreme Court of the United States.

Davis v. Bandemer (1986) The first pure gerrymandering case to reach the Supreme Court came from Indiana. In Davis v. Bandemer, the three-judge trial court, by 2-1 decision, had agreed with the plaintiffs that the redistricting plan enacted after the 1980 census violated the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs were Democratic voters from several parts of the state who claimed that the map was a law that was intended to, and did, disadvantage an identifiable group, in this case Democrats, and was justified by no legitimate governmental interest. Plaintiffs presented this claim as grounded in established Equal Protection doctrine, including principles that “the state must govern impartially” and legislative classifications must be “rational” (that is, must “serve important governmental purposes”). They bolstered their claim with language from several Supreme Court cases affirming that laws having “a real and appreciable impact on the exercise of the franchise” must “serve important governmental objectives.” Plaintiffs also argued that the law was intentionally designed to injure

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19 Id.
supporters of a political party, which is a group of citizens entitled to be free from discriminatory legislation.21

The defendants responded that the issue was not justiciable because there were no judicially manageable standards, redistricting was inherently a political issue, and the Equal Protection Clause conferred no group right on political parties or their supporters. Because at that time the nationwide effect of curtailing gerrymandering would have benefited Republicans more than Democrats, an unusual array of amici curiae appeared. Briefs supporting the plaintiffs were filed by the ACLU, Common Cause, and The Republican National Committee. The California State Assembly, the Mexican American Legal Defense and Educational Fund, and the California Democratic Congressional Delegation supported the defendants.

The Supreme Court reversed by a seven-two vote with no majority opinion. A four-justice plurality (White, joined by Brennan, Marshall and Blackmun) held the plaintiff’s claims justiciable. The plurality quoted at length from Baker v. Carr, which opened the door to challenges to unequal populations and limited nonjusticiable “political questions” to six areas described collectively as those “essentially a function of separation of powers.”22 Among these are matters lacking “judicially discoverable and manageable standards.”23 The plurality agreed that there was no “arithmetic presumption” to identify a constitutional violation, but rejected the claim that this established a lack of judicially manageable standards.24 The plurality noted that when Baker held challenges to unequal population justiciable, the “one-person-one-vote”25 rule had not yet been devised.

Turning to the merits of the plaintiff’s claim, the plurality noted that in multimember districting cases the Court had “repeatedly stated that districting that would ‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population’ would raise a constitutional question.”26 The plurality agreed with the district court that plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. The plurality readily accepted the district court’s finding of intentional discrimination. The maps had been designed in secret with the aid of computer consultants and were moved through the legislative process through

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22 Davis, 478 U.S. at 121 (“It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”) (quoting Baker v. Carr, 369 U.S. 186 (1962)).
23 Id. at 217.
24 Id. at 110.
25 Id. at 150.
26 Id. at 119 (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)) (emphasis removed).
“vehicle” bills which had no content. The maps were first revealed to the minority members or the public in the last days of the legislative session. The final approval was by unanimous Republican majorities in both houses of the Indiana General Assembly over the dissenting votes of all Democratic members.

Despite the partisan motivation, the plurality found the proof of lasting effect insufficient. The plurality would require proof “that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions.” The trial of the case was held in 1984 before the election of that year. The only evidence of the effect of the maps was the 1982 election, in which Democratic candidates received 51.9% of the votes cast for the Indiana House but elected only 43 of 100 Representatives. The plurality held that one election was not sufficient to establish a lasting injury.

Justice O’Connor, joined by Chief Justice Burger and future Chief Justice Rehnquist, would reverse for lack of justiciability. Justice O’Connor also found no right of a political group to assert a constitutional claim. In her view, the racial discrimination cases were not applicable precedent because court intervention to address racial discrimination was justified by the Fourteenth Amendment.

Justice O’Connor supported her conclusions with two factual assertions that time has proved questionable. First, gerrymandering has not proven to be “self-limiting,” as she suggested based on an academic study published in 1984. To the contrary, it has metastasized. To use the Indiana example again, the 1981 map challenged in Bandemer created fifty-six House districts that were considered by its sponsoring legislators to be “safe” for Republicans, and the election results bore out their confidence. The 2011 Indiana gerrymander produced at most five competitive Senate districts and perhaps ten competitive House districts in the Indiana state maps. Thirty-seven Indiana House races were uncontested in the 2014 general election. Congressional districts across the nation show the same trend. Few studies conclude that more than 35 of the 435 districts today are competitive.

Second, Justice O’Connor found no proof “that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.” As already noted, in a few states, including Justice O’Connor’s Arizona, a voter initiative has been invoked by “the people” to address gerrymandering. But in a large majority

27 Id.
28 Id. at 134.
29 Id. at 163.
30 Id. at 181–182.
31 Id. at 144.
32 Id. at 144–61.
33 Id.
34 Id. at 152.
35 The district court found a district “competitive” if neither major party had more than 55% of the votes for the two major party candidates. This standard of measuring “safe” and “competitive” districts was accepted by the district court and endorsed by experts for both sides. As will be elaborated below, it has stood the test of time. If one party has 55% of the vote, the other party must increase its 45% by 10% of the two-party total, or 11.1% of its votes. History has shown this occurs rarely, hence a district with one party whose candidate received 55% or greater in the district is considered “safe” for that party. Id.
36 Id. at 152.
of states a voter initiative is not available, and, as described in Part I, temporary legislative majorities across the nation have typically sought to solidify a stranglehold on the maps.

Justice Powell, joined by Justice Stevens, dissented. They would accept Justice Fortas’ definition of gerrymandering as “deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes” and would affirm the district court’s judgment. They pointed out that some district lines may be distorted to achieve a partisan advantage, but the effect is statewide. The dissent would look to several factors in evaluating whether there was deliberate manipulation of districts without legitimate justification. These factors include whether the legislative process itself exhibited partisan motivation (which the plurality also found), disregard of traditional political boundaries, irregular shaped districts, and the absence of any considerations beyond partisan advantage.

**Vieth v. Jubelirer (2004)** Following the redistricting to adjust for the 2000 census, plaintiffs tried again, this time in Pennsylvania. Vieth v. Jubelirer was appealed to the Supreme Court after the three-judge court dismissed plaintiffs’ political gerrymandering claim. Again, the Supreme Court produced no majority opinion.

Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, argued that the Bandemer holding of justiciability should be revisited and overruled. The plurality first noted that Article 1, §4 of the Constitution allows Congress to “make or alter” Congressional districts as drawn by states; and in 1842, Congress had acted to require single member districts of “contiguous territory”; and in 1872, Congress had imposed a requirement of equal population. Since 1911, only the single member district requirement survives.

The plurality then turned to the language from Baker v. Carr to describe nonjusticiable “political questions” and quoted verbatim in Bandemer. The plurality labeled them “six independent tests” of nonjusticiability and focused on the second: “a lack of judicially discoverable and manageable standards,” which imposes the requirement that, unlike legislatures, courts are to impose law only if “principled, rational, and based upon reasoned distinctions.” The plurality noted that although lower courts had entertained claims of unconstitutional gerrymandering, none had granted relief, and no plaintiff had satisfied the Bandemer plurality’s standard. The Vieth plurality described the Bandemer standard in various ways, both as to individual districts and as to the state as a whole. But the plurality did not describe it, as it might fairly be summarized, as a requirement of a showing of a lasting impairment of voting strength. Rather, the plurality attacks the Bandemer approach

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37 Id. at 161.
38 Id. at 164.
39 Vieth, 541 U.S. at 267.
40 5 Stat. 491 (1842).
41 12 Stat 572 (1872).
42 Vieth, 541 U.S.at 277–78.
43 Id. at 279–80.
as confused because the plurality saw no clear way to identify the predominant purpose as between the likely ever-present partisan considerations and other considerations such as compactness, adherence to political boundaries, etc.\textsuperscript{44} But this is a fact question, as later cases will hold, and the evidence in virtually every gerrymandering case demonstrates to any objective observer that the predominant motivation for the maps as a whole was preservation of the dominant party’s majority status. Indeed, all six Justices of the Bandemer court who addressed the question found it obvious.

The Vieth plaintiffs argued for a standard that would require proof of (1) systematic “cracking and packing” the minority and (2) inability of the minority to attain a majority of the seats even if it obtained a majority of the votes.\textsuperscript{45} The plurality viewed this as a claim that groups have a right to proportional representation, a right that several precedents have rejected.\textsuperscript{46} The plurality understood the plaintiffs’ measure of the minority party’s vote to be based on statewide races and responded that this measure was unworkable because candidates of both major parties had won statewide races. The plurality also accepted the view that “there is no statewide vote” for districted legislative offices, citing two relatively dated academic sources.\textsuperscript{47} Finally, the plurality noted that “natural” packing occurs from the fact that some groups, notably Democrats in cities, are more densely clustered, and therefore a neutrally drawn map would be biased against them.

Justice Stevens agreed that statewide claims are nonjusticiable, but individual district claims were cognizable by analogy to racial gerrymanders, which had been held unconstitutional.\textsuperscript{48}

Justice Souter, joined by Justice Ginsburg, found the Bandemer standard too demanding and would later find some gerrymanders unconstitutional, but he would limit the plaintiffs to district-specific claims. Souter would allow a claim based on a burden-shifting process patterned on those used in employment and housing discrimination cases. If a plaintiff’s district were manipulated to the disadvantage of the plaintiff’s group, the defendants would be required to justify the district by objectives other than naked partisan advantage.

Justice Breyer dissented, viewing the partisan gerrymandering as “unjustified entrenchment,” and he set out several scenarios that he considered sufficient to support a claim. As might be expected, all of this came down to Justice Kennedy, whose views on this matter will likely be dispositive, absent a change in the Court. Justice Kennedy agreed with the plurality that the plaintiffs had not set out a “manageable and workable standard” to evaluate political gerrymanders, but he was not willing to conclude that none could be found. He therefore formed a majority to

\textsuperscript{44} Id. at 284.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 268.
\textsuperscript{47} Id. at 289 (quoting Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. REV. 1, 59–60 (1985); see also Peter Schuck, Partisan Gerrymandering: A Political Problem Without Judicial Solution, in Political Gerrymandering and the Courts 240, 241 (Bernard Grofman ed., 1990).
affirm dismissal of the Vieth complaint, but left for future resolution whether a majority of the Court could find a manageable standard. Interestingly, Justice Kennedy introduced the concept that the First Amendment, whose right of association protects the formation of political parties, also protects “representational rights.” And he suggested that if a gerrymander “had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudent basis for intervention than does the Equal Protection Clause.” In his view, the ultimate constitutional issue is whether political considerations “burden representational rights,” and a manageable standard requires a means to “measure the effect of the apportionment . . . to conclude that the State did impose a burden.”

League of United Latin American Citizens v. Perry (2006) dealt with the Texas legislature’s redrawing of Congressional districts in mid-decade to override a plan devised by a court after the initial apportionment was found to violate the population requirement. The plaintiffs alleged both Voting Rights Act violations and unconstitutional political gerrymandering. Justice Kennedy wrote for a five-justice majority, putting to rest the tenuous claim advanced by a few courts that Vieth had held gerrymandering claims nonjusticiable. Describing his own deciding vote, Justice Kennedy stated: “The Vieth plurality would have held such challenges nonjusticiable political questions, but a majority declined to do so.” In a portion of his opinion, writing for himself, Justice Kennedy succinctly described a successful partisan gerrymandering claim as one that imposes “a burden, as measured by a reliable standard, on the complainants’ representational rights.”

A majority found the new legislative plan violated the Voting Rights Act by splitting a Latino majority district. Chief Justice Roberts and Justice Alito, both addressing redistricting cases for the first time, affirmed dismissal of the gerrymandering claim for failure to offer a reliable standard but expressed no opinion on justiciability. Justices Scalia and Thomas adhered to their view that the gerrymandering claim was nonjusticiable.

Some observers took LULAC as indicating the Court’s receptivity to revisiting Vieth and Bandemer, but until recently, few plaintiffs have taken up the challenge.

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49 Vieth, 541 U.S. at 315.
50 Id. at 269.
51 Id. at 315.
54 Perry, 548 U.S. at 400.
55 Id. at 404.
57 Stephanopoulos & McGhee, supra note 16 at 832.
IV. TEA LEAVES IN SUBSEQUENT SUPREME COURT OPINIONS

The Supreme Court has not entertained a direct constitutional challenge to a gerrymander since LULAC. But the Court has addressed several cases on the periphery of that issue that may offer insight into the Justices’ current thinking.

By the time Arizona Legislature v. Arizona Independent Redistricting Commission\(^\text{58}\) reached the Court in 2015, Justices Kagan and Sotomayor had replaced Justices Souter and Stevens. All indications are that this had no effect on the 4-4 division that gave Justice Kennedy the deciding vote in Veith and LULAC.

Arizona, like California and some other western states, allows voters to enact laws by popular vote, and Arizona voters had used that process to transfer the districting function from the state legislature to a bipartisan commission. The Arizona Legislature sued to preserve its districting prerogative, claiming that the Elections Clause of the Federal Constitution required that districts be drawn by the state legislature. Justice Ginsburg, joined by Justices Kennedy, Breyer, Sotomayor and Kagan, held that if a state chooses to vest legislative power in the people as a whole, it does not violate the Elections Clause.\(^\text{59}\) Ginsburg’s opinion for this five-justice majority quoted from Justice Kennedy’s concurrence in Veith: “Partisan gerrymanders,’ this Court has recognized ‘are incompatible with democratic principles.’”\(^\text{60}\) She summarized the state of play on partisan gerrymandering: “The plurality [in Veith] held the matter nonjusticiable. Justice Kennedy found no standard workable in that case, but ‘left open the possibility that a suitable standard might be identified in later litigation.’”\(^\text{61}\) Like LULAC, this language, not necessary to resolve the Elections Clause issue, can be read as an open invitation to reopen the search for a suitable standard.

Finally, shortly after the death of Justice Scalia, Justice Breyer writing for a unanimous Court, decided Harris v. Arizona Independent Redistricting Commission.\(^\text{62}\) In that case, Arizona legislators and their allies renewed their attempt to regain the keys to the legislative fortress, this time contending that the bipartisan commission had drawn its map to favor Democrats, and therefore the population variations in the state legislative maps, though within tolerances acceptable if justified by legitimate redistricting principles, were based on illegitimate considerations and were unconstitutional.

The Court unanimously rejected the factual premise that the commission had been motivated by partisan considerations, accepting the district court’s factual finding that compliance with the Voting Rights Act was the reason for the commission’s accepting population deviations within the ten percent tolerance allowed by precedent. The unanimous opinion concluded by “assuming, without


\(^{59}\) Id.

\(^{60}\) Id. at 2658 (citing Veith, 541 U.S. at 316).

\(^{61}\) Id. (citing Veith, 541 U.S. at 281, 317).

deciding, that partisanship is an illegitimate redistricting factor," plaintiffs failed to show it.

V. Searching for Standards

Gerrymanderers typically do their work as soon as a new census is available and create hypothetical models based on past elections. Essentially the same techniques adopted by the Indiana Republican majority and its highly paid consultants in 1981 are in use today, though refined and improved by vastly greater computing power and the ease with which graphic displays of districts can be easily manipulated to test a tweak here or there to a given district. Repeated use and refinement of this technique at considerable expense demonstrates it is believed reliable and effective. The results in most states are maps with all the attendant problems identified in Part I. The need for judicial intervention cannot be overstated. Voter initiatives are not available in most states, and the legislative branch, inherently locked in a conflict of interest of monumental proportions, has shown itself incapable of reform in almost every state.

A majority of the current Court is now on board with Justice Kennedy’s summary of the situation: gerrymandering claims are justiciable, but no manageable standard to measure the burden on representative rights has yet been shown. Gerrymandering is thus now in the same place districts of unequal populations were after Baker and before Wesberry and Reynolds. Plaintiffs are now launching a new round of constitutional challenges attempting to establish such a standard, and some may reach the Supreme Court in the next term.

The Efficiency Gap as a Measureable Standard. Whitford v. Nichol\textsuperscript{63} was tried in May 2016, and is before the three-judge court for decision as of this writing. The court had previously denied defendants’ motions to dismiss the complaint and for summary judgment, carefully reserving for trial whether the plaintiffs’ proof would be sufficient to establish a claim. The Whitford plaintiffs alleged an unconstitutional gerrymander of the Wisconsin state House and Senate.\textsuperscript{64} They proceeded on the assumption that such a claim required proof of partisan motivation and a measurable, material, and lasting effect on the voting power of the minority party.

Partisan motivation relied in part on evidence developed in a prior case which had attacked the same maps based on population deviations of less than one percent.\textsuperscript{65} The plaintiffs there contended that even these usually permissible deviations were unconstitutional because the map was drawn with partisan intent. The three-judge court in that prior case described the denials of partisan intent from the legislative staffers involved, some of whom also testified in Whitford, as “almost laughable,”\textsuperscript{66} but dismissed the complaint because the population deviations were de minimis.

\textsuperscript{64} Id. at 918.
\textsuperscript{65} Baldus v. Members of the Wis. Gov’t Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wis. 2012).
\textsuperscript{66} Id. at 851.
The *Whitford* plaintiffs presented evidence of the legislative process similar to that found sufficient by six justices in *Bandemer*—secrecy in developing the maps, rushed legislative process driven by party-line voting, outside consultants testing various maps for partisan bias based on prior election returns, and statements of the drafters or their consultants.\(^{67}\) They offered the “efficiency gap” proposed by Stephanopoulos and McGee\(^{68}\) as a measure of partisan effect to meet a manageable legal standard. The efficiency gap measures the difference in the number of “wasted votes” for candidates of the two major parties. Wasted votes are votes cast for a losing candidate, plus all votes for a winner above the number required to win the district. The efficiency gap is the difference between the statewide totals of wasted votes for the two parties expressed as a percentage (positive or negative) of the total votes for the two parties’ candidates for the legislative body. Here is a simple example of the efficiency gap in a hypothetical election of a nine-district legislative body with 900 voters, 450 of each party. Its map looks like this, with the most recent party votes in each district:

<table>
<thead>
<tr>
<th>55-45 Red</th>
<th>55-45 Red</th>
<th>55-45 Red</th>
</tr>
</thead>
<tbody>
<tr>
<td>60-40 Blue</td>
<td>60-40 Blue</td>
<td>60-40 Blue</td>
</tr>
<tr>
<td>55-45 Red</td>
<td>55-45 Red</td>
<td>55-45 Red</td>
</tr>
</tbody>
</table>

In this example six districts would be considered “safe” for Red and three “safe” for Blue. The efficiency gap is 16.7%, calculated as follows (for simplicity ignoring the one vote more than 50%, which is immaterial in the real world where districts contain thousands of voters):\(^{69}\)

<table>
<thead>
<tr>
<th>3</th>
<th>40</th>
<th>60</th>
<th>120</th>
<th>180</th>
<th>120</th>
<th>9</th>
<th>3x40=120</th>
<th>3x10=30</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total votes:</td>
<td>450</td>
<td>450</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Efficiency Gap= (300-150)/900=150/900= 7+16.67% in favor of Red  -16.67% disadvantage to Blue</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

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\(^{67}\) *Whitford*, 151 F.Supp.3d at 918; *Davis*, 478 U.S. at 109.

\(^{68}\) Stephanopoulos & McGhee, *supra* note 16 (The article was widely circulated among academics and advocates concerned with redistricting issues for some time before its publication).

\(^{69}\) See *id.* at 18 (In the real world, districts are not exactly equal in number of votes cast, so adding the wasted votes by district is tedious. A simpler and quicker method of calculating the efficiency gap in a two party race is ½ of a party’s seat advantage minus 2 times its vote advantage, with both advantages expressed as percentages. In this hypothetical Red captured 6/9 or 66.7% of the seats, which is 33.3% more than Blue’s 33.3%. The two parties each received 450 votes, so Red’s vote advantage is 0%. The efficiency gap is ½ of 33.3% or 16.7%).
In simple terms, the efficiency gap is an index of the relative legislative muscle the two parties get from each vote and how much the districting dilutes the vote of one party. It measures the presence in a map of the goal that a gerrymanderer sets out to accomplish: “pack” as many of the opposing party’s voters as possible into districts that the opponents will win anyway, and “crack” the opponent’s votes in competitive districts down to levels that assure success for the gerrymanderer.

The efficiency gap thus supplies the “measurable” component of a manageable standard of unconstitutional gerrymandering, analogous to the equal population requirements of Wesberry and Reynolds. It also is relevant, but not sufficient, to establish partisan motivation.

**Proof of a material and lasting burden.** The challenge raised by the Bandemer plurality and by the Court’s later demands for a manageable standard is to establish that the maps will create a lasting and material impairment of the minority party’s representational rights. These requirements boil down to showing how much of an efficiency gap revealed by the first actual election under a new map (or by a hypothetical election using the new districts measured by the voting history from past election) is sufficient to demonstrate a probable, lasting material impairment of representational rights.

To establish reliability and durability, the Whitford plaintiffs did not rely solely on common sense or the fact that the defendants spent over $200,000 to generate their maps.\(^{70}\) Plaintiffs offered two basic means of testing the durability of an efficiency gap of a given magnitude. One expert testified that he had analyzed a large number of elections and found that a map exhibiting an efficiency gap of seven percent or more in the most recent election would continue the dominant party as the majority in the legislative chamber throughout a decade in 95% of the cases. The plaintiffs argue that this finding and other statistical showings establish to a high degree of probability that the degree of Republican bias in the Wisconsin map will enable it to retain majority control throughout the decade, thus establishing a material and lasting impairment of the minority party voters’ representational rights.

*Mopping up.* There are a number of subsidiary issues that are often debated and cloud the issue. It is true that in some areas, notably cities with large minority populations, Democrats tend to be clustered more densely than Republicans.\(^{71}\) The degree to which that is truer of Democrats (in cities) than Republicans (in suburbs) is hotly debated. Very likely, however, any “natural” bias rarely exceeds low single digits, and never approaches the thirteen percent efficiency gap that the Whitford plaintiffs allege. Similarly, there is some skirmishing over how to account for the efficiency gap in uncontested districts, which are numerous in some heavily gerrymandered states. Some hypothetical vote for the nonexistent opponent of an

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70 Whitford, 151 F.Supp.3d at 918.
unopposed winner needs to be constructed.\textsuperscript{72} It is up to the political scientists to work this out with reasonably reliable statistical analyses. There will be multiple reasonable means of resolving these nuances, but the differences among them are unlikely to affect the ultimate conclusion that representational rights are indeed impaired by large efficiency gaps.

\section*{VI. INDEPENDENTS AND MINORITY PARTIES}

Finally, plaintiffs have typically asserted claims asserting denial of rights to political parties or their supporters, and alleged that the effect of a gerrymander is statewide. Viewed as a denial of the ability to reach majority of a chamber in the state legislature, it seems correct that all supporters of the excluded party are wrongly denied representation of their views, and the effect is statewide.

A qualitatively different complaint is available to Independents and third-party supporters. In a competitive district, they can choose between the two major party candidates, and often affect the outcome. In a gerrymandered map, however, up to ninety percent of the districts are virtually certain to elect the prevailing candidate in the party dominating that district.\textsuperscript{73} As a result, at least in states with closed primaries, Independents are effectively disenfranchised, having no say in whom the parties nominate, and being handed the winner of the district majority. As a result, in some districts Republicans and Independents are shut out, and in others Democrats and Independents are excluded from a meaningful vote. Some of this phenomenon occurs in any districting plan, but it is not unconstitutional because it is not the product of “illegitimate” districting considerations. The Supreme Court has assumed, without deciding, that partisan districting is “illegitimate” for purposes justifying population deviations. If so, it seems equally illegitimate in drawing district lines. Such an approach would create different, district-specific claims by different groups of people in different parts of the state.

In this connection, the recent decision of the Seventh Circuit in \textit{Common Cause Indiana v. Individual Members of the Indiana Election Commission}\textsuperscript{74} is interesting. The court unanimously affirmed the Chief Judge of the Southern District in holding unconstitutional Marion County Indiana’s system for electing its thirty-six Superior

\footnotetext{72}{It would seem that a hypothetical vote for the minority party that did not field a candidate could be reasonably constructed by first determining the ratio of the total votes for the minority’s least well known statewide candidate (examples are auditor, treasurer, secretary of state) in all legislative districts which were contested between the two parties to the total votes for that party’s legislative candidates in those districts, then attributing that percentage of the statewide candidate’s vote in the legislative district to create a hypothetical anonymous minority candidate vote. This would require precinct level data on the statewide candidate’s race to construct his/her hypothetical district vote. If that is not available, it may be necessary to use presidential races adjusted for relative volume between them and state legislative races. I understand statisticians may favor more sophisticated techniques, and leave that issue for the courts to resolve.}

\footnotetext{73}{In 2014, thirty-seven of the one hundred Indiana House seats were unopposed. The prevailing candidate in ninety-four of hundred districts received more than fifty-five percent of the votes cast for a major party candidate. Election Results, INDIANA ELECTION DIVISION, http://www.in.gov/apps/sos/election/general/general2014?page=office&countyID=1&officeID=10&districtID=1&candidate= (last updated March 11, 2015, 10:01 AM).}

\footnotetext{74}{800 F.3d 913 (7th Cir. 2015).}
Court judges.\textsuperscript{75} The system was instituted in 1975 to assure partisan balance of the trial bench in Indianapolis and only slightly tweaked since.\textsuperscript{76} Its most recent incarnation called for each of the two major parties to nominate only half of the number of judges whose seats were up for election in any year. Absent a write-in or third party candidate, all primary winners were assured election in the general election. In the forty years of this plan, only an occasional write-in or third party candidate popped up, and none came anywhere near success.

The Seventh Circuit grounded its decision expressly in a violation of First Amendment representational rights, holding that restricting the parties to nominating only half the seats burdened the voting rights of the party adherents, and also finding troublesome the disparity between the voting rights conferred on primary voters and others.\textsuperscript{77} The scheme invalidated in \textit{Common Cause} was a de jure denial of voting rights to some, while a gerrymander can accomplish the same thing de facto. It remains to be seen whether this approach will supplement or even displace the conventional attack on gerrymanders as deprivations of minority party rights.

\textsuperscript{75} \textit{Id.} at 928.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
Drawing the Line for Democratic Choice: How the Petition Clause Can Restore a Citizen’s Right to Participate in Commission-Driven Redistricting

Mateo Forero*

ABSTRACT

In this Article, I argue that commission-driven redistricting (and the “apolitical” process enshrined therein) frustrates a citizen’s right to meaningfully participate in electoral design. This right is fundamental, and has long been safeguarded by the First Amendment’s assertion that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” Accordingly, I propose that courts use the Petition Clause as a constitutional remedy against rules that abridge substantive public input in commission-driven redistricting. To illustrate this claim, I analyze how one commonly adopted commission rule—the ex parte contacts prohibition—limits democratic choice. Then, I examine how a court might deploy the First Amendment to repair the harm inflicted by the rule.

INTRODUCTION

What does Bullwinkle have in common with a broken-winged pterodactyl? According to the courts, both resemble congressional districts that were oddly drawn to achieve suspicious electoral outcomes.1 Gerrymanders, as they are more commonly known, have long been the stuff of political intrigue. In large part, this is because state legislatures—the entities which usually produce them—are political by nature.2

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1 See Bernard Grofman & Thomas L. Brunell, Redistricting, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR 649, 651 (Jan E. Leighley ed., 2010) (noting that in most jurisdictions, redistricting “defaults to the legislature and the governor. For these states, redistricting is no different than passing state law. The state legislators pass new maps and rely on the governor to sign them into law”); WILLIAM J. KEFFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 22 (10th ed. 2001) (“By and large, what the legislature brings to lawmaking is the power to represent the people and the authority to make social; what it can leave is its distinctive imprint on the policies recommended by others. Neither in what it brings to the process of making law nor in what it leaves in public policy is its power trifling”).
Indeed, the specter of partisan bias in redistricting is exactly what makes gerrymandering suspicious. But the close link between partisanship and electoral design is not a random one. Notably, Article I, Section 4 of the Constitution provides that the “times, places and manner of holding elections for . . . Representatives, shall be prescribed in each state by the legislature thereof . . . .” Thus, it is by design that our Founding Fathers placed the task of drawing electoral maps in the hands of those closest to the people. Theirs was an institutional choice rooted in the vision of a pluralist and federalist republic.

That choice, however, was seriously undermined by the U.S. Supreme Court in one of its recent decisions. In Arizona State Legislature v. Arizona Independent Redistricting Commission, the Court held that a state may draw congressional districts through a freestanding agency—even though the text of Article I, Section 4 assigns that duty to its legislature. The Court reached this conclusion by interpreting “legislature” to mean “legislative power,” which includes prescription by direct democracy. Therefore, the Court found that an Arizona initiative assigning redistricting authority to an independent commission was a permissible exercise of the state’s “legislative power.” Rationalizing its decision, the Court stressed that

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3. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 601–09 (2002) (arguing that partisan gerrymanders harm democratic accountability, individual rights, and group-based interests); and see Grofman & Brunell, supra note 2, at 663 (noting that “it is common journalistic wisdom that redistricting is an important cause of the extreme ideological polarization between the two parties found in the U.S. House of Representatives and in many state legislatures”).

4. U.S. CONST. art. 1, § 4, cl. 2 (emphasis added). Although “legislature” has been interpreted broadly in Elections Clause jurisprudence, this is not without caveats. See Colorado General Assembly v. Salazar, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting) (“[T]o be consistent with Article I, Section 4, there must be some limit on the State’s ability to define lawmaking by excluding the legislature itself in favor of the courts” (emphasis added)).

5. James Madison, widely recognized as the philosopher of the Constitution, noted that “the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves an election into the state legislatures.” The Federalist No. 45, at 287–88 (James Madison). Following Madison’s cue, Professor Franita Tolson has argued that partisan gerrymandering is federalism-reinforcing “because: 1) the states’ redistricting power links officials in separate spheres of government; and 2) this link, when combined with the loyalty commanded by the political party structure, allows the state to send an ideologically cohesive House delegation to Congress to influence federal policy.” Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 Utah L. Rev. 859, 889 (2010).


7. Id. at 2666–68. The Court’s interpretation was based on three cases that had previously given the Elections Clause its “functional” gloss. See also Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); Hawke v. Smith, 253 U.S. 221 (1920); Smiley v. Holm, 285 U.S. 355 (1932). However, as the dissenters pointed out, those cases never stood for the proposition that the identity of a legislature changes clause-by-clause in the Constitution. Arizona Legislature, 135 S. Ct. at 2682–83 (Roberts, C.J., dissenting).

removing legislatures from the line-drawing process curbs partisan entrenchment in state government. On that point, the Court noted that commissions like Arizona’s “have succeeded to a great degree in limiting the conflict of interest implicit in legislative control over redistricting.”

The reasoning in Arizona Legislature, however, is problematic because it gainsays the Framers’ preference for a participatory (i.e., political) redistricting process. This preference was grounded on the fact that legislatures have long been considered adept at transforming disparate viewpoints into social consensus. Thus, it makes sense that Article I, Section 4 was written to give those institutions—instead of unelected bodies—the weighty task of electoral design. But Arizona Legislature imperiled that choice by allowing states to bypass the Constitution in the name of “nonpartisan” redistricting. Effectively, the Court invited states to vest redistricting power in commissions that are not accountable to the public, even though the costs to democracy are precipitous. In Arizona, for example, the state traded away a majoritarian consensus model for a system at risk of bureaucratic gridlock. This action hurt the citizens of Arizona the most, since they lost their ability to lobby candidly and directly for competing electoral maps, and they are now shut out by

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9 Arizona Legislature, 135 S. Ct. at 2674 (reasoning that commission-driven redistricting, as adopted by Arizona, is “in full harmony with the Constitution’s conception of the people as the font of governmental power”). What the Court failed to see, however, was that the compromise of our federal Constitution changed that “font” of power in order to serve superordinating structural interests (e.g., federalism, pluralism). See Tolson, supra note 5, at 898. In other words, the Elections Clause was the Framers’ method of protecting the people from their own hyper-majoritarian vices.

10 Arizona Legislature, 135 S. Ct. at 2676.

11 James Madison famously observed that legislatures “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations . . . .” Within that model, he argued, “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.” The Federalist No. 10, at 76, 77 (James Madison). Over time, political scientists have confirmed the wisdom of Madison’s pluralist perspective. See, e.g., ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AMERICAN POLITICS 223-56 (2d ed. 2005) (describing pluralism as an ordering theory of political science); THEODORE J. LOWI, THE END OF LIBERALISM: THE PROBLEM OF THE DEMOCRATIC REPUBLIC OF THE UNITED STATES 22–66 (40th anniversary ed. 2009) (arguing that “interest group liberalism” captures the essence of modern legislative power).

12 Arizona Legislature, 135 S. Ct. at 2658 (framing the question before it as primarily “concern[ing] an endeavor by Arizona voters to address the problem of partisan gerrymandering”). The dissent amply criticized this rationale, asserting that: “The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law’s virtues as a policy innovation cannot redeem its inconsistency with the Constitution. ‘Failure of political will does not justify unconstitutional remedies.’” Id. at 2690 (Roberts, C.J., dissenting) (internal citations omitted).

13 Id. at 2659.

14 See Cain, supra note 8, at 1833 (“[B]ecause redistricting is a technical exercise, [Arizona’s] commissioners necessarily rely upon staff with geographic information system (GIS) skills (i.e., the ability to actually draw the lines), those with statistics training to do the Voting Right Act section 2 analysis, and legal counsel specializing in voting rights law. This sets up principal-agent problems based on asymmetries of information. In theory, the technical staff could steer commission decisions in a given direction by skewing the advice and options it gives to the commissioners”).
procedural rules “shielding” the commission from outside influence. The result has been a staggering loss of public access to an important field of policymaking.

Concerned by that outcome, I aim to explore how public access to redistricting can be restored in states that use (or are planning to adopt) the commission model. In this Article, I argue that commission-driven redistricting (and the “apolitical” process enshrined therein) frustrates a citizen’s right to meaningfully participate in electoral design. This right is fundamental, and it has long been safeguarded by the First Amendment’s assertion that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” Accordingly, I propose that courts use the Petition Clause as a constitutional remedy against rules that abridge substantive public input in commission-driven redistricting. To illustrate this claim, I will analyze how one commonly adopted commission rule—the ex parte contacts prohibition—limits democratic choice. Then, I will examine how a court might deploy the First Amendment to repair the harm inflicted by the rule.

This Article proceeds in two substantive Parts. In Part II, I explore redistricting commissions from the institutional perspective. I first discuss the history of partisan gerrymandering and redistricting reform and then use that backdrop to analyze the comparative dynamics of independent commissions. Within that context, I survey and critique the ex parte contacts prohibition common to all independent commissions. My assessment reveals that—when compared to the legislative method—this rule limits public access to the redistricting process and

15 The inability to interact one-on-one with redistricting commissioners inflicts a serious individual harm on the people of Arizona. Absent procedural barriers, political “relationships . . . develop from extensive informal contacts between lobbyists and government decision-makers. Both parties to the exchange of information . . . benefit from this closeness. For their part, government decision-makers obtain valuable information that helps them make decisions. As for lobbyists, closeness allows them access to the people who make the decisions that affect them and their clients.” ANTHONY J. NOWNES, INTEREST GROUPS IN AMERICAN POLITICS: PRESSURE AND POWER 121 (2d ed. 2013).

16 My thesis focuses on a narrow issue: whether procedural barriers in the redistricting context abridge democratic-choice interests safeguarded by the First Amendment. But the same type of argument could be made about procedural barriers in any other area of public policy. This broader confluence of administrative law and First Amendment jurisprudence raises interesting questions, and merits more research than what is currently available. See, e.g., Cass R. Sunstein & Adrian Vermeule, Libertarian Administrative Law, 82 U. CHI. L. REV. 393, 423–27 (2015).

17 U.S. CONST. amend. I. The Framers believed that, by securing this right, “the people may . . . publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.” See Proceedings in the House of Representatives, June 8, 1789, in 1 ANNALS OF CONG. 738 (1789) (Joseph Gales ed., 1834), reprinted in RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 110 (2012).

18 This argument relies on Professor Ronald Krotoszynski’s hypothesis that the Petition Clause carries an expansive right of access to the government. KROTOSZYNSKI, supra note 17, at 170. In his seminal work on the subject, Professor Krotoszynski posits that “petitioners have a right to have their petitions be received and heard by the government,” and that “this right to be heard must [also] include a right of proximity to the government officials to whom a petition is addressed.” KROTOSZYNSKI, supra note 17, at 170.

19 For an overview of the ex parte contacts rule in federal practice, see Sidney A. Shapiro, Two Cheers for HBO: The Problem of the Nonpublic Record, 54 ADMIN. L. REV. 853 (2002).
dilutes the effect of citizen petitions on electoral design. Using that conclusion as a descriptive frame, I then proceed to make my normative First Amendment argument.

In Part III, I explore how the harm inflicted by the ex parte contacts rule implicates the First Amendment. I do this by measuring the values historically protected by the Petition Clause against the rule’s dilutive effect on those interests. Concluding that petitioning rights are materially infringed, I then contend that courts should subject the ex parte contacts rule to strict-scrutiny balancing. Borrowing from an analogous line of cases recognizing a right of access to court proceedings, I argue that this balancing reveals a constitutional infirmity. Therefore, I conclude that courts should invalidate the commission-specific rule as an invalid restraint on redistricting petitions.

I. Redistricting Commissions & Democratic Choice

Animating this Article is the acknowledgment that redistricting is, by nature, a political endeavor. This Part gives depth to that proposition by: (1) tracing a narrative between voting rights litigation and commission-driven redistricting and (2) exploring the institutional problems created by the commission model. The discussion proceeds in three sections. First, I examine the events that prompted commission-based reforms—namely, the failed attempt by courts to police partisan gerrymandering. Then, I survey how those reforms have played out in the states and consider why the independent commissions adopted in six jurisdictions are constitutionally significant. Finally, I delve into one of the procedural rules that makes commission-driven redistricting problematic, and I analyze why mechanisms of its kind violate principles of pluralism. This last section will provide a staging point for the First Amendment claim I make in Part III.

A. Jilted at the Bench: A Brief History of Partisan Gerrymandering Claims

History teaches us that commission-driven redistricting was born from a wrinkle in American jurisprudence. For over a century after the Constitutional Convention, courts respected the vesting of redistricting power in the legislative branch of each state.20 Justice Frankfurter forcefully articulated this position, writing in Colegrove v. Green that “courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”21 That remedy, however,

21 328 U.S. 549, 556 (1946) (plurality opinion). In Colegrove, a group of voters sought to enjoin an Illinois congressional election. Id. at 550. The Illinois district map had not been modified since 1901, and the voters argued that it entrenched population inequalities. Id. at 551. The Court, however, rejected the plea for judicial intervention—reasoning that only the states and Congress could provide a remedy. Id. at 552-53.
became quite elusive in the mid-twentieth century, as racial entrenchment and major shifts in demography distorted the political process. It became clear by the 1960s that state legislatures were using their redistricting power for invidious ends, and in *Baker v. Carr*, the Supreme Court finally intervened. The *Baker* Court held that challenges to electoral design were justiciable under the Fourteenth Amendment and concluded that courts had a duty to protect equality in voting rights. Thus, despite Justice Frankfurter’s criticism that the Court was spewing “empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope,” the Court confidently entered the political thicket. Not surprisingly, that adventure soon presented the Court with insurmountable challenges.

In a line of cases beginning with *Reynolds v. Sims*, the Court elaborated its “one person, one vote” rule, which required states to draw districts with equal populations. The Court later clarified that this equipopulation principle applied rigidly to congressional districts—even though a group of dissenters warned that “legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality.” In a scathing critique of the decision in *Wells v. Rockefeller*, Justice Harlan objected that “the Court’s exclusive concentration upon arithmetic blinds it to the realities of the political process.” And similarly, in *Karcher v. Daggett*, Justice Powell noted that an “uncompromising emphasis on numerical equality” actually “encourages and legitimates even the most outrageous partisan gerrymanders.” These reproaches laid bare that the Court was lost in the political thicket: setting rules against quantitative vote dilution, while exacerbating

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23 369 U.S. 186, 201 (1962) (concluding that a 1901 Tennessee districting law violated equal protection). However, the writing was on the wall two years before *Baker* was decided. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court had ruled that an Alabama municipal gerrymander violated the Fifteenth Amendment.

24 *Baker*, 369 U.S. at 217. Writing for the Court, Justice Brennan established the familiar six-factor test for determining “political questions.” *Id.* Upon applying those factors, he concluded that malapportionment claims could be addressed by the Court. *Id.* at 226.

25 *Id.* at 270 (Frankfurter, J., dissenting).

26 377 U.S. 533 (1964) (holding that a state must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable”). In fact, the *Reynolds* rule was a derivative of two other cases decided that same Term. See *Gray v. Sanders*, 372 U.S. 368, 376–78 (1963) (invalidating Georgia’s county-unit primary system, which used a vote-weighing mechanism similar to the federal electoral college); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that population disparities between Georgia’s congressional districts violated Article I, Section 2 of the Constitution).


28 *Wells*, 394 U.S. at 555 (White, J., dissenting).

29 *Id.* at 552 (Harlan, J., dissenting). His scathing dissent mocked the “magic formula” of “one man-one vote” as unworkable and ineffective at preventing partisan gerrymandering. *Id.* at 549–50.

30 462 U.S. 725, 785 (1983) (Powell, J., dissenting). Justice Powell’s critique arose from the Court’s decision to invalidate a New Jersey congressional plan that diluted Republican votes in Newark. *Id.* at 726.
problems in qualitative vote manipulation. However, because none of the Court’s cases through the 1970s presented the precise issue for decision, the problem of partisan gerrymandering remained largely unpولiced.

This reality forced the Court in *Davis v. Bandemer* to consider whether equipopulous districts drawn with a partisan motive were unconstitutional. In a six-to-three decision, the *Bandemer* Court held that such partisan gerrymanders were in fact justiciable. However, the majority disagreed on the standard to be applied—with Justice White proposing one test and Justice Powell offering the alternative. Justice White’s approach focused on two elements: the “consistent degradation” of voter influence and the “continued frustration” of the majority’s electoral will. Meanwhile, Justice Powell’s approach hinged on three factors: the shapes of voting districts and adherence to established political boundaries; any legislative history bearing upon partisan motivation; and evidence of a dilutive distribution of voters by party affiliation. Criticizing both tests as disingenuous, the dissent argued that partisan gerrymanders were simply nonjusticiable. Leading that view, Justice O’Connor predicted that courts would be unable to follow the tests set forth by the splintered majority. She asserted that the judiciary was unfit to make policy determinations about partisanship, and accordingly, that it should stay out.

This lack of guidance from the Court made *Bandemer* claims impossible to prove, and decades of litigation failed to settle the matter. Unsurprisingly, by the

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32 478 U.S. 109 (1986). In the earlier case of *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court had upheld a Connecticut redistricting plan against partisan gerrymandering claims. The *Gaffney* Court, however, failed to address the justiciability of the challenge. See id. at 737. Thus, in an important way, *Bandemer* was an attempt to correct the error.
33 *Id.* at 123. Justice White, writing for a majority on justiciability, explained that qualitative vote manipulation was not a political question. *Id.* at 126. He reasoned that the Baker factors counseled in favor of judicial intervention—especially since the Court had succeeded in finding a “judicially manageable standard” in the ambit of quantitative dilution claims (i.e., one person-one vote). *Id.* at 126–27.
34 The six-vote majority agreed that partisan gerrymandering required proof of “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” *Id.* at 127. See also id. at 161 (Powell, J., concurring in part and dissenting in part). However, they divided on how to measure the requisite discriminatory effect. See Berman, *supra* note 30, at 796.
35 *Bandemer*, 478 U.S. at 132–33.
36 *Id.* at 173 (Powell, J., concurring in part and dissenting in part).
37 *Id.* at 147 (O’Connor, J., concurring) (predicting that the proposed tests would devolve into “a requirement of roughly proportional representation for every cohesive political group”).
38 *Id.* at 144 (O’Connor, J., concurring). This argument is buttressed by the fact that “nothing in our constitutional text or history supports the judgment that states act unconstitutionally by creating voting mechanisms and district lines that produce wholly disproportional representation.” Berman, *supra* note 30, at 820.
time Vieth v. Jubelirer was decided in 2004, a plurality of justices were convinced that partisan gerrymandering was a nonjusticiable political question. Describing the proposed standards as “misguided when proposed,” and observing that they had produced “one long record of puzzlement and consternation,” the plurality voted to overrule Bandemer entirely. The plurality also rejected the four tests proposed by the Vieth dissenters—echoing Justice O’Connor’s admonition that it is “impossible to assess the effects of partisan gerrymandering,” difficult to establish whether a party has majority status, and “impossible to assure” that a party that does enjoy majority status “wins a majority of seats.” Justice Kennedy concurred in the judgment, agreeing that the Bandemer test was inappropriate and noting that the approaches of the Vieth dissenters were questionable. However, he held out hope for a yet-to-be-discovered method. As of 2016, the Court has not found that such a standard exists.

B. Harnessing Politics to Fix Politics: The Rise of Commission-Driven Redistricting

In large part because of Vieth, commentators soured to the idea that courts could (and should) police partisan gerrymandering. Fueled by this frustration, policymakers began urging a more limited role for the judiciary in line-drawing controversies. The proposals for accomplishing this were varied, but importantly, all agreed that the political process should be “harnessed” to “fix” the conflict of interest

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40 541 U.S. 267, 290 (2004) (plurality opinion). In Vieth, Democratic voters challenged a Pennsylvania redistricting plan that strongly favored the Republican Party. Id. at 272–74. The controversy arose after the state lost two congressional seats to reapportionment, and was forced to redistrict. Berman, supra note 30, at 798. The plan was designed to hand Republicans fourteen of the state’s nineteen congressional seats—even though both parties enjoyed nearly equal support among the Pennsylvania electorate. Id. The legislature accomplished this by “slashing through municipalities and neighborhoods, splitting counties . . . [and] producing oddly misshapen districts.” Brief for Appellants at 12–13, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580).

41 Vieth, 541 U.S. at 283 (plurality opinion).

42 Id. at 282 (plurality opinion).

43 Id.

44 Id. at 287–89 (plurality opinion). For a detailed description of the four tests suggested by the Vieth dissenters, see Berman, supra note 30, at 799–802.

45 Id. at 306–17 (Kennedy, J., concurring in the judgment).

46 Id. at 308–12 (Kennedy, J., concurring). Instead, Justice Kennedy suggested that analyzing partisan gerrymanders through the First Amendment might yield a “more relevant” analysis. Id. at 314 (Kennedy, J., concurring) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”).

47 See Cain, supra note 8, at 1810–11 (“Some legal scholars and political scientists continue to urge the courts to intervene more deeply into partisan and incumbent gerrymandering issues, putting forward new refinements of formal redistricting criteria or fairness formulas for consideration. But others think this unwise and seek to lessen the current burden on the courts.”).
in legislature-driven redistricting.\textsuperscript{48} One commentator, for instance, proposed shaming politicians into drawing maps more “responsibly,”\textsuperscript{49} while others argued for accountability through the state referendum process.\textsuperscript{50} Most radically, however, a group of scholars suggested stripping elected officials of their redistricting duties entirely.\textsuperscript{51} It is in this milieu that commission-driven redistricting became an attractive policy mechanism.

Prompted by these proposals, states began establishing redistricting commissions with varying degrees of power.\textsuperscript{52} In a recent study of the existing models, Professor Bruce Cain describes commissions as being in one of four typologies: advisory, backup, political, or independent.\textsuperscript{53} I will briefly sketch each model here in order of least to most autonomous.

First are advisory commissions, which can only recommend redistricting plans to the legislature and whose members are not insulated from partisan dynamics.\textsuperscript{54} Eight states currently use the advisory commission model, and two of those jurisdictions serve as good illustrations of the categorical norm.\textsuperscript{55} In New York, for example, the legislature can adopt, amend, or ignore the commission’s proposal as it chooses.\textsuperscript{56} The commission itself consists of four legislators and two non-legislators who are appointed by party leaders in Albany.\textsuperscript{57} This formation stands in contrast to the Iowa commission whose five members cannot be in party positions, in elected office, or be related to members of the state legislature.\textsuperscript{58} On one hand, that quirk makes Iowa’s model more autonomous than New York’s; but the commission itself has little power. As in New York, the Iowa legislature may approve or reject the plans produced by the commission at will.\textsuperscript{59}


\textsuperscript{49} Heather K. Gerken, \textit{Getting from Here to There in Redistricting Reform}, 5 DUKE J. CONST. L. & PUB. POL’Y 1, 7 (2010).


\textsuperscript{52} See JUSTIN LEVITT, BRENNAU CTR. FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 20–22 (2010) (cataloguing the reform trends emerging throughout the United States).

\textsuperscript{53} Cain, supra note 8, at 1813.

\textsuperscript{54} \textit{Id.} at 1813–15.


\textsuperscript{56} See N.Y. LEGIS. LAW § 83-m(5) (Consol. 2014 & Supp. 2016) (“The primary function of the task force is to compile and analyze data, conduct research for and make reports and recommendations to the legislature, legislative commissions and other legislative task forces.”).

\textsuperscript{57} See \textit{id.} § 83-m(2) (describing the appointment process of the legislative task force members).

\textsuperscript{58} IOWA CODE § 42.5(2) (2014 & Supp. 2016).

\textsuperscript{59} See \textit{id.} § 42.6(3) (explaining the duties of the commission).
Next are backup commissions, which can only exercise conditional (but independent) authority and whose members are not insulated from partisanship. Eight states currently use backup commissions, albeit for different kinds of districts. However, in all of those jurisdictions, redistricting power is conferred only if a legislature fails to draw the lines. As Professor Cain notes, the mere existence of this trigger “can be consequential . . . [because] knowing that stalemated redistricting negotiations would throw the matter to a backup commission can alter the legislative bargaining strategies in certain circumstances.” This phenomenon can be readily observed in states like Connecticut whose commission has a mandated bipartisan composition. When the partisan divide is close to fifty-fifty in the legislature, there may be more frequent recourse to the commission. But when the legislature is dominated by one party, the majority may wish to avoid a commission-enacted plan.

At a third level are political commissions, which possess initial line-drawing authority and are headed by panels that proportionally represent interests in the state. Seven jurisdictions use this model with variations on composition and scope of power. However, one feature common to all political commissions is their focus on balanced representation. Some states achieve this by allocating membership through statewide offices (e.g., the Governor or Attorney General), while others mandate bipartisan and multi-geographic officeholders. New Jersey’s institutional

60 Cain, supra note 8, at 1815.
61 Illinois, Maryland, Mississippi, Oklahoma, Oregon, and Texas use a backup commission only for state districts. See Ill. Const. art. IV, § 3; Md. Const. art. III, § 5; Miss. Const. art. XIII, § 254; Okla. Const. art. V, § 11A; Or. Const. art. IV, § 6; Tex. Const. art. III, § 28 (explaining the composition or role of the backup commissions). Meanwhile, Indiana uses its backup only for congressional districts. But see Ind. Code Ann. § 3-3-2-2 (LexisNexis 2012) (explaining the establishment of redistricting commissions for congressional districts). The only state to use its backup for state and congressional districts is Connecticut. See generally Conn. Const. art. III, § 6(b) (explaining the role of the backup commission).
62 See Cain, supra note 8, at 1815 (arguing that commissions’ initial lack of line-drawing power is “a serious deficiency”).
63 Id. To illustrate this point, Professor Cain presents a hypothetical situation: if a backup commission has a different partisan composition than the legislature, the risk of losing authority over the matter will always “give the majority party leadership more leverage over individual majority party members (i.e., ‘hold this up by insisting on your selfish demands and we lose control of the process to the other party’).” Id.
64 See Conn. Const. art. III, § 6(b) (requiring that each party leader appoint two commissioners, and then agree on a ninth “citizen commissioner”).
65 See Cain, supra note 8, at 1816 (explaining that political commissions are more independent than advisory or backup commissions).
66 Arkansas, Colorado, Pennsylvania and Missouri use political commissions for state redistricting. See Ark. Const. art. VIII, § 1; Colo. Const. art. V, § 48; Mo. Const. art. III, §§ 2, 7; Ohio Const. art. XI, § I; Pa. Const. art. II, § 17(h). Meanwhile, the commissions in New Jersey and Hawaii draw both congressional and state lines. But see Haw. Const. art. IV, § 2; N.J. Const. art. II, § 2, ¶ 1.
68 Colorado’s model is noteworthy on this count. The state constitution requires that no more than four commissioners can live in the same congressional district. See Colo. Const. art. V, § 48. But see Cain, supra note 8, at 1816 n.29 (other states only require bipartisanship).
framework is an example of the latter approach. There, the redistricting commission “consists of equally sized contingents of Democratic and Republican appointees chaired by a tiebreaking member selected by the commissioners themselves or the by the state supreme court if the commissioners cannot agree.” These commissioners must agree on New Jersey’s state and congressional districts, and they are supposed to do so in a manner that keeps elections competitive. As it were, Professor Cain believes the New Jersey model should be emulated in other states.

Finally, at the highest level of autonomy are independent commissions. As Professor Cain notes, independent commissions are the “culmination of a reform effort” aimed at completely eradicating the risks of partisan gerrymandering. He argues that these systems are in a league of their own because they: (1) are completely isolated from elected officials and (2) are able to put district lines in place without legislative approval. Because of their novelty and because of the Supreme Court’s stamp of approval in Arizona Legislature, independent commissions are likely to proliferate beyond the six states that currently use them (Alaska, Arizona, California, Idaho, Montana, and Washington). Thus, studying the commissions that already exist can provide important insights about the landscape and future of redistricting reform.

In that endeavor, Professor Cain’s analysis again sheds some light on the nuances. For example, he observes that Washington’s approach is the least independent because it gives “party leaders the power to appoint commissioners subject to certain restrictions,” and it grants the legislature a “limited ability to amend the commission’s recommended districts.” Meanwhile, he catalogues Alaska, Idaho, and Montana as intermediate states because they “do not give their legislatures any opportunity to amend the commission’s plans,” but they do “allow

69 Cain, supra note 8, at 1817.
70 Id. at 1838 (describing the “informal” bargaining process that occurs among New Jersey’s commissioners during redistricting).
71 See id. at 1839–41 (arguing that New Jersey’s bargaining process should become a formalized procedure in other commission frameworks).
72 Id. at 1817 (observing that the object of the independent commission model is to eliminate “legislators’ ability to choose the district lines they run in (sometimes simplistically characterized as elected officials choosing voters rather than voters choosing their representatives). The term for this problem—i.e., legislators drawing district lines that they ultimately have to run in—is legislative conflict of interest (LCOI)).
73 Id. These features sound similar to those which characterize political commissions. However, they are different in substance: the independent commission—at least in theory—operates entirely outside the sphere of horse-trading and tug-of-war prevalent in state capitals.
74 See Arizona Legislature, 135 S. Ct. at 2677 (“The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have ‘a [sic] habitual recollection of their dependence on the people.’ In so acting, Arizona voters sought to restore ‘the core principle of republican government,’ namely, ‘that the voters should choose their representatives, not the other way around.”’ (citing The Federalist No. 57, at 350 (James Madison)) and Berman, supra note 30, at 781).
75 See Alaska Const. art. VI, § 8–10; Ariz. Const. art. IV, Pt. 2, § 1(14); Cal. Const. art. 21, § 2; Idaho Const. art. 3, § 2(a); Mont. Const. art. V, § 14; Wash. Const. art. II, § 43(1).
76 Cain, supra note 8, at 1819; see also Wash. Const. art. II, § 43(7); Wash. Rev. Code Ann. § 44.05.100 (2012).
legislative leaders to make . . . appointments subject to restrictions by elected officials, political party leaders, and lobbyists.” 77 Finally, he classifies Arizona and California as the most independent systems because their commissions are wholly autonomous, and their nomination processes are increasingly merit-based. 78 In Arizona, for example, the Commission on Appellate Court Appointments identifies potential candidates for office; 79 in California, legislative leaders can only strike nominees from the candidate pools prepared by the State Auditor. 80

In the aggregate, these reforms highlight a continued effort to eradicate legislative conflicts of interest from redistricting. However, that goal bears false promise. As Professor Cain aptly observes, “a core problem for U.S. redistricting reform is that the system of nonpartisan expertise is weaker (even, sadly, in electoral administration) than in the other Anglo-American democracies that also use single member district rules.” 81 Thus, the idea that independent commissions can cure what Vieth could not is plainly unrealistic.

Indeed, not only is the goal illusory, its implementation presents a threat to the pluralist mode of policymaking. 82 By erecting institutional barriers between the redistricting and legislative processes, citizens in commission-driven states are placed at two degrees of separation from electoral design. That separation, in turn, is deepened by the reality that most commissions have to abide by the administrative code of their home states. 83 This is because administrative codes are normally designed to mitigate outside pressures on rulemaking and adjudication. 84 In practice,

77 Cain, supra note 8, at 1819, and see ALASKA CONST. art. VI, § 8; MONT. CONST. art. V, § 14; IDAHO CODE § 72-1502 (2006).
78 Cain, supra note 8, at 1819.
79 See ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8).
80 See CAL. CONST. art. XXI, § 2(d); CAL. GOVT CODE § 8252(b)-(g) (West 2014); Cain, supra note 8, at 1824 (noting that the desired effect of this policy was to create “a bipartisan panel of citizens, unconnected to incumbent legislators and relying on neutral criteria, [who] would create fair and competitive district boundaries without explicit instructions to do so and without using political data”).
81 Cain, supra note 8, at 1820–21; see Nicholas O. Stephanopoulos, Our Electoral Exceptionalism, 80 U. Chi. L. Rev. 769, 780–86 (2013) (surveying non-American institutional models of election administration).
82 To understand this point, consider the mechanics of redistricting reform. In adopting a commission model, a state hopes to impact a dependent variable (partisan-motivated redistricting) by tweaking a group of independent variables (e.g., institutions, personnel). When it makes those changes, however, the state also impacts other output coefficients tied to the same variables—namely responsiveness to public needs. The result is a redistricting process that takes in neither downstream (i.e., legislator) nor upstream (i.e., citizen) inputs. This creates an information gap that ends up being filled by intra-stream (i.e., bureaucratic) priorities. Cf. Nikolaos Zahariadis, Ambiguity and Multiple Streams, in THEORIES OF THE POL’Y PROCESS 25, 31 (Paul A. Sabatier & Christopher M. Weible eds., 3d ed. 2014) (discussing how policy outputs are impacted by the confluence of input “streams”); Ellen M. Immergut, Institutional Constraints on Policy, in THE OXFORD HANDBOOK OF PUB. POL’Y 557, 565–68 (Michael Moran, Martin Rein & Robert E. Goodin eds., 2006) (discussing how governmental structure affects policy outputs).
84 See Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy, 47 WAKE FOREST L. REV. 463 (2012) (“The job of public administration is not limited to aggregating the preferences of interest groups when normative issues present themselves. Instead, as Brian Cook points out, public administration must be a ‘political
this means citizens of some jurisdictions have no way to directly and openly share their views with the officials that matter.\textsuperscript{85} It is precisely this mix of institutional and procedural isolation that raises grave concerns about the public’s ability to meaningfully participate in redistricting.

C. Procedural Dysfunction: Independent Commissions and the Ex Parte Contacts Rule

To illustrate my point about the threat to pluralism from commission-based redistricting, it is useful to study how one procedural rule common to all independent commissions harms democratic choice. Take, for instance, the rule barring redistricting commissioners from engaging in ex parte contacts with citizens.\textsuperscript{86}

In California, the state legislature directs that “commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing.”\textsuperscript{87} It further stipulates that “the commission shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program.”\textsuperscript{88} Similarly, in Washington, the state legislature directs the commission to comply with the “Administrative Procedure Act, chapter 34.05 RCW.”\textsuperscript{89} And that law, in relevant part, provides that commissioners “may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.”\textsuperscript{90} These commands are just examples, but they are representative of the ex parte contacts prohibition used by most states. Indeed, the rule is commonly adopted by

\textsuperscript{85} Of course, citizens may participate in other indirect or diminished ways (e.g., by attending public hearings held by the commission). But the mere absence of alternative avenues for substantive participation in redistricting is what creates an individual-rights problem.

\textsuperscript{86} Although state administrative codes differ in their implementation of the ex parte contacts rule, they largely follow the federal example. Cf. Ex Parte Communications in Informal Rulemaking Proceedings (Recommendation 77-3), 1 C.F.R. § 305.77 (2001) (listing the advantages of restraining ex parte communications, including reducing the possibility of unfair influence over decision makers, and affording interested parties opportunity to respond to information relied upon in the decision-making process).

\textsuperscript{87} CAL. GOV’T CODE § 8253(a)(3) (West 2014). The rule was passed as part of Proposition 11, which established the state’s independent redistricting commission by initiative. See Cain, supra note 8, at 1823.

\textsuperscript{88} CAL. GOV’T CODE § 8253(a)(7) (West 2014). This provision was meant to link the state’s ex parte contacts rule to California’s open-meeting laws. See Michael Halberstam, Beyond Transparency: Rethinking Election Reform from an Open Government Perspective, 38 SEATTLE U. L. REV. 1007, 1048–51 (2015).

\textsuperscript{89} WASH. REV. CODE ANN. § 44.05.080(1) (West 2014). This directive was enacted as part of a legislative package following the redistricting amendments to the state constitution. WASH. CONST. art. II, § 43(4) (“The legislature shall enact laws providing for the implementation of this section, to include . . . additional standards to govern the commission”).

\textsuperscript{90} WASH. REV. CODE ANN. § 34.05.455(2) (West 2014); see also William R. Andersen, The 1988 Washington Administrative Procedure Act—An Introduction, 64 WASH. L. REV. 781, 811–813 (1989).
redistricting commissions because it is key to accomplishing a “bias free” line-drawing process. On its face, this objective seems defensible; however, use of the rule also constricts the ability of citizens to interact candidly and personally with their commissioners. In effect, the prohibition creates a catch-22: a “neutral” redistricting process has been created but only at the expense of the constituent-representative relationship. Intuitively, that outcome seems more harmful to representative democracy than having a less-than-perfect method for drawing electoral maps.

To understand why, consider how constituents interact with officials in commission-based states. Because of the ex parte contacts rule, if an individual wishes to propose (or give feedback on) a redistricting plan, he may only do so in the sterile environment of a public hearing. As a practical matter, this requirement may force the citizen to dilute or modify his position out of fear of retaliation from other members of the public. Alternatively, the requirement may cause commissioners to be less receptive to constituent input than if they were listening in a more informal—or even private—setting. In either scenario, the citizen suffers from an inability to impact the redistricting process at an organic and substantive level. From that institutional perspective, the ex parte contacts rule discourages participation in a field that should be most open to the people it affects—that is, the voters. Indeed, the

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91 See Ron Levy, Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena, 53 McGill L.J. 1, 23–24 (2008) (observing that in a “recommendation designed to keep influential partisans from exercising power behind closed doors, Common Cause proposes the creation of new state readjustment commissions whose members would ‘be prohibited from all ex-parte communications’ with elected officials and lobbyists”).

92 I call the public hearing a “sterile environment” because it turns out to be useless for deliberative policymaking. At least one study in public administration has documented this conclusion: “The most ineffective technique is the public hearing. Public hearings do not work. Low attendance at public hearings is often construed as public apathy or silent approval of the status quo. In actuality, low attendance is more likely to be related to the structure of public hearings. Administrators recognize that the structure of public hearings and public meetings prohibits meaningful exchange. As one administrator said, ‘The public hearing is not about communicating, it is about convincing.’ . . . An activist suggested that the public hearing was window dressing, ‘We have these hearings so they can check off on their list that they’ve had their citizen participation. . . . It’s participation out of the fear that they are going to look bad.’” Cheryl Simrell King et al., The Question of Participation: Toward Authentic Public Participation in Public Administration, 58 Pub. Admin. Rev. 317, 323 (1998).

93 Cf. Carson Hilary Barylak, Reducing Uncertainty in Anti-SLAPP Protection, 71 Ohio St. L.J. 845, 845 (2010) (“Public participation has long been considered an essential element of effective governance, [and] resolution of broad social problems. . . . The values underlying First Amendment protections and pluralism demand that individuals and groups have the opportunity to make their voices heard, without the threat of retaliation by those equipped with greater financial or institutional power.”).

94 See King et al., supra note 89, at 319 (“Many administrators are, at best, ambivalent about public involvement or, at worst, they find it problematic . . . . As a result, although [they] view close relationships with citizens as both necessary and desirable, most of them do not actively seek public involvement. If they do seek it, they do not use public input in making administrative decisions.”).

rule ensures that redistricting will be conducted in isolation and with primarily bureaucratic priorities in mind.96

Compare that scenario to how an individual in a state with legislative redistricting participates in electoral design. Unlike the officials in commission-based states, legislators considering district maps are not bound by an ex parte contacts prohibition.97 Therefore, they are able to meet individually and privately with constituents about their redistricting concerns and priorities. Because each legislator is answerable to the citizens with whom she meets, she is more likely to take these critiques seriously.98 This practice, in turn, motivates legislators to advocate for their constituents and use their views as bargaining chips negotiating with each other.99 Cognizant that their voice has weight in the legislative arena, individuals are more willing to share their unvarnished opinions about potential redistricting plans. At its core, this interaction is a positive outcome—since greater input in the process yields electoral maps that are more comprehensive and representative.

In a nutshell, the latter example represents pluralism at work. Contrary to the rationale in Arizona Legislature, this process was the one our Framers had in mind when they drafted Article I, Section 4 of the Constitution.100 The fact that independent commissions with unworkable ex parte contact rules are countermanding that preference should be of deep constitutional concern. It is to that concern that I turn my attention next.

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96 See id. at 678 (“With nonpartisan expertise . . . often comes detachment from the policy goals of the political branches. For example, it is quite typical for nonpartisan experts to attempt to make district lines as coterminous with political subdivision boundaries as possible. Pursuing such a goal, however, often conflicts with attention to communities of interest that straddle such boundaries and with a state’s public policy goal of regionalism in uniting cities and suburbs”).

97 In fact, the hallmark of the legislative process is that representatives can freely communicate with constituents. This information-sharing function is central for democratic accountability: if legislators fail to heed public demands, they will be met with retaliation at the ballot box. See STONE & BUTTICE, Voters in Context: The Politics of Citizen Behavior, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR, supra note 2, at 555, 561.

98 See Cain, supra note 8, at 1817 n.29 (“I can attest from my own experience as a redistricting consultant that legislators are often pressured by their constituents and supporters to shape district lines in particular ways and that legislators are often loath to ignore their demands for fear of the electoral or fundraising consequences”).

99 See Persily, supra note 92, at 679 (“Legislative bargains in the redistricting process are not completely detached from others that occur throughout a legislative session. Through redistricting, legislatures not only make the tough value-laden decisions as to how communities should be represented, but they create service relationships between representatives and constituents that fit into larger . . . policy programs”).

100 See supra note 5 and accompanying text.
II. RESTORING PUBLIC ACCESS TO REDISTRICTING

In Part II, I showed how the ex parte contacts rule undermines pluralism in redistricting policy. In Part III, I contend that this harm to democratic choice also triggers a redressable constitutional violation. Specifically, I argue that the ex parte contacts rule—when used by redistricting commissions—runs afoul of the First Amendment right “to petition the Government for a redress of grievances.” In making this claim, I contend that: (1) the Petition Clause safeguards a citizen’s right to influence electoral design and (2) that the ex parte contacts rule abridges that right by impeding and diluting meaningful participation in commission-driven redistricting.

This discussion proceeds in three sections. First, I define the scope of the Petition Clause coverage by examining its historical context. I then use that history to measure whether procedural barriers in redistricting trigger the Clause’s protection. Second, finding that the ex parte contacts rule materially inhibits First Amendment interests, I argue that courts should subject the provision to a strict scrutiny balancing test. Third, I forecast this balancing analysis by analogizing to a line of cases that enforce public access to court proceedings. Using that framework, I conclude that the ex parte contacts prohibition cannot survive strict scrutiny. On one hand, the rule inhibits a process that is historically and functionally reliant on democratic input; but on the other hand, a state’s interest in “neutral” redistricting is not compelling enough to justify the burden on citizen petitions.

A. Constitutional Trigger: The Historically Recognized Right to Influence the Government

As is customary in First Amendment jurisprudence, I begin with an inquiry into what interests are safeguarded by the Petition Clause. Normally, this inquiry would be guided by the Supreme Court’s authoritative precedents. However, this is

101 This thesis relies on Professor Krotoszynski’s contention that the Petition Clause codifies a justiciable and enforceable right of access to the government. See KROTOSZYNSKI, supra note 16, at 170.
102 U.S. CONST. amend. I. It is no answer to impaired advocacy that a citizen can still petition a commission through the formal administrative process. See KROTOSZYNSKI, supra note 16, at 175 (“The availability of one means of petitioning the government should not imply the absence of other means of engaging in petitioning activity that would-be petitioners might prefer to use”). For one, participating in that process may not actually provide the type of access the citizen desires. See KEN GODWIN ET AL., LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS 40 (2013). Plus, the Supreme Court has warned against this precise argument. See Healy v. James, 408 U.S. 169, 183 (1972) (holding that “the Constitution’s protection is not limited to direct interference with fundamental rights,” and that procedural barriers can form “an impermissible, though indirect, infringement of . . . [those] rights”).
impractical here, since the judiciary has long treated the Petition Clause as a dead letter.\textsuperscript{104} Instead, I resort to the academic literature for more concrete guidance.

In his influential book on petitioning, Professor Ronald Krotoszynski suggests that “like the Free Speech Clause, the Petition Clause should be interpreted and applied dynamically or purposively—the federal courts should identify the core purpose, or purposes, of the Petition Clause and then use the clause to advance and secure them.”\textsuperscript{105} To that end, considering the Clause’s “historical origins and past meaning should be useful, perhaps even essential, to identifying and securing its proper place in contemporary constitutional law.”\textsuperscript{106} Following that instruction, I aim now to define the Petition Clause through its historical antecedents.\textsuperscript{107}

Petitioning first became a significant political activity in the thirteenth century when it was codified in the Magna Carta as a right of the nobility enforceable against King John.\textsuperscript{108} By the reign of Edward III in the mid-1300s, petitioning was a common practice exercised by noblemen and knights.\textsuperscript{109} The Crown had a formalized structure for receiving petitions, and this structure consisted of in-person presentations by the landed elite on behalf of the English people.\textsuperscript{110} This model was followed by Parliament in the sixteenth century as its representative power grew.\textsuperscript{111} The House of Commons would receive grievances from the citizenry, and accordingly, the House petitioned the Crown for changes in the general law.\textsuperscript{112} As Parliament itself became the source of prescriptive power, citizen petitions were read and debated directly.\textsuperscript{113} And by the time of the English Revolution in 1688, petitioning was seen as a birthright of all

\textsuperscript{104} As I describe in Part III.B, the Supreme Court has invoked the Petition Clause before. However, those precedents have been limited to the circumstances they control, and have failed to recognize the Clause’s independent force. See KROTOSZYNSKI, supra note 16, at 157.

\textsuperscript{105} Id. at 81.

\textsuperscript{106} Id. at 82.


\textsuperscript{108} See Magna Carta 1215, 16 John c. 61, reprinted in 5 THE FOUNDERS’ CONSTITUTION 187, 187 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[I]f we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one . . . let [the] barons come to us . . . and let them ask that we cause that transgression to be corrected without delay.”).

\textsuperscript{109} KROTOSZYNSKI, supra note 16, at 85 (citing Professor William Stubbs’ extensive research on the practices and traditions of the English Crown in the high medieval period).

\textsuperscript{110} Id. at 85–86 (“Parliament itself generally petitioned the Crown to establish a [new] law; it did not purport to make laws in its own name. Only later, and not until after Charles I gave his consent to the Petition of Right in 1628, did Parliament consistently enact bills on its own authority . . . .” (footnote omitted)).

\textsuperscript{111} Id. at 86.

\textsuperscript{112} See id. at 86–87 (citing WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 346–48 (2d ed. 1892)) (documenting the work of the Committee of Grievances, which considered the vast array of petitions submitted to the House of Commons during the reigns of James I and Charles I).

\textsuperscript{113} See ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 516–17 (1930) (discussing a 1669 enactment which made consideration of petitions an inherent governmental duty of the House of Commons).
citizens.\textsuperscript{114} It was enshrined in the English Bill of Rights and was frequently used as a method of redress for both private grievances and collective concerns,\textsuperscript{115}

The idea that petitioning was a core democratic function was later exported to the American colonies, where it developed in unprecedented ways. Because North American settlements in the late seventeenth century were territorially disperse, direct petitioning by citizens became the most convenient method for legislators to keep a pulse on social needs.\textsuperscript{116} In many instances, individuals lobbied for regulations on local trades and professions, and community representatives stridently sought legislation on the sale of alcohol and lottery tickets.\textsuperscript{117} Colonial legislatures also considered petitions made by disenfranchised groups,\textsuperscript{118} and legislatures even accepted requests by lobbyists that advanced purely private interests.\textsuperscript{119} History tells us that the governor of New York was one of the first colonial officials to be subjected to this kind of organized petitioning by English merchants.\textsuperscript{120} But that example was not an isolated or anomalous political occurrence; in a concrete way, it shows that petitioning was alive across the American colonies.

Virginia, in particular, had a well-established petitioning culture, where powerful landed interests played the game of pressure politics.\textsuperscript{121} As early as the 1710s, well-connected planters from the Chesapeake Bay lobbied Virginia authorities for “legislation . . . prohibiting the export of bulk tobacco from that colony, for regulation of the trade to prevent Scottish smuggling, for a long period of grace between the landing of tobacco and the paying of customs duties, and for the prevention of tobacco planting in England.”\textsuperscript{122} These lobbying tactics were also common in Pennsylvania, where religious groups wielded great influence. At the turn of the eighteenth century, Quaker lobbyists “worked for approval of a Pennsylvania act forbidding the importation of slaves, they supported the proprietorship as a form of government, they worked to keep the Three Lower Counties (now Delaware) part of Pennsylvania, [and] they backed the separation of New York and New Jersey . . .

\begin{itemize}
\item \textsuperscript{114} See Krotoszynski, supra note 16, at 87 (“This growth in the importance and frequency of petitioning corresponds to the clearer demarcation of Parliament's legislative power.”).
\item \textsuperscript{115} Id. at 86–87.
\item \textsuperscript{116} See Raymond C. Bailey, \textit{Popular Influence upon Public Policy: Petitioning in Eighteenth-Century Virginia} 6 (1979) (underscoring that petitioning had been transplanted “literally during the first year of settlement at Jamestown, and by 1700 [it] had assumed an important role in the political process”).
\item \textsuperscript{117} See Mary Patterson Clarke, \textit{Parliamentary Privilege in the American Colonies} 209–10 (1943).
\item \textsuperscript{118} In 1769, a group of freed, black men lobbied the Virginia legislature to exempt their wives from a poll tax. See Gregory A. Mark, \textit{The Vestigial Constitution: The History and Significance of the Right to Petition}, 66 Fordham L. Rev. 2153, 2185 (1998) (noting that this campaign “was as incendiary an action as could be conceived in the slave South. All the more stunning, then, that the petition was not simply heard, but granted”).
\item \textsuperscript{119} See id. at 2183 (studying the lobbying campaigns of two women in colonial Georgia on behalf of their families).
\item \textsuperscript{121} See Alison G. Olson, \textit{The Virginia Merchants of London: A Study in Eighteenth-Century Interest-Group Politics}, 40 WM. & MARY Q. 363, 368–70 (1989).
\item \textsuperscript{122} Id. at 369.
\end{itemize}
The Quaker lobby was also active in New England, where it pressured Massachusetts, New Hampshire, and Connecticut assemblies for a variety of impost exemptions. These provisions were extended in 1737, after the governor of Massachusetts was “waited upon” by Quaker lobbyists from London.

These examples demonstrate that factional pressures were an accepted political reality in America by the 1770s. In fact, dissenters to the English Crown used those exact tactics to spark the cause of independence. American revolutionaries drew from the tradition of petitioning to craft their own political message. Their “Olive Branch” Petition of 1775 was essentially a lobbying effort on behalf of American interests to secure political outcomes in Britain (namely that the colonies be given free trade incentives by repealing laws like the Stamp Act). When these exhortations fell on deaf ears, the colonists found just cause for self-determination: their right to be heard by the sovereign was nothing more than a formality. It was a rude awakening for those American colonists who believed they still had access to the British ruling class, and the frustration of that belief made petitioning an item of constitutional reform.

Soon after independence, nine of the thirteen states adopted constitutions with sweeping protections for petitioning. For example, the Vermont Constitution of 1777 gave its citizens “a right . . . to apply to the legislature for redress of grievances, by address, petition or remonstrance.” However, proposals for a more expansive federal right led to heated debate at the Constitutional Convention. Some delegates pushed for a right of the people to bind their representatives by “instruction,” but luminaries like James Madison disagreed. Madison believed that a right conferring

124 Id. at 38.
126 See Alice Tanner Boyer, The “Olive Branch” Petition, 22 U. KAN. CITY L. REV. 183, 185 (1953–1954) (describing the heated debates over independence that led to a last-ditch plea to the King for peaceable redress).
127 See John Dickson & Thomas Jefferson, The Olive Branch Petition, reprinted in Boyer, supra note 123, at 189 (requesting that “measures be taken for preventing the further destruction of the lives of your Majesty’s subjects; and that such Statutes as more immediately distress any of your Majesty’s colonies be repealed . . .”).
128 Richard Penn ultimately delivered the Olive Branch Petition to the court of George III. See Boyer, supra note 123, at 186. It is unclear if the King personally reviewed the petition, but whether by happenstance or deliberate inattention, the document was left unanswered. Id.
129 KROTOSZYNSKI, supra note 16, at 108 (“To the colonists, the right to petition for redress of grievances (and the concomitant right to have one’s petition heard) was so fundamental that denial of the right was an act of tyranny and grounds for revolution.”).
131 Id. at 110.
only access to officials was consistent with the Anglo-American practice. Later, in Federalist No. 10, Madison noted that special interests “are sown in the nature of man,” and observed that democracy “involves the spirit of party and faction in the necessary and ordinary operations of the government.”

Records from the First Congress show that Madison’s predictions were correct: petitioning had become an effective method for obtaining policy outcomes in the nascent republic. Within months of opening its doors, Congress received petitions from veterans, tradesmen, printers, and surveyors. Notable examples included a group of Boston blacksmiths seeking wartime backpay, as well as Philadelphia newspapermen demanding patent legislation. These and many other petitioners used blunt in-person tactics to lobby (e.g., by seeking out legislators in their daily activities to secure political promises).

A good example of this approach was the antislavery campaign mounted by a well-funded and highly organized group of Quakers. In a show of force, members of the New York Yearly Meeting “wrote supplemental briefs for the committee considering [antislavery petitions], accosted members outside the doors of Congress, visited them at their lodgings, and invited them for meals, all the while making themselves conspicuous in the House galleries, looming over the proceedings like the specters of a guilty national conscience.”

The Quaker effort was so successful in stirring up debate that many representatives became suspicious of the initiative. The report of the ad hoc committee on abolition voiced this concern, noting sourly that “every principle of policy and concern for the dignity of the House, and the peace and tranquility of the United States, concur to show the propriety of dropping the subject, and letting it sleep where it is.” However, with its back against the wall, the committee suggested: (1) taxing the importation of slaves, (2) issuing guidelines for humane

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135 Madison was able to convince his colleagues to drop the more expansive proposal. Id. (citing congressional records which indicate that the proposals for a right of instruction “fell by the wayside”).


137 For example, the first petition to arrive in the House of Representatives was a plea from the Baltimore business community seeking enactment of trade policies. See William C. diGiacomantonio, Petitioners and Their Grievances: A View from the First Federal Congress, in The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development 29 (Kenneth R. Bowling & Donald R. Kennon eds., 2012).

138 Jeffrey L. Pasley, Private Access and Public Power: Gentility and Lobbying in the Early Congress, in The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development, supra note 127, at 62. This account of the initial flood of lobbying is particularly revealing, and is worth a close read for the history student.

139 Id.

140 Id. at 63–64 (“One suspects a good deal of loitering around taverns was involved, because in some cases . . . there is little evidence of extensive or meaningful contact with members of Congress.”).


142 Pasley, supra note 134, at 65.

143 Id. at 66 (noting that the Quaker campaign was “unique in its openness, high degree of organization, and goal of effecting broad changes in government policy . . .”).

144 1 Annals of Cong. 1472 (1790) (Joseph Gales ed., 1834), reprinted in Krotoszynski, supra note 16, at 111–12 (footnote omitted) (internal quotation marks omitted).
treatment, and (3) banning the fitting of slave-trade vessels in American ports.\textsuperscript{145} Although these policy recommendations were a far cry from banning slavery, they were still a victory for the Quaker lobbyists and their New York constituents. What is even more telling about this episode, however, is the fact that the committee’s complaints never engendered a backlash. As history indicates, this is because people of the day understood that \textit{direct} and \textit{proximate} petitioning was a fundamental right.

\textbf{B. Measuring the Harm: Procedural Barriers to Petitioning and the Analytical Quandary}

These historical accounts are rich in and of themselves. But what do they tell us about the interests protected by the Petition Clause? And more to the point of this Article, how do procedural barriers in commission-driven redistricting intrude on those values? In his book, Professor Krotoszynski provides a sound answer to the first question:

\begin{quote}
The history of the Petition Clause, including the history of its colonial and English antecedents, strongly suggests that the right to petition the government for a redress of grievances contemplates a right to do so \textit{in close proximity} to the government officials to whom the petition is addressed. In other words, the Petition Clause of the First Amendment properly construed and applied, should guarantee would-be petitioners a right, exclusive of their speech and assembly freedoms, to seek redress of their grievances \textit{within both sight and hearing} of those capable of giving redress.\textsuperscript{146}
\end{quote}

Seizing on that observation, Professor Krotoszynski suggests that “courts should start from a presumption that favors the ability of ordinary citizens to engage their elected representatives, government officers, and party leaders.”\textsuperscript{147} Therefore, he argues, any “regulations that would remove [petitioners] from the sight or hearing of government officials” should be deemed “invalid absent a substantial justification supported by the record.”\textsuperscript{148}

Using that framework to address the “pluralism problem” sketched in Part II.C, I now posit that procedural restraints in commission-driven redistricting presumptively breach the protective sphere of the Petition Clause. The argument is based on the reality that the \textit{ex parte} contacts rule, by design, prevents citizens from getting within earshot of their redistricting officers.\textsuperscript{149} In states with independent commissions, this prohibition presents an acute problem because individuals have \textit{no alternative avenues} (short of filing a lawsuit) for directly participating in electoral

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{145}] KROTOSZYNSKI, supra note 16, at 112 (cataloguing the various policy proposals referred to the floor of the House of Representatives). Professor Krotoszynski characterizes this outcome as a political success, noting that “despite the vehement objections of Southern members of the House, the members considered, debated, and responded on the merits to the petitions seeking abolition of the slave trade.” \textit{Id.}
\item[	extsuperscript{146}] \textit{Id.} at 154–155 (emphasis added).
\item[	extsuperscript{147}] \textit{Id.} at 168 (observing that this presumption best serves the concept of self-government highlighted in \textsc{Alexander Meiklejohn, Free Speech and Its Relation to Self-Government} 24–26 (1948)).
\item[	extsuperscript{148}] KROTOSZYNSKI, supra note 16, at 156.
\item[	extsuperscript{149}] \textit{See supra} notes 81–83 and accompanying text.
\end{enumerate}
\end{footnotesize}
design.\textsuperscript{150} In those systems, therefore, constituents can only interact with the mapmakers in the most formal and rehearsed of circumstances—a fact which sterilizes public input and prevents consensus building.\textsuperscript{151} As a conceptual matter, that outcome falls short of the advocacy-in-close-proximity value enshrined in the Petition Clause.\textsuperscript{152} And, since the \textit{ex parte} contacts rule preserves that specific status quo, there is little doubt that the First Amendment is implicated.

The remaining question, then, is how a court might apply Professor Krotoszynski’s presumption by way of existing doctrine. Regrettably, because the Supreme Court has relegated the Petition Clause to second-class status, there is no direct answer to that question.\textsuperscript{153} Even a cursory examination of the cases that have addressed petitioning reveals their limited utility here.

The Court first discussed the Petition Clause in 1867, almost a century after it was ratified as part of the Bill of Rights.\textsuperscript{154} At first, there were indications that the Clause might be given independent constitutional effect,\textsuperscript{155} but those aspirations were quickly extinguished. Instead, the Court began insisting that the right of petition could only be invoked if it was exercised in combination with other expressive freedoms.\textsuperscript{156} That approach led to the unfortunate fiction that deprivations of access to government could (and should) be decided on other First Amendment grounds.\textsuperscript{157} Worse yet, this inattention to the Petition Clause’s history and purpose led the Court

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  \item \textsuperscript{150} Sadly, this is not a hypothetical observation. Just one Term after the \textit{Arizona Legislature} case was litigated, the Arizona redistricting commission returned to the Supreme Court to defend its plans against partisan gerrymandering claims. See Amy Howe, \textit{Argument Analysis: Justices Hard to Read on Arizona Redistricting Plan}, SCOTUSBLOG (Dec. 8, 2015, 5:41 PM), http://www.scotusblog.com/2015/12/argument-analysis-justices-hard-to-read-on-arizona-redistricting-plan/. As of this writing, the Court has not yet ruled on the appeal from the district court. See Harris v. Ariz. Indep. Redistricting Comm’n, 993 F. Supp. 2d 1042 (D. Ariz. 2014). The Supreme Court ruled on the appeal from the district court on April 20, 2016. See Harris v. Ariz. Indep. Redistricting Comm’n, 136 S. Ct. 1301 (2016).
  \item \textsuperscript{151} \textit{Cf.} Carol Rice Andrews, \textit{A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right}, 60 OHIO ST. L.J. 557, 624 (1999) (“The right to petition guarantees the right to speak to a particular body of persons, those comprising the government. This targeted speech serves values not achieved by general speech. It gives citizens a better chance at having their voices heard by the very public servants who are making the decisions in government. People do not have to wait or hope that their views will be channeled by the press or others to the government” (emphasis added)).
  \item \textsuperscript{152} KROTOZYNSKI, supra note 16, at 156 (“The Supreme Court has, for almost all intents and purposes, simply subsumed and merged the Petition Clause into the rights of speech, assembly, and association”).
  \item \textsuperscript{153} Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867) (noting that a citizen “has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions”).
  \item \textsuperscript{154} See United States v. Cruikshank, 92 U.S. 542, 552 (1875) (“The very idea of a government, republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances”).
  \item \textsuperscript{155} Thomas v. Collins, 323 U.S. 516, 530 (1945) (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and petition for redress of grievances. All these, though not identical, are \textit{inseparable}” (emphasis added)).
  \item \textsuperscript{156} See Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) (“Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the \textit{same constitutional analysis}” (emphasis added)).
\end{itemize}}
to render a grossly misinformed decision that struck a reeling blow to the right.\footnote{In \textit{McDonald v. Smith}, the Court held that the Petition Clause did not afford citizens immunity from libel suits for statements made in petitions. 472 U.S. 479, 484 (1985). It reasoned that the right of petition is "cut from the same cloth as the other [First Amendment] guarantees." \textit{Id.} at 482. Thus, "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." \textit{Id.} at 485. \textit{But see KROTOSEYNSKI, supra} note 16, at 158 ("What the [\textit{McDonald}] Court failed to recognize was that through its history, the Petition Clause virtually demands special First Amendment status"); \textit{Eric Schnapper, "Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law}, 74 \textit{IOWA L. REV.} 303, 343–45 (1989) (demonstrating that petitioning had always enjoyed broad immunity from suit, and that it was conceptually distinct from freedom of speech).}

Since then, litigants have seldom dared to invoke the Petition Clause in its independent capacity.\footnote{Even in cases where petitioning rights are \textit{squarely} abridged by lobbying regulation, litigants have opted against a pure Petition Clause theory. \textit{See Nat'l Ass'n of Mfrs. v. Taylor}, 582 F.3d 1, 9 (D.C. Cir. 2009) (quoting the petitioner's brief for the position that "the disclosures mandated . . . will discourage and deter speech, petitioning, and expressive association"); Brief for Plaintiff-Appellant at 26, Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009) (No. 08-5085); \textit{Forero, supra} note 103, at 338–39.} In fact, the only time they have successfully done so was in the antitrust context. However, for purposes of my analysis, even these precedents provide scant guidance.

Arising from two Supreme Court cases, the \textit{Noerr-Pennington} doctrine relies on the Petition Clause to grant absolute immunity from antitrust liability for lobbying activities that have anticompetitive effects.\footnote{\textit{E.R.R. Presidents Conference v. Noerr Motor Freight}, Inc., 365 U.S. 127 (1961); \textit{United Mine Workers v. Pennington}, 381 U.S. 657 (1965). In recent years, litigants have sought to extend the holdings in these cases beyond the antitrust context. \textit{See GEORGE W. PRING \\& PENEOLOPE CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT} 8 (1996) (cataloguing different kinds of retaliation lawsuits that violate the right of petition).} Particularly in \textit{Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.}, the Court seemed to grasp the urgency of letting constituents petition without fear of retaliation.\footnote{365 U.S. at 138 ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms").} In his majority opinion, Justice Black noted that democracy “depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would create serious institutional problems.”\footnote{\textit{Id.} at 137–38.} Relying on that principle, the Court concluded that it was permissible for a railroad company to wage a mass media campaign aimed at passing legislation harmful to its competitors.\footnote{\textit{Id.} at 145 ("In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other . . . . [T]hat [deceptive effort], reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned").}

That disposition, of course, is in line with our historical understanding of Petition Clause protections.\footnote{\textit{See supra} notes 115, 117, 133 and accompanying text.} However, the \textit{Noerr-Pennington} doctrine provides little in the way of a doctrinal rubric for analyzing procedural barriers to the right of petition. It also does not help that \textit{Noerr} dealt with \textit{indirect} petitioning—which is
materially different from the type of proximate participation abridged by the *ex parte* contacts rule.\(^{165}\) Therefore, in order to extract a meaningful legal test for Petition Clause analysis, it is necessary to look elsewhere in the First Amendment for inspiration. This approach might seem academic, but it has actually been endorsed by the Supreme Court. In *Borough of Duryea v. Guarnieri* the Court noted that:

> [T]he rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are ‘cognate rights’ . . . . Both speech and petition are integral to the democratic process, *although not necessarily in the same way*. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy . . \(^{166}\)

Accordingly, since the Speech and Petition Clauses are at least analogues, it seems prudent to use that branch of doctrine to inform the present constitutional analysis. As it turns out, one line of the Speech Clause cases furnishes an appropriate methodology for safeguarding a right of “proximate petitioning.”

### C. Applying the Test: Protecting Redistricting Petitions Through the Public Access Principle

In a series of decisions between 1980 and 1986, the Supreme Court announced that the First Amendment—through the Speech and Press Clauses—implies a right of public access to court proceedings.\(^{167}\) Relevant to this Article, those cases articulated a test that defines *when* a barrier to governmental access becomes constitutionally impermissible.

The foundation for this “public access” test was laid out in *Richmond Newspapers, Inc. v. Virginia*, where the Court declared for the first time that citizens possess an enforceable right to observe criminal trials.\(^{168}\) In a plurality opinion

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165 KROTOSZYNski, *supra* note 16, at 161 (“Justice Black’s opinion does not link a mass media campaign—or other forms of indirect petitioning—to the traditional exercise of the right, which involved direct communication between a group of petitioners, on the one hand, and a legislator or an executive branch official, on the other. It is certainly true that this sort of indirect petitioning seems rather far removed from the historical paradigm of petitioning, which involved, quite literally, laying a petition at the foot of the throne”).

166 No. 09-1476, slip. op. at 7 (U.S. June 20, 2011) (internal citations omitted) (emphasis added). In *Guarnieri*, the Court considered whether the Petition Clause protects public employees from retaliation by their supervisors for grievances lodged against them. *Id.* at 1. Ultimately, the Court held that §1983 suits of this kind should be judged under the Speech Clause’s “public concern” test. *Id.* at 5. To reach that conclusion, the Court reaffirmed *McDonald v. Smith*’s flawed logic of commingled expressive rights. *Id.* at 8; see *supra* note 154 and accompanying text. However, as the passage I quoted above suggests, the Court did leave space for analogizing from Speech Clause precedent to create *new doctrine* specific to the Petition Clause.


authored by Chief Justice Burger, the Court traced the history of criminal trials from the Norman Conquest of England to Colonial America.\textsuperscript{169} Using that backdrop, the Court found that “throughout its evolution, the trial has been open to all who cared to observe.”\textsuperscript{170} Therefore, the presumption of openness “is noquirk of history; rather, it has long been recognized as an indispensable attribute” of due process.\textsuperscript{171} In a concurring opinion, Justice Brennan went beyond the historical record to underscore the “structural role” that the First Amendment plays “in securing . . . our republican system of self-government.”\textsuperscript{172} On this point, he noted that a First Amendment right of access supports “not only ‘the principle that debate on public issues should be uninhibited, robust and wide-open,’ but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”\textsuperscript{173}

Two years later, in \textit{Globe Newspaper Co. v. Superior Court}, the Court reaffirmed its commitment to the \textit{Richmond Newspapers} holding.\textsuperscript{174} Led by Justice Brennan, the Court held that a statute requiring closed proceedings during the testimony of rape victims breached the First Amendment.\textsuperscript{175} In so concluding, the Court endorsed the theory that public access promotes the “free discussion of governmental affairs.”\textsuperscript{176} It reasoned that any abridgment of that interest should be subjected to strict scrutiny. In other words, the government must prove that mandatory closure of a proceeding “is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”\textsuperscript{177} Applying the standard, the Court found that the interest in shielding rape victims from press scrutiny—though strong—“does not justify a mandatory closure rule.”\textsuperscript{178} Nonetheless, the Court noted, “the circumstances of the particular case may affect the significance of the [openness] interest.”\textsuperscript{179}

Finally, in \textit{Press-Enterprise Co. v. Superior Court}, the Court extended strict scrutiny protection \textit{outside} the criminal context.\textsuperscript{180} In the first phase of litigation, the

\textsuperscript{169} Id. at 564–69 (citing \textsc{Mathew Hale, The History of the Common Law of England} 343–45 (6th ed. 1820) and 3 \textsc{William Blackstone, Commentaries} *372–73).
\textsuperscript{170} Id. at 564.
\textsuperscript{171} Id. at 569. On that point, the Court also noted that “without the freedom to attend [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.” Id. at 580 (internal quotations omitted).
\textsuperscript{172} Id. at 587 (Brennan, J., concurring).
\textsuperscript{173} Id. at 587 (Brennan, J., concurring). In the same breath, Justice Brennan also cautioned that this rationale could produce “theoretically endless” justification for governmental access. Id. at 588. To mitigate this problem, he suggested that an assertion of the right must be weighed against its effect on the integrity of the proceeding. Id. at 589.
\textsuperscript{174} 457 U.S. 596, 604 (1982).
\textsuperscript{175} Id. at 610–11.
\textsuperscript{176} Id. at 604–05.
\textsuperscript{177} Id. at 606–07.
\textsuperscript{178} Id. at 607–08.
\textsuperscript{179} Id. The Court recalled that a “flexible” application of the compelling-interest rubric was justified—especially since “the plurality opinion in \textit{Richmond Newspapers} suggested that individualized determinations are always required before the right of access may be denied.” Id. at 608 n.20.
Court held that its *Richmond Newspapers* holding applied to jury *voir dire*. And in the second phase, it held that the First Amendment also attached to preliminary hearings—even though they had no particularly strong analogue in history. To explain this decision, the Court read its cases as creating one single frame of analysis. Specifically, it prescribed that a court may extend the right of public access whenever “tradition” or “structural benefits” call for it. Thus, because openness in preliminary hearings was “structurally beneficial,” a lack of historical antecedents could not save the closure rule.

By combining the *Richmond Newspapers* and *Globe Newspaper* holdings in this manner, the *Press-Enterprise* Court created a convenient test for the lower courts to apply. Following that test, a court considering when to keep a proceeding closed must examine: (1) whether public access to the proceeding has been traditionally granted and (2) whether “public access plays a significant positive role in the functioning of the particular process in question.” If both questions are answered in the affirmative, or if one answer carries a strong affirmative presumption, the court may not close the proceeding. Only a compelling interest could justify the closure—and even then, the government must show that the barrier it has erected is narrowly tailored to meet it.

For purposes of the present Petition Clause analysis, the *Press-Enterprise* test seems useful. Conveniently, it answers the question of when a procedural restraint cannot block citizens from engaging (through observation or participation) in democratic functions. Indeed, applying the *Press-Enterprise* analysis to the *ex parte*
contacts rule reveals that substantive citizen participation in commission-driven redistricting would carry immense “structural benefits." To understand why, consider one case that has used Press-Enterprise to hold administrative proceedings open.

In Detroit Free Press v. Ashcroft, the U.S. Court of Appeals for the Sixth Circuit reviewed a challenge to the Immigration and Naturalization Service (INS) regulations, which forbade public access to “special interest” deportation hearings. Applying the Press-Enterprise test, the court concluded that public access to INS proceedings (1) ensured “fairly and properly” conducted hearings, (2) improved government performance and accuracy, (3) had a “cathartic” effect on the community, (4) gave a “perception of integrity and fairness,” and (5) promoted a more informed public. Because those structural benefits were so compelling, the requirement that openness be historically supported was analytically less important. The court, therefore, subjected the INS rule to strict scrutiny and found that the government’s interest in confidentiality was not narrowly tailored.

Aside from validating the Press-Enterprise test in the administrative context, the Sixth Circuit’s “structural benefit” explanations are revealing. Although the five rationales were found in the ambit of immigration hearings, a court could easily find that they apply with equal force in the redistricting context.

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188 See 303 F.3d 681 (6th Cir. 2002). The case arose from the government’s “special interest” prosecution of a Muslim man in Detroit who had overstayed his tourist visa. Id. at 683–85.
189 Id. at 683 (“The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”).
190 Id. at 703–04 (“In an area such as immigration, where the government has nearly unlimited authority, the press and the public serve as perhaps the only check on abusive government practices.”).
191 Id. at 704 (“Congressional oversight hearings . . . can do little to correct past [mistakes]. In contrast, openness at the hearings can allow mistakes to be cured at once.” (quoting Soc’y of Prof’l. Journalists v. Sec’y of Labor, 616 F. Supp. 569, 575–76 (D. Utah 1985)).
192 Id. (“It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals’ rights.” (quoting the district court below)).
193 Id. (“The most stringent safeguards for a deportee ‘would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding.’” (quoting First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 486 (3d Cir. 1986) (Adams, J., concurring))).
194 Id. at 704–05 (“Public access to deportation proceedings helps inform the public of the affairs of the government. Direct knowledge of how their government is operating enhances the public’s ability to affirm or protest government’s efforts.”).
195 Id. at 700 (The court rejected an argument that the tradition of openness in a hearing must date back to the time “when our organic laws were adopted.” Indeed, it observed, Press-Enterprise II had “relied on exclusively post-Bill of Rights history.”).
196 Id. at 705–07.
197 Accord Klaris et al., supra note 163, at 63 (“Due process obligations and a history of openness dating from the advent of the administrative state lead to the inexorable conclusion that the First Amendment’s presumptive right of access attaches to administrative adjudicatory proceedings.”).
Consider, for example, how each benefit would play out if commission-erected procedural barriers were struck down. First, allowing *ex parte* contacts with commissioners would foster “fair and proper” redistricting by ensuring that citizen feedback is incorporated into the electoral plan. Second, *ex parte* contacts with redistricting officials would improve “government performance” by increasing the upstream flow of policy information related to line drawing. Third, permitting *ex parte* contacts would be “cathartic” for citizens who might otherwise feel blocked out of the redistricting debate (especially in states like Arizona and California). Fourth, allowing *ex parte* contacts would foster “perceptions of integrity” by making unelected commissioners seem approachable. And fifth, the incidence of *ex parte* contacts would create a more “informed public” by permitting commissioners to answer constituent-specific questions about a redistricting plan.

Stepping back, the *Detroit Free Press* factors make clear that *ex parte* contacts are a necessary ingredient for “proximate petitioning.” This is an alarming conclusion given that virtually all redistricting commissions prohibit off-the-record communications. However, by invoking the Petition Clause to remove that procedural barrier, a court could reverse the harm to pluralism inflicted by the recent shift to commission-based redistricting. In *Press-Enterprise* parlance, re-democratizing electoral design would create significant “structural benefits.” Importantly, it would restore the Framers’ preference for a consensus model of redistricting, and it would countermand any negative consequences from the Supreme Court’s ruling in *Arizona Legislature*. Because these functional benefits are specific and articulable, the “history” prong of *Press-Enterprise* becomes an ancillary (albeit equally well-documented) consideration. Therefore, a court applying the test should be prepared to invalidate the *ex parte* contacts rule under strict scrutiny analysis.

**Conclusion: Broader Implications?**

The foregoing discussions show that procedural hurdles in the redistricting process may raise grave constitutional problems. At the same time, my analysis of how the *ex parte* contacts rule abridges petitioning is merely illustrative. At one level of abstraction, the First Amendment framework I present may also be useful for

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198 See supra note 11 and accompanying text.
199 See supra note 79 and accompanying text.
200 See supra notes 81–83 and accompanying text.
201 See supra note 91 and accompanying text.
202 See supra note 14 and accompanying text.
203 See supra notes 88–90 and accompanying text.
204 See supra note 12 and accompanying text.
205 See supra note 191 and accompanying text. Notwithstanding that conclusion, there is little ground to argue that *ex parte* contacts have not traditionally been part of the redistricting process. To the contrary, it is their very incidence that fueled the redistricting reform movement.
206 One unanswered question is whether a redistricting-specific government interest can save the *ex parte* contacts rule. That assessment is beyond the scope of this Article, but we can surmise that a compelling justification with strong factual support will be required. See Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2012–13) (surveying the Court’s “new absolutist” approach to the First Amendment).
scrutinizing other rules that dilute access to commission-driven redistricting. At two levels of abstraction, my argument that procedural barriers abridge petitioning rights may be revealing in other policy areas outside of redistricting. And at three levels of abstraction, the idea that the Petition Clause provides an independent source of constitutional protection may be a boon to jurisprudence in the ambit of expressive freedom. Aside from those figurative conclusions, however, this Article seeks to make a more basic contribution. Fundamentally, presents one method by which courts can harness the Constitution to restore the Framers’ vision for a pluralist electoral system. In no unclear terms, this Article draws a line in the sand for democratic choice.
The Vote is Precious

Melissa A. Logan*

ABSTRACT

This Note traces the history of the voter suppression in the United States, connecting present-day efforts to restrict access to the polls to harmful practices of the past. After demonstrating that the United States has never truly fulfilled the promise of the Fifteenth Amendment—that no citizen shall be denied the right to vote based on race, color, or previous condition of servitude—I argue that the federal government must take steps to protect voters from racial discrimination. I propose that Congress can use the power bestowed to it under the Elections Clause to regulate the time, place, and manner of elections in order to preempt any state’s attempt to suppress the vote.

INTRODUCTION

On September 21, 2015, Congressman John Lewis visited Bloomington, Indiana, to discuss his graphic novel series, March, which tells his story of growing up in Troy, Alabama, becoming involved in the civil rights movement, and marching with Dr. Martin Luther King, Jr. His efforts with the Student Nonviolent Coordinating Committee (SNCC) were pivotal in ensuring the full enfranchisement of Blacks in the American South. He is now a United States Representative for Georgia, and his involvement in civil rights campaigns continues to this day. During a question-and-answer session, Congressman Lewis was asked to explain the importance of voting to Blacks, broken by a system in which they no longer had faith. Congressman Lewis responded, “The vote is precious. It’s almost sacred in a democratic society such as ours. It’s the most powerful nonviolent tool or instrument that we have and we should use it. And I say to people, why did people try to keep us from voting? It must be important.”

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1 JOHN LEWIS, ANDREW AYDIN & NATE POWELL, MARCH: BOOK ONE (2013); JOHN LEWIS, ANDREW AYDIN & NATE POWELL, MARCH: BOOK TWO (2015); JOHN LEWIS, ANDREW AYDIN & NATE POWELL, MARCH: BOOK THREE (2016).


4 The Power of Words with Jon Lewis, Andrew Aydin, & Nate Powell, COMMUNITY ACCESS TELEVISION SERVICES (Sept. 21, 2015), http://catstv.net/m.php?q=2661, at 1:27:05.
The vote is precious. While we often speak of a right to vote, the ability to vote may not be a right at all. On paper, every American citizen is entitled to vote without being discriminated against because of his or her race, native language, or socioeconomic status. Nevertheless, a right without a remedy is not a right; a right must be enforced in order for the right to be legitimate. For the last fifty years, the Voting Rights Act of 1965 (VRA) has been the prophylactic guarantor of the right to vote. However, the coverage provision of VRA that allowed the Department of Justice to enforce the Act was invalidated in 2013. Now, voting is arguably a mere privilege that American citizens may exercise, but disenfranchisement of “others” prevents this privilege from becoming an absolute right guaranteed to all. The struggle to extend the franchise to groups beyond White male landowners has taken centuries. While some argue that the ills of voter discrimination and unequal access to the polls is over, as evidenced by the Shelby County decision, it would be a mistake to assume the problem of disenfranchisement is a relic of the past.

During the past two presidential elections in 2008 and 2012, as well as the current 2016 election, Democrats and Republicans have warred over voter suppression and its racial impact. Yet in a culture that feels less and less comfortable explicitly confronting race and racism, it is unlikely that the problem of Black disenfranchisement, or the disenfranchisement of other minority groups, can be addressed directly in a race-conscious manner. Still, the connection between race and the struggle to achieve an unencumbered right to vote is undeniable.

The current wave of voter-suppressive legislation is not an anomaly. Rather, it is an episode in the ebb and flow of systematic oppression, at the well-known intersection of racial and voting discrimination that pre-dates Reconstruction. It is another reincarnation of Jim Crow. Today, concerted efforts to disenfranchise Black Americans continue and have expanded to impact other minority voters as well.

This Note will first trace the history of voting rights and tools of suppression used to disenfranchise Black voters. Part I.A will analyze the period beginning at the founding and through Reconstruction. Part I.B focuses on the voter suppression trends following Reconstruction until the 1950s. Part I.C looks at the “Second Reconstruction” and the shift toward protecting the vote during the latter part of the

7 Shelby Cnty., Alabama v. Holder, 133 S. Ct. 2612 (2013); see infra at Part III.A, section ii for a discussion of Shelby County.
8 Id. at 2618 (“There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”); see also Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J. concurring in part and dissenting in part) (“The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.”)
11 See, e.g., id.
twentieth century. Part II compares the recent waves of voter suppression and how they connect to efforts and vote suppression of the past, arguing that the voter restrictive legislation being proposed and passed across the nation is not a new form of vote suppression. Rather, it is another incident in the ebbs and flows of voter suppression and voter mobilization. Finally, this Note argues that the federal government must intervene to ensure equality in voting. Part II.B. proposes that a race neutral proposal is the best way to combat voter suppression. This note suggests that the federal government set voter registration, identification, and procedural standards for all federal elections under the Election Clause.

I. HISTORICAL EBBS AND FLOWS OF VOTER SUPPRESSION AND DEMOBILIZATION

In the United States, voting has never been an inclusive right. The access to the franchise has been restricted by race, gender, socio-economic status, and age. Voters are still required to prove their eligibility through administrative hurdles that impede some would-be voters from participating in elections. In order to create effective solutions for the future, we must look back at our country’s voting history.

A. Founding through Reconstruction

At the founding of the United States of America, only free adult male property owners, twenty-one years of age and older, could vote.\(^\text{12}\) Some states also gave free Black men the right to vote prior to the Civil War, although this ability was largely eliminated before the enactment of the Fifteenth Amendment.\(^\text{13}\) Ratified in 1870, the Fifteenth Amendment was the last of the Reconstruction Amendments. The Amendment reads: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”\(^\text{14}\) It also gives Congress the power to “enforce this article by appropriate legislation.”\(^\text{15}\) Federal power to enforce the Fifteenth Amendment was extended by the Enforcement Act of 1870.\(^\text{16}\) This Act provided that it was the duty of all election officers:

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\text{to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred}
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\(^\text{13}\) See id. at 54–55.
\(^\text{14}\) U.S. Const. amend. XV, § 1.
\(^\text{15}\) Id. § 2.
\(^\text{16}\) Enforcement Act of 1870, 16 Stat. 140 § 2.
dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.\textsuperscript{17}

The Reconstruction Amendments were a radical attempt to realize racial equality after the destabilizing Civil War. The aims of the Thirteenth, Fourteenth, and Fifteenth Amendments were bold. However, the Radical Republicans who drafted the Reconstruction Amendments were ahead of their time, because the country was not ready for political and social equality for Black Americans. It would be almost a century before the words in the Reconstruction Amendments were given any effect or practical meaning through the passage of the Voting Rights Act of 1965.\textsuperscript{18}

The Radical Republicans wanted to give Congress broad power, because the legislature did not trust the Supreme Court to guarantee the rights promised in the Reconstruction Amendments.\textsuperscript{19} Their fears proved to be true soon after the ratification of the Fifteenth Amendment. When faced with challenges to the Reconstruction Amendments, the Supreme Court narrowed the reach of the legislation, essentially thwarting any attempt to achieve the equality pledged by the recently amended Constitution.\textsuperscript{20}

The Fifteenth Amendment was effectively reduced to meaningless words by the Supreme Court in 1876.\textsuperscript{21} Kentucky election inspectors were indicted for refusing to count the vote of William Garner because of his race, thereby violating the Fifteenth Amendment.\textsuperscript{22} In \textit{United States v. Reese}, the Supreme Court affirmed the dismissal of the suit, narrowly construing the power of the Amendment: “The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.”\textsuperscript{23} The Court further reasoned that the Fifteenth Amendment did not provide a punishment; accordingly, it could not “substitute the judicial for the legislative department of the government” to create a punishment or set a limit on who could be convicted of the general prohibition against abridging an individual’s right to vote on account of race.\textsuperscript{24} After \textit{Reese}, the Fifteenth Amendment afforded no remedies for a Black person who was unconstitutionally prevented from voting because of his or her race.

In \textit{United States v. Cruikshank},\textsuperscript{25} the federal government’s powers under the Enforcement Act were also gutted by the Supreme Court. The \textit{Cruikshank} defendants were charged with conspiracy under the Enforcement Act after a gruesome murder of a Black family in Louisiana, which came to be known as the Colfax Massacre.\textsuperscript{26} In

\textsuperscript{17} Id. § 2.

\textsuperscript{18} P.L. 89-110.


\textsuperscript{20} See e.g., Slaughter-House Cases, 83 U.S. 36 (1873).

\textsuperscript{21} United States v. Reese, 92 U.S. 214 (1876).

\textsuperscript{22} Id. at 215.

\textsuperscript{23} Id. at 217.

\textsuperscript{24} Id. at 221.

\textsuperscript{25} 92 U.S. 542 (1876).

his majority opinion, Chief Justice Waite never explicitly detailed the horror of Easter Sunday 1874, when an estimated 100 Blacks were killed by the White League, a paramilitary group intent on securing white rule in Louisiana, in a clash with Louisiana’s almost entirely Black state militia. The Court found the rights or privileges at which the conspiracy was aimed were “rights or privileges which were derived from the state and which the federal government had no power to protect.” The Court did not seem to think that the Reconstruction legislation affected the balance of power created between the state and national government by the Tenth Amendment; some even argued it misinterpreted the Framers’ theory. Cruikshank “signaled open season on blacks and other racial minorities.” These decisions effectively transferred the responsibility to protect civil rights back to the states, the exact circumstance the framers of the Reconstruction Amendments were trying to avert.

B. Post-Reconstruction to the Second Reconstruction

Southern Black Americans were not completely disenfranchised. Some were able to successfully vote and some were elected to public office. In fact, two Black men, Hiram Revels and Blanche K. Bruce, were elected to represent Mississippi in the United States Senate in 1870 and 1875, respectively. Nevertheless, the overall outlook was grim.

Formal enfranchisement of Blacks during Reconstruction “ended with Supreme Court decisions gutting both the [F]ourteenth and [F]ifteenth Amendments on the same day followed soon by a political decision to terminate already dwindling enforcement efforts.” By 1877, Reconstruction was officially dead with the presidential election of Rutherford B. Hayes and the removal of the remaining troops in the South. The Southern states continued to implement strategies to disenfranchise Black voters; some strategies included both formal disenfranchisement by preventing them from registering and informal disenfranchisement by allowing their names to be on the rolls without the ability to actually exercise the franchise. The attempts to eliminate or control the Black vote “through bribery or coercion [ ] created a general atmosphere of corruption

29 See Huhn, supra note 26, at 1075 (“The Court’s ruling on state action in Cruikshank certainly did not accord with the understanding of the Framers. The Republican members of Congress articulated this principal theory: ‘Allegiance and protection are reciprocal rights.’ They believed that citizens owe allegiance to their government because (and to the extent that) the government affords them protection.”).
30 Huhn, supra note 26, at 1077.
33 Derfner, supra note 28, at 523.
surrounding southern elections, causing many whites to feel that eliminating the possibility of [B]lack voting would reduce the fraud, corruption and violence that had been necessary to maintain [W]hite control.”35 Somehow, the corruption that developed to keep Black Americans from voting converted into the cause of disenfranchisement.

Still, at the turn of the century, Black voters continued to look to the courts to realize their rights, which, although unenforced, were still the letter of the law. Jackson W. Giles, a citizen of Montgomery, Alabama, brought a suit in equity “on behalf of himself and on behalf of more than five thousand [N]egroes, citizens of the county of Montgomery, Alabama, similarly situated and circumscribed as himself, against the board of registrars of that county.”36 Giles sought to compel the county voting officials to register him, and thousands of other eligible Black voters, who had been illegitimately precluded from registering after the state constitution had been amended.37

Writing for the Court, Justice Oliver W. Holmes Jr., put Black voters in a catch-22: the Court acknowledged the probability that the challenged provisions to the Alabama constitution were void but found no way to remedy the situation.38 It could not add Giles’ name to an unconstitutional voting list but also did not strike the grandfather provisions down as unconstitutional:

The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?39

The Court saw political rights as unenforceable, concluding that “[u]nless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form.”40 The non-interventionist approach established in Giles became the blueprint for Southern resistance to the civil rights movement, “serv[ing] as notice that the Court would not stand as a barrier to the mass disfranchisement of African-Americans in the Deep South.”41

Weary of Black enfranchisement, Southern legislatures looked for legal ways to prevent Southern Blacks from voting while still complying with the Reconstruction Amendments. The states and their political leaders, both Northern and Southern, concocted various schemes to maintain an all-, or overwhelming majority-, White

35 Derfner, supra note 28, at 535.
36 Giles v. Harris, 189 U.S. 475, 482 (1903).
37 Id.
38 Id. at 486.
39 Id.
40 Id. at 488.
The disenfranchisement schemes were effective. For example, the amount of Black registered voters in Louisiana dropped from 130,334 in 1896 to 5,320 by 1900; by 1910, only 730 Black voters remained registered, a mere 0.5% of eligible Black men. From the late 1800s until the eventual passing of the Voting Rights Act of 1965, tools to suppress the Black vote included grandfather clauses, violence and intimidation, white primaries, purging voting lists of Black registered voters, poll taxes, and literacy tests.

i. Poll Taxes

The poll tax was one of the first disenfranchisement devices used to circumvent the requirements of the Fifteenth Amendment. In 1889, Florida was the first state to institute a two-dollar poll tax. The Mississippi Constitution was amended in 1890 to also require voters to pay a poll tax of two dollars per year. Some states instituted cumulative poll taxes, which demanded that past and current taxes be paid, thereby increasing the amount a potential voter owed. In other states, poll taxes had to be paid years in advance of an election—another barrier that kept Blacks away from the polls. During this time period, the meaning of the poll tax evolved, “where it once had referred to a head tax that every man had to pay and that sometimes could be used to satisfy a taxpaying requirement for voting, it came to be understood as a tax that one had to pay in order to vote.” This shift allowed for poll taxes to be used in a discriminating fashion as local officials often made it difficult for only Black men to pay their taxes in order to vote.

The practice spread throughout the South. By 1904, every ex-Confederate state adopted the poll tax. Most states charged between one and two dollars, which “represented a significant charge to many inhabitants of the nation’s economic backwater region.” The amount was especially harsh in the South, particularly for recently-freed slaves who overwhelmingly worked as tenant farmers or sharecroppers. The consequences of the poll tax were devastating. At a Mississippi constitutional convention, a state legislator called the poll tax “the most effective instrumentality of Negro disenfranchisement”; another Mississippi Congressman

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42 Franklin, supra note 31, at 210.
44 See generally, Frances Fox Piven, Lorraine C. Minnite & Margaret Groake, Keeping Down the Black Vote: Race and the Mobilization of American Voters (2009).
45 Franklin, supra note 31, at 210.
46 Id. at 210.
47 Keyssar, supra note 12, at 111.
48 Derfner, supra note 28, at 535.
49 Keyssar, supra note 12, at 112.
50 Id. at 105.
51 Id. at 63.
53 Id. at 65.
stated that ninety percent of Black Mississippians were disenfranchised by the device.\textsuperscript{54}

The poll tax, however, was not limited to Black disenfranchisement. The device also had class consequences, preventing poorer Whites from exercising their right to vote.\textsuperscript{55} In 1937, the practice was upheld by the Supreme Court in \textit{Breedlove v. Suttles}.\textsuperscript{56} \textit{Breedlove} involved a challenge by a White male voter who was not allowed to become a registered voter in Georgia because he had not paid poll taxes.\textsuperscript{57} Breedlove argued that because the Georgia poll tax only applied to persons between the ages of twenty-one and sixty, and only applied to women if they registered to vote, the poll tax was repugnant to the Equal Protection Clauses of the Fourteenth and Nineteenth Amendments.\textsuperscript{58} The Court reasoned that requiring a payment as a condition of voting did not deny a privilege or immunity of United States citizenship because the“[p]rivilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.”\textsuperscript{59}

Poll taxes in federal elections were outlawed in 1964 with the ratification of the Twenty-Fourth Amendment,\textsuperscript{60} which states:

the right of citizens of the United States to vote in any primary or other election or President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.\textsuperscript{61}

Two years later, the Supreme Court extended this proscription to local elections in \textit{Harper v. Virginia State Board of Elections}.\textsuperscript{62} The Court found “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”\textsuperscript{63}

\textbf{ii. Literacy Tests}

Another voter qualification that seemingly complied with the Fifteenth Amendment was the requirement that a person be literate to vote. Literacy tests were pervasive throughout the entire country. In fact, between 1889 and 1913, nine Northern states required all voters to be able to read English.\textsuperscript{64} The provisions generally required the applicant to read a section of the state or federal constitution

\begin{footnotes}
\item 54 Id. at 66.
\item 55 See id. at 71–72.
\item 56 302 U.S. 277 (1937).
\item 57 Id. at 280.
\item 58 Id. at 280–81.
\item 59 Id. at 283.
\item 60 U.S. Const. amend. XXVI.
\item 61 Id. § 2.
\item 63 Harper, 383 U.S. at 666.
\item 64 Kousser, supra note 52, at 57.
\end{footnotes}
The Vote is Precious

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Like the poll tax, the potential reach of literacy tests was crushing. An estimated fifty percent of Black men were illiterate during this time. In 1900, the literacy test estopped a majority of Black voters in that year, and would have disenfranchised as many as thirty to forty percent of Whites in some states if it were applied fairly. The mere existence of the measure prevented Black voters from even attempting to register because Negroes “believe[d] that they [would] have a hostile examination put upon them by the white man, and they believ[ed] that that [would] be a preventive to their exercising the right of suffrage, and they [would] not apply for registration.”

The practice was deemed constitutional in Williams v. Mississippi in 1898, which indirectly targeted the practice by challenging the composition of a jury that could only include registered voters. The Supreme Court found that the Constitutional amendments that prescribed qualifications for electors, including a literacy provision, were constitutional both facially—because there was no outward discrimination between the races—and as-applied, because “it has not been shown that their actual administration was evil, only that evil was possible under them.”

In fact, the Supreme Court has never found literacy tests to violate the Reconstruction Amendments. As recently as 1959, the Court declared literacy requirements were constitutional on their face where the literacy requirements were neutral on race, creed, color, and sex. Despite their potential constitutionality, literacy tests were suspended under the Voting Rights Act of 1965 (VRA). The section suspending such tests was upheld by the Supreme Court in Katzenbach v. Morgan. Nevertheless, it is possible that literacy tests could be implemented in such a way that does not violate the Reconstruction Amendments or the VRA.

### iii. Grandfather Clauses

Poll taxes and literacy tests not only disenfranchised a majority of Black eligible voters but also had a disparate impact on poor Whites. To remedy the consequence for White voters, states implemented Grandfather clauses that exempted from literacy tests any person who could vote prior 1867, or anyone who

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65 Id. at 58.
66 KEYSSAR, supra note 12, at 112.
67 KOUSSEUR, supra note 52, at 580.
68 Id. at 59.
69 170 U.S. 213 (1898).
70 Williams, 170 U.S. at 225.
74 Any literacy test imposed, however, must comply with the requirements of § 4(e), which prohibits conditioning the right to vote on the ability to read write, and understand English for American citizens who studied in “American-flag” schools where the predominant language of instruction was not English.
was a direct descendant of a registered voter prior to 1867. In other words, if your grandfather could vote before the Reconstruction Amendments, so could you. While this practice was race-neutral on paper, the obvious consequence was to prevent any Black person from being able to vote, as the Fifteenth Amendment was not passed until 1870. Enacting grandfather clauses was a political decision that was more about disenfranchising poor Whites than it was about disenfranchising Blacks.

Drafters of grandfather clauses knew such legislation was “grossly unconstitutional.” Accordingly, nearly every state included a sunset provision that would allow enough White voters to become registered before the laws could be challenged in court. The strategy proved effective as the clauses were not challenged until 1910, and the Supreme Court did not issue a ruling on grandfather clauses until 1915. The gap in time between the 1890s, when the majority of grandfather clauses were instituted, and the Supreme Court decision twenty-five years later allowed White voters to be added to the voting rolls and Black voters to be removed.

The Court heard a challenge, in *Guinn v. United States*, to a grandfather clause in an Oklahoma state constitutional amendment in October 1913, but the decision was not released until June 1915, after a year and eight months elapsed. A unanimous Court concluded that the Oklahoma constitutional amendment was invalid and that the Amendment was void because it attempted to deny citizens the right to vote using pre-Fifteenth Amendment standards. Despite a public understanding of the unconstitutionality of the clause and the Supreme Court’s clear decision, the Oklahoma legislature was able to avoid compliance by drafting a new law that automatically registered voters who were registered in 1914, an exclusively White electorate; anyone not grandfathered in under the new standard could only register between April 30 and May 11, 1916, or forfeit their right to vote. This practice continued for over two decades until it, too, was invalidated by the Court in 1939.

iv. Lynch Mob Terror and Intimidation

Another powerful tool to prevent Blacks from exercising their right to vote, even if they were registered, was to make Blacks so fearful of violent consequences of voting that they would simply choose to stay home on Election Day. The Ku Klux Klan, formed in 1865 by a group of Confederate Army veterans in Pulaski,
Tennessee, aimed to “destroy Congressional Reconstruction by murdering [B]lacks—and some [W]hites—who were either active in Republican politics or educating [B]lack children.” KKK night riders threatened violence, and often followed through with their promise, against Black voters. Lynch mob terror, a traumatizing terrorism tolerated by state and federal officials, peaked in the period between 1890 and 1940, claiming the lives of thousands of Black Americans. Racial terror lynching was a tool used to enforce Jim Crow laws and racial segregation—a tactic for maintaining racial control by victimizing the entire African-American community, not merely punishment of an alleged perpetrator for a crime.

Black citizens were publicly and extrajudicially executed for various reasons, including fear of interracial sex, minor social transgressions, allegations of crime, and to send a message to the entire Black community that they were not welcome, resulting in mass exodus from the area. In the early twentieth century, lynching was also used to silence Black leaders demanding economic and civil rights. Lynching was an effective type of terror, with the public spectacle and press coverage for the death of fellow Black citizens:

[S]outhern [B]lacks lived with the knowledge that any one of them could be a victim at any time. They also knew those unlucky enough to be chosen as targets could not expect protection from the law, for law enforcement officers often acquiesced or even joined in the mob violence. To avoid provoking a violent response, many [B]lacks adopted deferential patterns of conduct towards [W]hites . . .

After seeing a Black person lynched for attempting to vote, many would-be Black voters likely decided that attempting to vote was not worth their life and opted not to vote.

White officials used less violent forms of intimidation to informally keep Blacks from voting. For example, Governor Eugene Talmadge publically warned: “Wise Negroes will stay away from the white folks’ ballot boxes on July 17. . . . We are the true friends of the Negroes, always have been and always will be as long as they stay in the definite place we have provided for them.”

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87 Id.
90 Id. at 5.
91 Id. at 10–17.
92 Id. at 14; see also Piven et al., supra note 44, at xii (detailing the assassination of Medgar Evers, NAACP Mississippi field secretary in his driveway by Ku Klux Klansman).
94 Bernd, supra note 88, at 24.
v. White Primaries

Future Supreme Court Justice Thurgood Marshall called White primaries the “most effective, and on the surface the most legal” device to check Black participation in Southern politics. At their onset, primaries were local, informal affairs that were unregulated by law and therefore prone to unlawful, discriminatory acts. As primary elections became formalized and regulated by political parties, formal rules still limited the ability to participate to White voters only. This practice was initially upheld by the Court because primaries were not understood to be within the meaning of an election under the Constitution. Marshall observed:

It is one of those little ironies of which Southern politics is full, that the primary movement which was motivated, at least in part, by democratic motives and a desire for wider participation in the representative process was turned into a device for eliminating millions of Negroes from participation in government.

The White primary system was challenged on numerous occasions, with the four most prominent cases arising out of Texas. In *Nixon v. Herndon*, the Supreme Court found the practice violated the Fourteenth Amendment and therefore did not reach the validity of the statute under the Fifteenth Amendment. Five years later, the Court was again confronted with the validity of White primaries and, for a second time, invalidated the practice under the Equal Protection Clause of the Fourteenth Amendment. Three years later, the Court in *Grovey v. Townsend*, rejected Fourteenth and Fifteenth Amendment claims, deferring to the Texas Supreme Court, which found that the Democratic party’s exclusion of Black voters did not constitute state action.

In 1944, the White primary was ruled unconstitutional under the Fifteenth Amendment in *Smith v. Allwright*. Writing for the eight-to-one majority, Justice Stanley F. Reed held:

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

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96 Id.
97 Id. at 336.
99 MARSHALL, supra note 95, at 336.
100 273 U.S 536 (1927).
103 321 U.S. 649 (1944).
104 Smith, 321 U.S. at 661–62 (internal citations omitted).
The decision in *Smith* was surely a step forward for the safeguarding of voting rights. In fact, Professor Michael J. Klarman claims *Smith* “inaugurated a political revolution in the urban South” and led to monumental increases in Black voter participation. Despite its significance, the demise of the White primaries was not the final cure for voter discrimination. Writing in 1957, Thurgood Marshall accurately noted “[t]he collapse of the white Democratic primary, despite fond hopes, has not resulted in full participation by all in the political life of the south.”

vi. Purging Voter Rolls

During the first half of the twentieth century, many important steps were taken in extending the franchise to all, including the passage of the Nineteenth Amendment that expanded the right to vote to women, at least in theory. However, these lawful protections could not guarantee that all eligible voters could actually register and vote in practice. In Georgia, there were 135,000 registered Black voters; in an effort to disenfranchise them, the Democratic Party launched a campaign to challenge the registration of thousands of Black voters.

The motivation for this massive disenfranchisement was to ensure the election of Democrat Eugene Talmadge for governor of Georgia by preventing Blacks from voting for his primary rival, James V. Carmichael, who the majority of Black voters supported. Talmadge’s campaign implemented a white supremacy drive “to organize groups indoctrinated with the ‘white supremacy’ viewpoint, but also sought to provide local supporters with specific means of reducing the number of black votes.” The plan involved using a provision of Georgia law that allowed any citizen to “challenge the voting right of a registrant thought to be improperly qualified.” The purging of voting lists was challenged in federal courts. However, when federal courts issued injunctions ordering that the disqualified registrants be reinstated, the local officials could not comply because the names had been lost or destroyed. White voters, mainly of low socio-economic status, were also purged. Nevertheless, “the exclusive thrust of the action in most counties, and the major thrust of it in the remaining counties, was its use as a racial device against blacks.”

On Election Day in Savannah, Georgia, Chatham County officials halted voting for several hours until the Chatham County Democratic Executive Committee chairman could arrive to handle the numerous challenges brought against Black voters, challenges that were made by Talmadge supporters. When polls closed for

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106 MARSHALL, supra note 95, at 340.
107 U.S. Const. amend. XIX.
108 BERND, supra note 88.
109 Id.
110 Id. at 22.
111 Id.
112 Id. at 25.
113 Id.
114 Id. at 28.
the evening, thousands of Black voters were left waiting in the street.\textsuperscript{115} Because of
the long wait, newspapers estimated that more than 5,000 Black voters were unable
to participate in the election.\textsuperscript{116} Talmadge won the county by a margin of 3,629.\textsuperscript{117} Thus, the disenfranchisement of Black voters had a significant effect on the outcome
of the primary election.

The 1946 Georgia gubernatorial election is but one example of the effectiveness
of purging voter lists. Even if litigation had been successful in ruling the practice
unlawful, the ability to enforce such a ruling was rendered impossible by corrupt local
officials and the postviolation litigation process.

\textbf{C. A Shift Toward Civil Rights Protection and the “Second
Reconstruction”}

Despite the long history of voter suppression, many fundamental changes to
constitutional law during the twentieth century expanded the franchise. Grassroots
efforts were key in creating the momentum that led to a shift in doctrine by Congress
and the Supreme Court.

\textit{i. Civil Rights Acts of 1957, 1960, and 1964}

Many view \textit{Brown v. Board of Education of Topeka—}\textsuperscript{118} the landmark case
which ended segregation in public schools and led to the dismantling of Jim Crow—
as a turning point in the fight for racial equality. Ironically, in the immediate
aftermath of the \textit{Brown} decision, its opponents led the charge to strengthen civil
rights protections at the federal level. In an effort to distance his administration from
the decision,\textsuperscript{119} President Dwight D. Eisenhower drafted proposed legislation, which
served as the basis for the Civil Rights Act of 1957, the first civil rights legislation
since Reconstruction.\textsuperscript{120} The 1957 Act was passed “to provide means of further
securing and protecting the civil rights of persons within the jurisdiction of the United
States” and created the Civil Rights Division of the Department of Justice as well as
the Commission on Civil Rights, and authorized the appointment of the Assistant
Attorney General for Civil Rights.\textsuperscript{121} This legislation signaled the growing federal
interest in enforcing civil rights laws by combating voter suppression efforts in
federal elections.

In 1959, the Civil Rights Commission’s report recognized the system was
broken, concluding, “qualified Americans, are, because of their race or color, being

\begin{flushleft}
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} 347 U.S. 483 (1954).
\textsuperscript{119} Michael J. Klarman, \textit{Brown, Racial Change, and the Civil Rights Movement}, 80 VA. L. REV. 7, 134–35
(1994).
\textsuperscript{121} Id.; \textit{Civil Rights Division}, U.S. DEPT OF JUSTICE, www.justice.gov/crt (last visited Oct. 31, 2016);
\end{flushleft}
denied their right to vote.” One year later, Congress passed the Civil Rights Act of 1960, in response to Southern resistance to court orders regarding school desegregation and established the federal courts as “voting referees.” As he signed the Act into law, President Eisenhower commented he believed it held “great promise of making the Fifteenth Amendment of the Constitution fully meaningful.”

While the 1957 and 1960 Acts focused on voting rights, the Civil Rights Act of 1964 focused on equal access to public accommodations. Although the 1964 Act would ostensibly be “appropriate legislation” to enforce the Fourteenth Amendment right to Equal Protection, unfavorable precedent made the Court hesitant to rely on any of the Reconstruction Amendments to uphold the law. Therefore, instead of relying on the race-conscious amendments, the Court avoided the racial issue and found the 1964 Act constitutional under the Commerce Clause.

ii. The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is arguably the most radical civil rights legislation passed to date. The VRA, “an act to enforce the Fifteenth Amendment,” gave unprecedented power to the federal government to oversee elections, both state and federal. Section 2 states, “[n]o voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” Section 2 is violated when a law or practice intends to discriminate based on race or has a disparate impact on a certain race. The most controversial sections, 4 and 5, singled out states and local jurisdictions with a history of racial discrimination in voting for federal intervention known as preclearance. Section 4(b) outlined the coverage formula. Originally, covered jurisdictions were those who used a test or device as a prerequisite to voting on

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123 Pub. L. 86-449.
125 Id.
127 E.g., Civil Rights Cases, 109 U.S. 3 (1883).
128 Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. REV. 1801, 1803 (2010) (“Lawyers from the Kennedy and Johnson administrations, however, argued that the Commerce Clause theory was the safer route. To reach the Fourteenth Amendment question, the Supreme Court would have to overturn a series of precedents dating back to the 1870s that had severely limited Congress’ power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments. . . . It was risky to ask the Supreme Court to overturn years of settled precedents; . . . .”).
131 Id.
132 Id.
133 Id.
134 Id.
November 1, 1964, and had less than fifty percent voter registration or a comparatively low turnout in the 1964 election. The section was reformulated in 1970; the most recent formula applied to states or counties that had a voting test and less than fifty percent voter registration or turnout. Section 5 requires that any of the § 4(b) covered jurisdictions had to get approval from the Department of Justice before any voting-related changes could be implemented.

Unsurprisingly, the vast majority of covered jurisdictions were in the Deep South. These jurisdictions, however, were not ordained for perpetual intervention. Any covered jurisdiction could seek a § 4(a) bailout upon proving in the past ten years that a number of factors were met: full compliance with the VRA; no further violation of § 4(b); no objection from the Attorney General or denial of a § 5 declaratory judgment by the District Court of the District of Columbia; there were no adverse judgments in any voting discrimination lawsuits nor any pending lawsuits alleging discrimination; and no violations of the Constitution or federal, state, or local laws with respect to voting rights unless the jurisdiction could establish that any such violations were trivial, were promptly corrected, and were not repeated.

Still, some say the VRA was not strong enough. “Although the Voting Rights Act outlaws discriminatory election administration procedures, it is the actions and inactions of federal officials, not the existence of the law, which protects and undermines the right to vote.” Despite any perceived flaws, the VRA had been fundamental in undoing, or at least neutralizing, the discriminatory practices of decades past. The electorate became even larger in 1971 when the Twenty-Sixth Amendment to the Constitution lowered the voting age from twenty-one to eighteen. The electorate was finally more inclusive of all Americans.

iii. The Important Role of Social Movements in Obtaining Civil Rights Legislation

This shift toward civil rights protection was not done entirely out of the goodness of politicians’ hearts; rather, politicians were also motivated by the Great Migration and the civil rights movement. Between 1910 and 1960, almost five million Blacks left the South for large cities in the North and West. By leaving the rural South, more Blacks became enfranchised and now constituted an important electorate for both parties.

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135 Id.
137 Id.
140 U.S. Const. amend. XXVI.
141 PIVEN ET AL., supra note 44, at 34–35.
142 Klarrman, supra note 119, at 30.
143 PIVEN ET AL., supra note 44, at 34–35.
states that controlled almost eighty percent of the presidential electoral votes.\textsuperscript{144} Black voters had historically voted with the Republican Party but now found themselves in the heart of the Democratic base in the North.\textsuperscript{145} The electoral leverage, coupled with the civil rights movement, transformed American politics.

Black-led social movements for political and social equality were also pivotal in the passage of the civil rights legislation in the 1950s and 1960s. After returning from fighting for democracy in World War II, Black soldiers returned home only to be reminded that the promise of democracy was still yet to be fulfilled in their own country. The Second World War’s most significant ramification for racial change may have been its impact on Black attitudes and the ability of the Black community to mobilize.\textsuperscript{146}

American Blacks had almost universally supported the preceding generation's war to make the world safe for democracy, only to be disappointed when neither the ideological underpinnings of the war nor their own contributions to the war effort yielded substantial changes in American racial practices.\textsuperscript{147} This hypocrisy would not be lost on the Supreme Court Justices either: “the Justices cannot have failed to observe the tension between a purportedly democratic war fought against the Nazis, with their theories of Aryan supremacy, and the pervasive disfranchisement of Southern blacks.”\textsuperscript{148} The civil rights movement brought the problems in the South to the rest of the country. Had the violent atrocities of Bloody Sunday in Selma, Alabama,\textsuperscript{149} not been televised, the VRA would likely not have been passed so quickly.

The political success of the midcentury civil rights legislation must be understood within the context of the struggle for civil rights and racial equality. Collective action in the Black community concerning voting, especially, has continued into the twenty-first century. During the 2004 presidential election, prominent Black figures such as Sean “Diddy” Combs and Russell Simmons urged young voters to participate with the famous “Vote or Die” campaign\textsuperscript{150} and “Rock the

\textsuperscript{144} Klarman, supra note 119, at 30–31.
\textsuperscript{145} Piven et al., supra note 44, at 37.
\textsuperscript{146} Klarman, supra note 105, at 73–74 (2001) (“Another critical change in circumstance that enabled more effective enforcement of Smith was the greater capacity of Southern blacks by 1944 to capitalize on a favorable Court decision. Earlier civil rights victories in the Supreme Court had entailed few practical consequences, partly because the African-American community had been unable to mobilize behind their enforcement. Smith was a highly salient event for Southern blacks, and they quickly seized upon it as the occasion for registering to vote and demanding access to Democratic primaries. Thousands of returning World War II veterans took their release papers that entitled them to exemption from the poll tax, headed off to city hall, and demanded that they be registered to vote. Many expressed the conviction that ‘[a]fter having been overseas fighting for democracy, . . . when we got back here we should enjoy a little of it.’”)  
\textsuperscript{147} Klarman, supra note 119, at 16.
\textsuperscript{148} Klarman, supra note 105, at 64.
Vote.” The campaign proved to be successful; twenty-one million voters under thirty years of age went to the polls, the biggest turnout of the youth vote since 1972.\footnote{Jose Antonio Vargas, Vote or Die? Well, They Did Vote: Youth Ballots Up 4.6 Million from 2000, in Kerry’s Favor, THE WASHINGTON POST, Nov. 9, 2004), at C01.}

By the latter part of the twentieth century, the promise of the Fifteenth Amendment was more than mere words in the Constitution. Real change was implemented, and access to polls was possible. Still, challenges remain to fulfilling the Fifteenth Amendment to this day.

II. THE RACIAL DISPARITY IN VOTING RIGHTS, WHILE IMPROVED, HAS YET TO BE Solved.

In 2015, we celebrated the fiftieth anniversary of the Voting Rights Act. Nevertheless, the fight to ensure the promise of the Fifteenth Amendment, the right to vote regardless of the color of one’s skin, is far from over in the twenty-first century. In fact, research suggests that recent proposed and passed voting regulations “indicate that proposal and passage are highly partisan, strategic, and radicalized affairs. These findings are consistent with a scenario in which the targeted demobilization of minority voters and African-Americans is a central driver of recent legislative developments.”\footnote{Keith G. Bentele & Erin E. O’Brien, Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies, 11 PERSP. ON POL. 1088, 1088 (2013).} In other words, some of the methods and tools might have changed but the United States is facing “Jim Crow 2.0”—another wave of systematic voter disenfranchisement, often because of racial and political motivations. Sadly, when comparing current voting regulations to those of the past, a shocking trend appears: none of this disenfranchisement is new.

A. Progress Made to Ensure Universal Suffrage Continues to Be Undermined by State Action.

States continue to control access to the ballot, leaving the federal government with few options to combat voting rights violations.\footnote{See, e.g., PIVEN ET AL., supra note 44, at 169 (“Federal prosecutors have few modern tools to use in combating the wide variety of vote suppression tactics. . . . Instead, they rely mainly on what is left of the Enforcement Act of 1870.”).} Despite the improvements and efforts made to improve access to voting, restrictive state legislation still makes voting harder than it ought to be.\footnote{See, e.g., Eric Black, Why is Turnout So Low in U.S. Elections? We Make It More Difficult to Vote than Other Democracies, MINNPOST (Oct. 1, 2014), https://www.minnpost.com/eric-black-ink/2014/10/why-turnout-so-low-us-elections-we-make-it-more-difficult-vote-other-democracies.} In 2013, Keith G. Bentele and Erin E. O’Brien analyzed what causes or motivates a state’s decision to enact restrictive voting laws.\footnote{Bentele & O’Brien, supra note 152.} The pair found that the continued exclusionary practice, a tradition dating back to the nineteenth century, is “a tendency bolstered, yet again, by the power and flexibility federalism grants to the states.”\footnote{Id. at 1091.}

As was done to maintain one-party rule in the South during the first half of the twentieth century, current practices are politically motivated. “[R]ecent
legislative efforts to restrict voter access are usefully conceptualized as yet another wave of election reforms in a long history for such reforms, pursued in order to demobilize and suppress particular categories for partisan gain.”¹⁵⁷ In fact, political leaders in areas with large Black populations and increased minority turnout in a previous presidential election are more likely to propose restrictive legislation; this association makes it clear that “the racial composition of a state is strongly related to the proposal of changes that would restrict voter access.”¹⁵⁸ Today’s voter suppression efforts overwhelmingly favor Republicans because people of color are more likely to vote Democrat.¹⁵⁹ Bentele and O’Brien note, “[w]hile we can only infer motivation, these results strongly suggest that the proposal of these policies has been driven by electoral concerns differentially attuned to demobilizing African-American and lower-income Americans.”¹⁶⁰

State actors, motivated by partisan politics, have few incentives to guarantee the right to vote. States have implemented new laws, or resurrected old practices, in the name of preventing voter fraud, which, while race-neutral on their face, have had a devastating racial impact on the ability to vote in state and federal elections.¹⁶¹ Recent efforts at voter demobilization and vote dilution are today’s Jim Crow practices.

Today’s disenfranchisement may look different than that of the nineteenth and twentieth centuries. We do not have voting officials that discriminatorily impose literacy tests or poll taxes to overtly prevent Black people from voting. Most state officials, unlike their nineteenth- and twentieth-century predecessors, would not go on record to say that their voting regulation is implemented to discriminate.¹⁶² While some old practices may have died, many of the old practices have resurfaced and continue to affect access to the polls today.

As discussed previously,¹⁶³ one effective practice in demobilizing voters is to purge the voting lists and remove would-be voters from the list of eligible voters or challenge the registration of a voter on Election Day. Sadly, this trend still continues

¹⁵⁷ *Id.* at 1104.
¹⁵⁸ *Id.* at 1096, Table 2.
¹⁵⁹ *Piven et al.*, supra note 44, at 14 (“The GOP agenda is to make it harder to vote. You purge voters. You don’t register voters . . . . You pick the states where you go after Democrats.”).
¹⁶⁰ Bentele & O’Brien, supra note 152, at 1098; *see also* *Piven et al.*, supra note 44, at 6 (“Since [the 2000 election of George W. Bush], the Republican Party has relied on stratagems like redistricting, highly partisan election administration, and old fashioned vote suppression to win what continue to be very close elections.”).
¹⁶¹ *See Piven et al.*, supra note 44, at 164 (“Like vote suppression since the days of Reconstruction, vote suppression today masquerades under the cover of party-run ‘ballot-security’ campaigns to fight fraud, and is also embedded in the rigmarole of ‘prudent’ election administration. Either way, formal and informal practices and campaign techniques that target minorities for vote suppression are usually justified as necessary to promote the integrity of the electoral process, a formulation that makes dirty politics look clean.”).
¹⁶³ *See* discussion *supra* Section II.B.
Even with court intervention, the damage may already be done as purged voters are often forced to vote provisionally.\footnote{Perez, supra note 44, at 173.}

Ahead of a close 2004 Presidential election, Republicans implemented a multipronged “antifraud” strategy including poll-watcher campaigns and the use of challengers at the polls in key states. No Republican has won the White House without winning the state of Ohio, making the state, which was never subject to the VRA’s preclearance requirements, a prime place for restrictive voting practices. Cuyahoga County, which is home to Cleveland, is the most consistently Democratic county in the state.\footnote{Id.} Between 2000 and 2004, 168,000 voters in the county were purged in an overly aggressive interpretation of the National Voter Registration Act.\footnote{Piven, supra note 44, at 173.} During the 2004 election, Ohio republicans also purged Democratic-leaning voters in Cincinnati.\footnote{Id.} In Hamilton County, twelve percent of registered voters were moved from active to inactive status; voters whose registration records were inactive had to show identification to vote at a time before providing identification to vote was a requirement.\footnote{Id.} If the polling official did not believe the voter’s identification was satisfactory, the voter was forced to cast a provisional ballot.\footnote{Id.} After the election, Republican Secretary of State J. Kenneth Blackwell ordered all provisional ballots be set aside and not be counted in the election.\footnote{Id.} All provisional ballots cast in Hamilton County came from Cincinnati, a city with a large Black population that tended to vote Democrat.\footnote{Id.} President George W. Bush won Ohio and was reelected, but many questioned the validity of the Ohio outcome because of voter suppression.\footnote{Id.}

In 2015, a tiny county in Georgia experienced “the worst voter suppression . . . ever seen” according to a former Department of Justice attorney, John Powers.\footnote{Fisher, supra note 44, at 173.} Hancock County, Georgia, is a small county of less than 1,000 people; the county is overwhelmingly Black with only 96 White residents.\footnote{Id.} The eligibility of hundreds of voters was challenged without notice.\footnote{Id.} One hundred and seventy-six voters were prevented from voting in the local elections; of those voters, all but two were Black.\footnote{Id.}
Challenging the registration of voters and purging names from the lists of eligible voters is a practice in which the victims often do not know until it is too late and they are unable to vote. Remedial lawsuits can do nothing to prevent the practice nor change the outcome of an election affected by the violation.

i. Voter Identification Laws

The past decade has seen the rise of voter identification laws, regulations that require a voter to present a photographic identification in order to vote.\(^\text{178}\) In 2006, Indiana was the first state to enact a strict photo identification law.\(^\text{179}\) The Court upheld the law in 2008, finding that the state’s interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence justified the “limited burden on voter rights.”\(^\text{180}\) The record presented to the Court was a limited one;\(^\text{181}\) in 2008, few truly understood the impact these laws would have on low-income and minority voters.\(^\text{182}\) Judge Richard Posner, who authored the preceding Seventh Circuit opinion upholding the law,\(^\text{183}\) later recanted his previous stance in a fiery dissent from an order denying a petition to rehear a challenge to Wisconsin’s voter identification law.\(^\text{184}\) Judge Posner concluded, “[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud . . . and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.”\(^\text{185}\) He cited Bentele and O’Brien’s research, noting that photo identification laws are “highly correlated with a state’s having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly [B]lacks.”\(^\text{186}\)

In fact, many argue that voter identification laws should be invalidated as poll taxes, which were found to violate the 24th Amendment. Congressman Lewis called the legislation “a poll tax by another name.”\(^\text{187}\) The congressman lamented “[n]ew restraints on the right to vote do not merely slow us down. They turn us backward, setting us in the wrong direction on a course where we have already traveled too far and sacrificed too much.”\(^\text{188}\) With documented evidence that voter identification laws...
impact citizens’ ability to exercise their right on Election Day, voter identification laws are currently being litigated across the country.\(^{189}\)

ii. \textit{Northwest Austin, Shelby County, and the Evisceration of the Voting Rights Act}

In July 2006, Congress overwhelmingly passed a twenty-five year extension of the VRA.\(^{190}\) Nevertheless, the Court heard a challenge to the constitutionality of the coverage formula a mere three years later in \textit{Northwest Austin Municipal Utility District Number One v. Holder}.\(^{191}\) The Court disposed of the case by allowing the utility district to bail out of the preclearance requirement, thereby avoiding the constitutional question of the validity of the Act.\(^{192}\) Nevertheless, the Court expressed doubt about the VRA’s continuing viability by commenting that the VRA was justified by “exceptional conditions” decades before, but “we are now a very different Nation.”\(^{193}\) Chief Justice Roberts wrote that the Court would not answer the “difficult constitutional question” of whether current conditions justified “the extraordinary legislation otherwise unfamiliar to our federal system.”\(^{194}\) In a concurrence in part and dissent in part, Justice Thomas took the Chief Justice’s doubts one step forward, concluding, “[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.”\(^{195}\)

Four years later, the Court heard another challenge to the VRA. In this suit, an Alabama county challenged §§ 4(b) and 5 of the VRA as facially unconstitutional.\(^{196}\) Unlike Northwest Austin, Shelby County was ineligible for a bailout because the Attorney General recently objected to proposed voting changes.\(^{197}\) The Court cited \textit{Northwest Austin}, finding that the VRA “imposes current burdens and must be justified by current needs.”\(^{198}\) The Court invoked federalism principles, without any real consideration of how the Reconstruction Amendments may have affected or influenced the federalism designed by the founders in 1787.\(^{199}\) Chief Justice Roberts’ majority opinion gave new meaning to the doctrine of equal sovereignty, citing only his opinion in \textit{Northwest Austin}.\(^{200}\) The Chief Justice noted

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  \item \(^{191}\) 557 U.S. 193 (2009).
  \item \(^{192}\) \textit{Id.} at 211.
  \item \(^{193}\) \textit{Id.}
  \item \(^{194}\) \textit{Id.}
  \item \(^{195}\) \textit{Id.} at 226 (Thomas, J., concurring in part and dissenting in part).
  \item \(^{196}\) \textit{Shelby Cnty.}, 133 S. Ct. at 2621–22.
  \item \(^{197}\) \textit{Id.}
  \item \(^{198}\) \textit{Id.} at 2622 (citing \textit{Northwest Austin}, 557 U.S. at 203).
  \item \(^{199}\) \textit{Id.} at 2623–24.
  \item \(^{200}\) See Charles and Fuentes-Rohwer, supra note 122, at 520 (“[N]ote how equal sovereignty begins as an ‘historic tradition’ at the start of the paragraph, morphs into a ‘doctrine’ in the middle of the paragraph, and comes to life as a ‘fundamental principle’ by the end of the paragraph. . . . \textit{Northwest Austin} not
that improvements in Black turnout were “in large part because of the Voting Rights Act,” but found that because Congress did not update the coverage formula, the Court was left “with no choice but to declare § 4(b) unconstitutional.” Section 5 remained intact and the Court invited Congress to “draft another formula based on current conditions.” However, without the coverage formula, the VRA is essentially lifeless, allowing previously covered jurisdictions free reign to implement voting changes without any supervision or intervention to prevent discriminatory laws from being implemented.

Justice Ruth Bader Ginsberg penned a passionate dissent maintaining, “the VRA provided a fit solution for minority voters as well as for States.” Justice Ginsburg pointed to the Reconstruction Amendments finding, “[i]t cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments.” She also noted that the challenges being faced by today’s minority voters were not direct attempts but rather “subtler second-generation barriers” for which Congress believed preclearance was necessary so as not to risk loss of the gains that had been made. Again, like in Giles v. Harris, the Court’s majority opinion put voting rights in an impossible catch-22: “If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime.” Justice Ginsburg elaborated that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

Shelby County is a rare, exceptional case in which an act of Congress that was once constitutional is no longer, not because of new understanding of the Constitution but rather an assumption that the underlying need for the legislation was no longer viable. Essentially, the Court found that racism and discriminatory voting practices were historical phenomena of the twentieth century because of improvements in the last fifty years, despite the wealth of research that contradicts that conclusion.

States that wanted to implement new voting changes, but were blocked by the Department of Justice thanks to the § 4(b) coverage requirement, wasted no time in taking advantage of the impotent legislation. In fact, as soon as Shelby County was decided, Greg Abbott, Attorney General for the state of Texas, announced that the

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201 Shelby Cnty., 133 S. Ct. at 2626 (emphasis in original).
202 Id. at 2631.
203 Id. More than three years after the Shelby County decision, Congress has made no legitimate effort at updating the coverage formula, leaving the VRA toothless.
204 Id. at 2634 (Ginsburg, J., dissenting).
205 Id. at 2637.
206 Id. at 2642 (citing 2006 Reauthorization §§ 2(b)(2), (9)).
207 Id. at 2638.
208 Id. at 2650.
state would be immediately initiating new voter identification laws that had previously been blocked by the Obama administration. On the very same day it was decided, Shelby County began to have devastating consequences for minority voters.


Many lament that the 2016 Presidential election will be the first national election without the full protections of the Voting Rights Act since its inception. Voting rights advocates worry over the restrictive voting laws and over voter suppression that might affect the outcome of the election. In fact, voters have been purged from voting lists during the primary and general seasons of the 2016 presidential election. The next president will likely nominate several Supreme Court Justices, making the 2016 election a key moment for the future of voting rights.

Still, there are positive signs. In 2015, two states, Oregon and California, passed automatic registration bills, removing one of the biggest barriers to voting and making access to the polls easier.

During the summer months of 2016, district and federal courts in key battleground states struck down numerous voter identification laws, citing racial animus as a motivating factor for these laws. In examining North Carolina’s voter

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214 Andrew Prokop, Oregon will be the first state to automatically register voters, Vox (March 17, 2015, 12:20 PM), http://www.vox.com/2015/3/17/82531387/oregon-voter-registration-automatic.


identification laws, the Fourth Circuit considered the actions of North Carolina legislators in the aftermath of the *Shelby County* decision.\(^{217}\) While acknowledging that the lawmakers were partly motivated by partisan politics, the Fourth Circuit found that “discriminatory racial intent motivated the enactment of the challenged provisions in [the legislation].”\(^{218}\) Similarly, the United States District Court for the District of North Dakota enjoined a voter identification law in because of its disparate impact on Native American voters.\(^{219}\)

The decisions in the recent cases concerning VRA and voter suppression give hope that courts might be able to stop voter suppression before a national election, even without the full protection of the VRA. However, that possibility alone is not enough. Voting must be protected during primaries, local, and state elections, not just for federal elections during a presidential election year. Because it seems unlikely that Congress will be able to come up with a new coverage formula and because of the Supreme Court’s skepticism towards race-conscious solutions in *Shelby County*, it is likely that a race-neutral approach to increasing voter access is the best option to combat voter discrimination.

**B. Looking Forward: Fixing a Racial Issue Through a Race-Neutral Approach**

From analyzing the history of the franchise, it is clear that access to the ballot box has, and continues to be, a racial issue in the United States. However, in order truly to achieve the promises of the Fifteenth Amendment, the most practical approach might be one that, at least on paper, does not acknowledge the racial problem.\(^{220}\)

A new preclearance coverage formula under § 4(b) of the VRA is the obvious possibility. With the celebration of the fifty-first anniversary of the Act on August 8, 2016, there were renewed calls to return the VRA to its full power.\(^{221}\) However, recent history shows us that voter suppression is a nationwide problem. It seems improbable that Congress would agree to allow the Justice Department to oversee the election


\(^{218}\) *Id.* at 57–58 (“[T]he totality of the circumstances -- North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so -- cumulatively and unmistakably reveal that the General Assembly used SL 2013-381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party.”).

\(^{219}\) Brakebill v. Jaeger, 1:16-cv-008-DLH-CSM (D.N.D. Aug. 1, 2016) (granting motion for preliminary injunction enjoining North Dakota Secretary of State from enforcing the North Dakota’s voter ID laws during the pendency of litigation).

\(^{220}\) Charles & Fuentes-Rohwer, *supra* note 122, at 499 (“Following Shelby County, we can no longer confidently assume that the Court will permit Congress to justify voting rights law and policy on the ground of remedying racial discrimination in the political process.”).

laws of every state in the Union; yet, such supervision would be the only way to ensure that every eligible voter has the ability to vote free of discrimination. In a different vein, both President Barack Obama and Senator Bernie Sanders have raised the idea of making Election Day a national holiday.\footnote{Ben Mathis-Lilley, Obama Endorses Idea of National Voting Holiday, \textsc{Slate} (May 12, 2016, 1:12 PM), http://www.slate.com/blogs/the_slatest/2016/05/12/president_obama_backs_election_day_voting_holiday_in_rutgers_student_interview.html; Make Election Day a National Holiday, \textsc{Bernie Sanders U.S. Senator For Vermont}, http://www.sanders.senate.gov/democracyday.} While this solution would address access to the ballot during presidential elections, it would do nothing to help voters in primaries or during local elections.

The best solution might be for the federal government to mandate the regulations for federal elections. The government can establish how citizenship must be proved, allow absentee ballots to be requested online, regulate the timetable for early voting and weekend hours, and permit same-day registration. In other words, Congress should establish procedures that make it easier to vote and protect the practices that many states have been attempting to eradicate.

The power of the federal government to regulate the time, place, and manner of its own elections under the Election Clause was upheld in \textit{Arizona v. Inter Tribal Council of Arizona, Inc.}\footnote{Id. at 2256–57 (“The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to ‘make or alter’ state election regulations. Art. I, § 4, cl. 1. When Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it \textit{necessarily} displaces some element of a pre-existing legal regime erected by the States.”).} The Court blocked Arizona’s attempt to require additional proof of citizenship because federal law preempted the state action, holding that when the federal government acts under its Election Clause power, federal regulations necessarily displace any conflicting state law.\footnote{Judge Rules Secretary of State Kris Kobach “Lacks the Authority to Create a Two-Tiered System of Voter Registration”, ACLU of Kansas (Nov. 4, 2016), https://www.aclukansas.org/en/press-releases/court-permanently-blocks-kobachs-dual-voter-registration-system; Brown v. Kobach – Memorandum decision and Order, ACLU of Kansas, https://www.aclu.org/legal-document/brown-v-kobach-memorandum-decision-and-order.} Thus, the federal government could effectively preempt a state’s attempts at voter suppression. In fact, a state judge in Kansas recently ruled that a two-tiered system of voter registration was unlawful.\footnote{133 S. Ct. 2247 (2013).} While the basis for this decision was based on the National Voter Registration Act, this rationale can easily be extended to the federal government’s power under the Election Clause.

The Election Clause method is not a perfect approach. It would still require Congress to approve such a method, and it would not stop a future suppression tool that has yet to be implemented or proposed. Nevertheless, it would be an effective corrective measure that would allow the federal government to regain control over voting rights without a full-functioning Voting Rights Act.

\section*{Conclusion}

Since the founding, the United States has struggled with unequal and discriminatory voting practices. The Radical Republicans laid a foundation for
political equality in the Reconstruction Amendments. Those values, after lying dormant for about a hundred years, were given practical meaning during the civil rights movement of the twentieth century. Despite the progress made over the last half-century, the Reconstruction Amendments have yet to be fully realized. Political parties still have incentives to introduce restrictive voting regulations, which far too often have negative racial consequences. Voter suppression practices that characterized the post-Reconstruction period have evolved into modern forms that allow discrimination against Black and minority voters.

The United States has a damning history of voter suppression. This legacy continues today in new forms of modern disenfranchisement that target Black and other minority voters. The states should no longer be trusted to regulate voting without federal supervision or intervention. The vote is precious—far too precious a right to be delegated to the state laboratories of democracy. In order to truly protect equal access to the ballot, the federal government must take a more active, prophylactic role in protecting the promise of the Fifteenth Amendment, the right to vote without discrimination based on race.
The Process of Power: 
A Process-Oriented Approach to Dissecting a Group’s Political Power

Pat Andriola*

ABSTRACT

Minority groups receiving protection under the Fourteenth Amendment must typically show that they have little "political power," the idea being that the judiciary ought not step in on their behalf if there are legislative outlets available to them. But how should a court determine whether a group is politically powerful (or powerless)? This article argues that the typical indicia of political power relied on by the courts are unwisely based on political outputs, or what minority groups strive for (such as laws in their favor), rather than political inputs, or the things that determine whether groups can get political outputs in the first place (such as money).

INTRODUCTION

The gist behind the “politically powerless” criterion of Carolene Products’ Footnote Four is that the judiciary should pay special attention to certain groups who, due to institutional failures of the democratic system, are particularly vulnerable to public action that discriminates against them.1 Determining whether a group is politically powerless is more of an art than a science, given that there is no visible bright line a court can look to for guidance (or even anything resembling a test articulated by the Supreme Court).2 During the trial on Proposition 8 in Hollingsworth v. Perry, the testimony of Stanford political science professor Gary Segura (and the questions he was asked by both counsel) seemed to indicate that the components of a group’s political power were the number of members it has,3 its financial resources,4 and its societal clout (as a byproduct of the public’s attitude toward the group).5 There was also an indication from the testimony that these inputs

* The author is a litigator in New York City who received his JD/MBA from New York University in 2015. He would like to dedicate this Article to Kenji Yoshino, the professor with whom the idea for this article was developed, and to Judge Gonzalo Curiel, a great alumnus of the Maurer School of Law.

1 See Kenji Yoshino, The Paradox of Political Power: Same-Sex Marriage and the Supreme Court, UTAH L. REV. 527, 537–38 (2012) (“[T]he Court reversed the spin of the countermajoritarian difficulty, suggesting that it was squarely within the competence of an unelected minority of judges to be solicitous of minority groups shut out of the political process”).

2 See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 n.17 (1994) (calling the Court’s political power test “ill-defined”). In fact, the Supreme Court has never even indicated if the inquiry is best determined by a simple binary approach, such as asking if a group either does or does not maintain political power or conceptualizing the issue on a continuum.


4 Id. at 1818 (“[W]hen there is money to be given, there are politicians to come accept it.”).

5 Id. at 1564. A group’s clout is also intimately tied to the activities of other organizations that coalesce to oppose the group. See id. at 1594.
would typically produce outputs of legislation beneficial to the group and elected representatives who are members of the group themselves and/or allies of it.\(^6\)

My argument is that although outputs are without question more practically important to disadvantaged groups in the long run, courts should focus more on the inputs, or process, rather than the results in determining whether a group actually has sufficient political power. Part and parcel of being a minority group with a history of discrimination against you is vulnerability, or an anxious unease that the political tides can shift in your disfavor as they have before. Since the Court in \textit{Caroline Products} was interested in specifying which groups were at risk of majoritarian attack (such that it was the task of the judiciary to curb the kinds of factionalism Madison once warned about)\(^7\), looking to inputs is a good method to determine how stable a group’s present political power is; whereas looking at outputs, complimentary data is most likely to tell us more about past inputs than they do about current ones.\(^8\)

Importantly, this Article also serves to undercut three myths that have accompanied the respective inputs when it comes to the political power of gays: (1) that gays make up ten percent of the population and thus by themselves constitute a significant voting bloc; (2) that gays are mostly affluent and well-connected and thus can attract the political capital of lawmakers; and (3) that America has done a complete 180 and is currently very accepting of homosexuality.

\section{Poker, Political Power, and Outputs}

In the game of poker, a player who is a ninety-nine percent favorite with one card remaining will still lose one out of a hundred times. The player is definitely more concerned with the result of the hand than her favorable odds before the last card is turned, since the odds are only valuable instrumentally in that they give her a greater chance of winning the hand itself. However, if we were trying to gauge the player’s chances of winning before the last card is turned, looking to the result of the hand would do nothing but muddle the analysis. Similarly, if we conceptualize a group’s political power by looking to its inputs, valuable instrumentally insofar as they allow for greater political results (which is the ultimate goal), I believe we have a better chance of rebuffing the counter-majoritarian difficulty the Court was concerned with in \textit{Caroline Products}.

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\item \textit{Id.} at 1539 (“[W]e would want to take into account the process whereby the outcome was achieved, and the subject matter of the outcome, before we concluded that the outcome by itself was sufficient evidence”).
\item Note, \textit{A Madisonian Interpretation of the Equal Protection Doctrine}, 91 \textit{Yale L.J.} 1403 (1982).
\item Current inputs might actually be a better correlative indicator of future outputs than current outputs are. This idea was actually taken from the world of advanced baseball statistics, which the author has a background in. It has been demonstrated that input-based pitching statistics, such as FIP, are actually better predictors of future ERA, an output-based statistic, than current ERA is. \textit{See} Colin Wyers, \textit{How well can we predict ERA?}, \textit{The Hardball Times} (June 18, 2009), http://www.hardballtimes.com/how-well-can-we-predict-era/.
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A. Allies

Professor Segura highlighted some of the main analytical problems with looking to outputs as an indication of a group’s intrinsic political power. Political allies, which Segura defines as “an individual or group who are willing to expend political capital on behalf of that position, not merely embrace it,” are a good example of a particularly poor metric for political power analysis. Because politicians will almost always support a group when there are no political costs to doing so, pointing to a bunch of politicians across the state and federal levels who claim to be allies is futile because the real issue comes when the politician has to make a zero-sum calculation (i.e., support the group at the expense of possible votes). A politician’s favorite approach when it comes to policy and constituents is being able to have her cake and eat it too: if a politician can somehow claim to support gay rights while at the same time not offending more traditional voters, she may be characterized as an ally when really he or she has done nothing but garden-variety opportunism. Since the factors that go into a politician’s political capital are fragile and dynamic, it’s tough to decipher how long she will be willing to actually spend effort on a group if the return on investment (for reelection or legacy-building purposes) is no longer positive.

A prominent example of someone who only came to be an ally once the cards were stacked in his favor is President Obama, who steadfastly believed in limiting marriage to opposite-sex couples in 2008 when the issue was more controversial and his election chances were exceedingly unclear, but he changed his mind during the 2012 campaign when public sentiment had shifted and he was a considerable favorite for reelection. Since the point of Footnote Four’s inclusion of political power is to figure out when the judiciary should step in because the political process has failed to protect vulnerable groups, the benefits of looking to allies is limited since they could easily abandon the group if either public opinion shifts or they need to use their political capital for more personally pressing concerns.

9 Transcript of Cross-examination of Gary Segura, supra note 3, at 1686.
10 Id. at 1581 (commenting that many allies will “retreat and retreat quickly” when “faced with difficult decisions that might be electorally risky”).
11 Id. at 1696 (citing Congressperson Pelosi as an example of someone who waned support for gay rights in 2009 because of diminished political capital).
12 See Nate Silver, Support for Gay Marriage Outweighs Opposition in Polls, FIVETHIRTEYEIGHT (May 9, 2012, 4:52 PM), http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls. Ironically, Obama was a supporter of same sex marriage as early as 1996, so his position “evolved” not once, but twice. See Jesse Singal, Obama’s Incoherent Stance on Gay Marriage, THE DAILY BEAST (May 8, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/05/08/obama-a-incoherent-stance-on-gay-marriage.html. President Obama was not the only presidential candidate to flip flop on issues relating to gays. Mitt Romney said during his campaign run that, as President, he would not interfere with a state’s decision regarding adoption or marriage. He then switched gears and openly supported a Constitutional amendment to limit marriage to opposite sex couples. See Zack Ford, Romney Campaign Flops Twice on Marriage Amendment and Same-Sex Benefits, THINKPROGRESS.ORG (Oct. 22, 2012, 9:03 AM), http://thinkprogress.org/lgbt/2012/10/22/1057711/romney-campaign-flops-twice-on-marriage-amendment-and-same-sex-benefits/.
B. Legislation

Looking to pro-gay legislation for indicia of political power is rife with similar problems. First, as Professor Segura notes, antidiscrimination legislation is clear evidence of a group’s vulnerability, as it addresses the fact that the group suffers from systematic discrimination in the first place. This is a phenomenon that mirrors Professor Yoshino’s point in The Paradox of Political Power: just as it takes a certain amount of political power for the judiciary to even notice a certain group, it takes a similar amount of political power for the legislature to notice a group as well.

Second, it’s easy to simply count up laws that are ostensibly pro-gay but in actuality do nothing more than codify judicial mandates or grant only some benefits while leaving others out of reach. There is a troubling irony to these laws: they are examples of the legislature reacting to decrees from the courts, but they are often used as examples for why the courts need not step in because the legislature has acted. If anything, these laws help to demonstrate that the only way for a minority group to get the legislature’s attention is by asking the judiciary to twist the legislature’s arm.

Third, legislation is not stagnant; it can be overturned either by the same legislature (if opinion changes) or by ballot initiatives (for example, Proposition 8). The reason input analysis is applicable here is that it looks at what conditions need to be present in order for laws favorable to minority groups to be overturned, whereas output analysis asks a relatively superficial question of, “Is there a law benefitting this group on the books?” Again, while favorable legislation is obviously a significant goal in advancing a group’s interests, courts should consider this evidence with a strong grain of salt because of its tenuousness.

C. Elected Representatives

ELECTING REPRESENTATIVES who themselves are members of the group is also an important end, but how that relates to political power can be deceiving. First, because sexual orientation is a complicated concept and less conspicuous than gender or race, and because gay politicians are often forced into the closet, it is hard to judge both the percentage of gays in the overall population and the percentage of gays in representative bodies (in order to see if there is a substantial difference between the two). Second, these politicians are usually elected from locales that are much more comfortable with homosexuality than the nation as a whole, so there is a local-versus-national divide at play. Third, while having elected representatives from your group is a good proxy for group representation, those representatives may not always have

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13 Transcript of Direct-examination of Gary Segura, supra note 3, at 1549 (analogizing an antidiscrimination statute to a medical prescription, saying the prescription doesn’t mean you’re healthy, but that there’s actually a problem).
15 Transcript of Direct-examination of Gary Segura, supra note 3, at 1549 (noting that some antidiscrimination ordinances in California “were passed in the wake of court decisions ordering that policies be adopted”).
16 See id. at 1574–75.
the interests of the group at the forefront of their agenda. Finally, like legislation, politicians can be removed from their public positions with a change in the political atmosphere.

II. **Inputs**

A. **Strength in Numbers**

Inherent in the idea of “insular” and “minority” groups is that the groups are literally outnumbered by the majority. While a strict numerical advantage cannot guarantee that a group will be properly represented, or even avoid oppression (for example, South African apartheid or nineteenth century women’s suffrage), it is certainly a correlative indicator of potential group success. Below is a comparison of the demographics of the population of the United States compared to that of the Congress whose session ended in 2015:

<table>
<thead>
<tr>
<th>Group</th>
<th>Percentage of Population</th>
<th>Percentage of 113th Congress</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>~49.2</td>
<td>~81.5</td>
</tr>
<tr>
<td>Female</td>
<td>~50.8</td>
<td>~18.5</td>
</tr>
<tr>
<td>White</td>
<td>~74.8</td>
<td>~82.5</td>
</tr>
<tr>
<td>Black</td>
<td>~13.1</td>
<td>~8.3</td>
</tr>
<tr>
<td>Latino</td>
<td>~16.7</td>
<td>~7.0</td>
</tr>
<tr>
<td>Asian</td>
<td>~5.0</td>
<td>~2.4</td>
</tr>
<tr>
<td>LGBTQIA</td>
<td>~3.4</td>
<td>~1.3</td>
</tr>
<tr>
<td>White Males</td>
<td>~36.8</td>
<td>~68.0</td>
</tr>
</tbody>
</table>

The numbers show that a group’s federal representation will somewhat mirror its countrywide population; a basic linear regression of the two for the groups above (not including White males so as not to double count) shows an \( r^2 \) value of .73, which means there is a very solid correlation between them. However, every group except Whites and males (and the cross section of the two) exhibit lower representation in Congress than their overall demographics would suggest. This should not be surprising given the history of socioeconomic domination of Whites and males in America and the zero-sum nature of demographic statistics (for example, if a white or male is elected to a seat, necessarily a non-white or non-male is not).

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18 For more on \( r^2 \) value, also known as the “coefficient of determination,” see generally Penn State Eberly C. of SCI., The Coefficient of Determination, \( r^2 \)-squared, https://onlinecourses.science.psu.edu/stat501/node/255 (stating that “Social scientists who are often trying to learn something about the huge variation in human behavior will tend to find it very hard to get \( r^2 \)-squared values much above, say 25% or 30%. Engineers, on the other hand, who tend to study more exact systems would likely find an \( r^2 \)-squared value of just 30% merely unacceptable”).
Strict population percentages for a group are not as valuable for quality political power analysis independent of the other inputs; indeed, inputs simply have to be looked at holistically. For example, in order to understand the discrepancy for most minority groups between their population percentage and their congressional percentage, we need to better understand the group’s financial position and how the public views the group, which are both incredibly important to winning seats on the Hill.

It is also important to note just how small of a percentage of the population LGBT members are compared to popular misconceptions. Gay activists used an obscure passage from an Alfred Kinsey book in the 1970’s to argue that the LGBT population hovered somewhere around ten percent in an attempt to choose a number that was significant but not threatening. Unfortunately, that number has still stuck around and is used as an informal statistic by many, overestimating the political might of gays. In reality, a Gallup poll, which used the largest representative sample of LGBT men and women ever, found the number to be roughly 3.4%. That number also includes bisexuals, whom the Supreme Court does not seem to consider as being independently constitutionally implicated. Since the Court is focusing on homosexuals, the number it should focus on is probably maxed somewhere around 1.7% considering that recent studies have shown that self-identified bisexuals outnumber self-identified gays.

The presence of the closet also complicates demographic statistics of the LGBT community. There seems to be a consensus that self-identification for race is not the same as for sexual orientation, and that there are many more gays in the population than studies show. For political power analysis, however, the potential presence of these “silent members” seems to do us little good. Aside from some sort of closeted political action, such as voting for or supporting gay politicians or allies, closeted members will have an extremely limited impact on the group’s overall progress. In fact, some studies have supported the age-old notion of the “closeted homophobe,” meaning that closeted gays actually are not silent and are instead counterproductively vocal in a way that cannibalizes group resources.

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21 Or, at the least, the Court has not articulated, in regard to suspect class analysis, if bisexuals are a subsection of hetero or homosexuals, a separate group, or something else altogether.
23 Id. (quoting activist Cathy Renna as saying, “of course [9 million] is an undercount”).
B. Wealth

In a post-Citizens United capitalist democracy, the connection between wealth and political power cannot be understated. High-income citizens are more likely to vote than low-income citizens. US senators are more responsive to constituents who are affluent, and statistical evidence shows the bottom third of income distribution have zero effect on their senators’ roll call votes. The wealthy help to shape ideology and social norms that eventually permeate into more tangible policy. Corporations spent almost one billion dollars on political lobbying in 2010 alone. Not only is money important in order to get your voice heard in Washington, it is also important in order to get the opportunity to legislate. Fifty-seven members of the Congress in 2011 were in the top one percent of wealth; 250 of them were millionaires and their median net worth was $891,506, nine times that of the average household.

But just as the population of gay Americans has been mythically overstated, so has their economic success. A report by the Williams Institute at UCLA finds that poverty is a major problem in the gay community. The study found that “gay and lesbian couple families are significantly more likely to be poor than heterosexual married couple families”; that “children in gay and lesbian couple households have poverty rates twice those of children in heterosexual married couple households”; and that lesbian couples are economically worse off than both heterosexual couple households and gay male couple households. Below is the median income for certain groups compared to their congressional representation.

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32 Id.
<table>
<thead>
<tr>
<th>Group</th>
<th>Median Annual Salary</th>
<th>Percentage of 113th Congress</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>$47,715</td>
<td>~81.5</td>
</tr>
<tr>
<td>Female</td>
<td>$36,931</td>
<td>~18.5</td>
</tr>
<tr>
<td>White</td>
<td>$54,620</td>
<td>~82.5</td>
</tr>
<tr>
<td>Black</td>
<td>$32,068</td>
<td>~8.3</td>
</tr>
<tr>
<td>Latino</td>
<td>$37,759</td>
<td>~7.0</td>
</tr>
<tr>
<td>Asian</td>
<td>$64,308</td>
<td>~2.4</td>
</tr>
<tr>
<td>LGBT (household)</td>
<td>$91,558</td>
<td>~1.3</td>
</tr>
<tr>
<td>Heterosexual (household)</td>
<td>$95,075</td>
<td>~98.7</td>
</tr>
</tbody>
</table>

Gay families seem to be in strong financial competition with their heterosexual counterparts on average, but as the study above showed they are also much more likely to fall under the poverty line.\(^{34}\) Moreover, although there is less data available in this area than is true of that for gay couples, studies have shown that non-partnered gay individuals also make less than both partnered gays and non-partnered heterosexuals.\(^{35}\)

Personal finances are also significantly different from successful group lobbying. The Human Rights Campaign, the largest LGBT equal rights advocate in America, came in 359th place of the top spenders in lobbying for 2012.\(^{36}\) While that number is not terrible considering the advocate is going against the likes of the US Chamber of Commerce and Google, it also is pretty far down for the largest advocacy group of its kind. Gay lobbying is far less powerful than the conservative myth of the omnipotent, megalithic “gay agenda” that the late Justice Scalia, in his Lawrence dissent, said had deeply influenced the law-profession culture.\(^{37}\)

**C. Societal Clout**

Quakers seem as vulnerable as any group based on the inputs above: there are only 130,000 of them in the country and they do not seem to have amassed any

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34 This most likely means that more gays reside at the ends of the income distribution gradient than is the case for heterosexuals (for example, if you are gay and poor you are more likely to be very poor than if you are straight and poor, and the same goes for being gay and rich). See Albelde et al., supra n. 31, at iii (finding that “After controlling for other factors, same-sex couples are significantly more likely to be poor than heterosexual couples”).

35 See Joe Clark, Full Findings: Singles as opposed to couples, GAY MONEY, http://joeclark.org/gaymoney/findings/#singles.


37 Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). Conservatives also argued that the gay agenda was using biased pollsters prior to the 2012 election in order to drum up support for Barack Obama by lying about polling data to show him as the favorite. Of course, not only was this homophobic conspiracy theory laughably wrong, but gay statistician and blogger Nate Silver ended up predicting all 50 states correctly. See Jordan Sargent, Don’t Listen to Nate Silver’s Gay Polls, Says Superstar Conservative Pollster, GAWKER (Oct. 27, 2012, 4:06 PM), http://gawker.com/5955480/dont-listen-to-nate-silvers-gay-polls-says-superstar-conservative-poster.
spectacular amount of wealth. But Quakers are not in a poor position because there is no apparent animosity toward them. If there were any reason for the majority to make the lives of Quakers miserable, it would not be easy for the group to defend itself, but at this point nobody is proposing anti-Quaker referenda. Societal clout, which is a group’s social standing based on the public’s attitude towards it, is important because it can serve as a weathervane for potential animosity-inspired legislation. Although the history of the discrimination prong takes into account prior feelings of societal ill will, current public views are just as important.

Despite a recent media and political narrative of societal acceptance of gays, they are still one of the most targeted, discriminated against, and distrusted groups in society. For example, thirty-one percent of the country still thinks that not only should same sex marriage not be allowed, but that gay relationships should be illegal. This number was as high as 40% in 2009, but also as low as 35% in 2003, 36% in 1989, and 39% in 1982. However, it also hit 57% in 1988 and 49% in 2004, demonstrating just how non-linear public opinion can be (despite the media’s insistence that the trend in the status quo is somewhat permanent). A 2006 study found that 22.6% of respondents to a poll did not think gays shared their vision of American society, slightly better than the rate for Muslims and five times as high as that of African-Americans. Thirty-six percent of the nation still opposes allowing gays to adopt. Thirty-nine percent of the country thinks gay marriage will make things worse, while forty percent thinks there will be no effect and only nineteen percent thinks it will make things better.

A significant hurdle in looking at these polls is the perception that homophobia and similar biases are fading away as society progresses, thus making it less necessary for the judiciary to step in. Professor Richard Epstein specifically warned

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40 Gay and Lesbian Rights, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (also finding that less than half the country thinks someone is born gay and that thirty-eight percent of the country still finds homosexuality to be “morally wrong”).

41 Id.


against the Court creating backlash to gay rights by jumping ahead of the majoritarian opinion. He wrote:

We can and should make an immense advance in this particular area, but the only way we are going to be able to do it is to pull the reins back a little bit and let the horse go at a slower pace. Whip the horse forward and you may collapse the entire carriage.\(^{46}\)

Epstein is using a statistical narrative (that public opinion is rapidly shifting more pro-gay) in order to argue for temperate judicial restraint. However, one should not take marginal progress and drape a “Mission Accomplished” banner over it. The only reason people are shocked by how quickly homosexuality is being accepted is because of how far the movement has had to come to even get to this mediocre position. In other words, it was once so bad to be a gay American that a poll saying only a third of the country wants to illegalize gay relations is somehow seen as an incredibly positive development in societal tolerance.

That is not to say that the progress the gay rights movement has fought for so strongly is really some sort of illusion; the gains are completely real and show the fortitude of the movement’s organizational and strategic abilities. But that does not mean the war has been won whatsoever, and the numbers are still awful in many places. Seventy-five percent of Arkansas residents opposed same sex marriage in 2004, with a political consultant saying, “You can’t be for gay marriage and be a statewide elected official in Arkansas.”\(^{47}\) Public attitude toward same sex marriage has been basically unchanged in over a decade in most southern states.\(^ {48}\) Even though overall hate crimes are down thirty percent since 1996 (with those against Blacks down forty-three percent), anti-gay hate crimes increased from 1,206 in 1996 to 1,256 in 2011.\(^ {49}\) Sixty-five percent of Americans do not approve of teaching children that homosexuality is a normal alternative lifestyle.\(^ {50}\) Meanwhile, self-reported discriminatory opinions against other groups with suspect classification are much lower than that against gays.\(^ {51}\) When a last place sports team wins a few games in a row, it does not mean the team is in the playoffs; it just means the team is doing better than its earlier poor performance. It is dangerous to conflate marginal increases in societal tolerance with the end of homophobia.

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51 Page, *supra* note 43.
CONCLUSION

The concept of political power seems, at least for those who argue the issue in court, more apt for vague and grandiose evidence. The motion for summary judgment for the Proposition 8 proponents mostly included quotes from politicians and pieces of legislation, as compared to any hard data or high-level analysis.52 Still, if the concept is to be taken seriously as doctrine, which in the light of Windsor and Obergefell is all the more unclear, a more rigorous approach is absolutely necessary. The judiciary’s role is to step in where the political process has failed, but it is difficult to decipher just when a group is vulnerable to the tyranny of the majority. While outputs are what every group is aiming for, the courts should look to inputs to see whether or not they are likely to get them.

NOTE

Organizing in the Shadows: Limits on Union Organization of Undocumented Day Laborers

Paige Coomer

ABSTRACT

This Note illustrates how the current US labor scheme acts as an impediment to union organization of undocumented day laborers. While the market for these contingent workers grows, so too does the need for worker protection from abuses. However, unions face legal and structural barriers that prevent them from effectively organizing day laborers. Ultimately, these legal and structural barriers show that the US labor scheme as a whole is incapable of effectively responding to the needs of day laborers, and by extension, to the needs of a globalized, migrant workforce. My Note argues that by failing to adapt to changes brought on by globalization, our labor law cannot be harnessed to protect vulnerable day laborers. As they stand, our labor laws secure the place of day laborers in the shadows of our working society.

INTRODUCTION

“They thought we Latinos were disposable workers.”¹

Josue was recruited from a street corner in New Orleans by an employer offering promising work for wages.² He was one of several jornaleros—day laborers, or temporary workers—hired to clean up portions of a Texas town that was destroyed by Hurricane Ike in 2008.³ Josue accepted the employer’s offer, relying on the promise of good work, payment, and decent working conditions.⁴ However, when Josue arrived for his first day of work, he was placed in an isolated labor camp, forced to perform dangerous work in toxic conditions with no protective equipment, and had no one to turn to for help.⁵ Josue and his fellow day laborers not only risked their health by performing dangerous construction work, but also faced discrimination and wage

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² Id.
³ Id.
⁴ Id.
⁵ Id.

* Executive Notes and Comments Editor, Indiana Journal of Law and Social Equality, Volume 5; Indiana University Maurer School of Law, May 2017; Centre College B.A. 2014. I would like to thank Professor Fred Aman for his guidance and for his constant reminders that we, as law students, can effectuate change. Thanks as well to Professor Kenneth Dau-Schmidt for sparking my interest in labor law, and to the Peggy Browning Fund for inspiring me and countless other students to fight for workplace justice. This note is dedicated to my mother, Lou Anne Coomer, the hardest worker and fiercest union supporter I know.
theft from their employers. When Josue protested against his employer for stealing wages, his employer called Immigration and Customs Enforcement (“ICE”). Josue, an undocumented worker, spent 78 days in jail for demanding $250 in unpaid wages.

Day laborers stand on sidewalks, street corners, and parking lots, waiting to be picked up by employers who offer temporary work. Often invisible to mainstream America, day laborers build our houses, farm our land, and cook our meals—moving our day-to-day lives ever-forward through their work in the low-wage labor market. Of these “men on the corner,” three-quarters are undocumented. And, as the above narrative demonstrates, many undocumented day laborers face rampant abuse from employers.

Josue’s situation is not uncommon. In any given day, approximately 117,600 undocumented day laborers search for work. Employers in industries such as construction and agriculture often take advantage of the undocumented labor market because such labor is cheap and flexible. Further, undocumented workers themselves often seek day labor jobs because of their informal, “no questions asked” nature. The jobs are quick and temporary, and employers often do not require the verification documents and English language skills required by more formal employment opportunities. However, such informality puts day laborers in a tenuous position: employers can withhold wages and place workers in unsafe

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6 Id.
7 Id.
8 Id.
10 Throughout this paper, I will refer to day laborers using the pronoun “he” because the majority of undocumented day laborers are male, with women comprising roughly two percent of the day labor population. Id. at 18. For an article discussing the unique problems women day laborers face, see Elizabeth J. Kennedy, The Invisible Corner: Expanding Workplace Rights for Female Day Laborers, 31 BERKELEY J. EMP. & LAB. L. 126 (2010).
11 Valenzuela et al., supra note 9, at iii.
12 Though day laborers come in many forms and work across various industries, this paper focuses on undocumented day laborers who migrate to the United States from the global south, namely Latin American countries. Typically, these laborers work in the construction or agricultural industries. See Rebecca Smith, An Honest Day’s Work: Day Labor Advocacy in the United States, 38 CLEARINGHOUSE REV. 355, 358 (2004).
13 Valenzuela et al., supra note 9, at i.
14 A report written by the Government Accountability Office found that contingent workers (day laborers) are paid less and have less job security than standard workers. This is because day laborers only receive work—and thus, only receive wages—when work is available. Because employers can hire day laborers at-will when work arises, they are in a more flexible position than the laborer. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, 30–31, 45–46, http://www.gao.gov/assets/670/669766.pdf (2015).
16 Id. at 375.
conditions. If undocumented workers complain, the employers simply threaten them with ICE and therefore avoid consequences for breaking the law.

As the tide of undocumented workers continues to flow into the United States, day labor is often the first place vulnerable immigrants turn to for work opportunities. But while the market for contingent workers grows, so too does the need for worker protection from abuses like those experienced by Josue. In light of this increase of day laborers and need for protection, it is essential to view day laborers within the broader labor landscape in the United States. When doing so, an interesting paradox crystalizes: the low-wage workforce continues to increase in size, but the bodies initially created to protect powerless workers—labor unions—are faltering. Traditionally, low-wage, unskilled labor in the United States was concentrated in the industrial sector. When these laborers faced workplace abuses, they unionized. Through collective action, industrial unions negotiated fair collective bargaining agreements to set wage and hour floors and promote fair workplace practices. After WWII, roughly forty percent of the working population was unionized. But as industrial workplaces have moved overseas to take advantage of cheap labor markets, union membership in the United States has steadily declined. Labor’s industrial stronghold, affected and changed by “a new epoch of global production and finance,” no longer exists to the extent it once did. Today in the United States, only twelve percent of the workforce is unionized.

Ultimately, both the growth of the undocumented, contingent workforce and the steady disappearance of labor unions as a viable source of collective action illustrate changes in domestic labor brought on by globalization. While unions once organized the industrial laborer of the past, the face of the worker has, in many ways,

19 Valenzuela et al., supra note 3, at 2 (writing that “[f]or 60 percent of day laborers, this work was the first occupation they had held in the United States.”)
20 See Jake Blumgart, Bonds of Steel, THE AMERICAN PROSPECT (Nov. 5, 2010), http://prospect.org/article/bonds-steel (noting the fragmented nature of U.S. labor unions and that present-day unions have not “figured out how to defend their members”).
21 See id. (writing that organized labor has shifted from industrial unions to service and public sector unions because jobs in these areas are not so easily outsourced).
22 The establishment of the Wagner Act, or National Labor Relations Act, gave workers the right to “organize and bargain collectively through representatives of their own choosing.” FRANK W. MCCULLOCH & TIM BORENSTEIN, THE NATIONAL LABOR RELATIONS BOARD 1510 (1974). In doing so, workers could create greater economic stability for themselves, as collective bargaining would “promote both a higher level of real wages and a better distribution of the national income.” JAMES B. ATELSON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 42 (1983).
25 Blumgart, supra note 20.
26 Uchitelle, supra note 23.
Undocumented workers—and more specifically, day laborers—provide a vivid illustration of this change. With roughly 11.1 million undocumented immigrants in the United States, undocumented workers occupy a key position in the US economy. The work that day laborers like Josue perform is vital, but the undocumented workers that perform day labor are some of the most vulnerable members of our society. This “vulnerability” comes not only from their status as undocumented workers, but from the fact that our labor laws and institutions—labor unions, specifically—that are meant to protect workers are incapable of reaching day laborers.

If we assume that the purpose of unions in the United States is to protect workers’ rights and set a baseline for fair workplace practices through collective bargaining, then unions are a logical place to turn when trying to determine how day laborers might be protected from abuse. A large population of workers desperately need the benefits of collective organization, but as they stand, unions face significant barriers to organizing these laborers. As a result, day laborers are excluded from national labor protections.

The purpose of this Note is to explore the barriers that prevent unions from reaching day laborers. In doing so, this Note first places the plight of day laborers in a global context by exploring why such barriers exist. Ultimately, these barriers arise as labor laws and labor institutions fail to adapt to a new globalized workforce. Next, this Note discusses in detail both the legal and structural barriers that prevent unions from organizing day laborers. Legal barriers involve both definitional restrictions that prevent day laborers from falling within the National Labor Relations Act’s grasp and the tension between upholding workers’ rights while, at the same time, enforcing strict immigration policies. Structural barriers involve the nature of a globalized, day labor workforce, and how traditional union organization does not comport to the characteristics of such workers.

Further, this Note explores alternative labor solutions that try to give day laborers the same workplace protections that unions have traditionally sought to achieve. Specifically, these alternatives are the transnational labor citizenship
model and the worker center model. Both of these models respond to the legal and structural obstacles presented by the barrier analysis. As such, my analysis of both the barriers and the proposed solutions demonstrates what happens to organizations—here, unions—when they fail to adapt to globalizing forces: the result of failure to adapt is exclusion, and day laborers suffer from such exclusion.

I. DAY LABOR IN THE CONTEXT OF GLOBALIZATION

Before exploring the barriers that prevent the organization of day laborers, we must first discuss the forces that led to the rise of an undocumented contingent workforce. Ultimately, globalization changed both the face of the domestic worker and the domestic workforce. By failing to adapt to these changes, domestic labor laws and unions are unable to protect day laborers.

Returning to Josue’s story, what led workers like Josue to come to the United States, and how can his tenuous position as an undocumented day laborer be explained? Essentially, day laborers are part of a broader pool of migrant workers who fled poverty and economic stagnation in search of opportunity in the United States. But more than that, migrant workers reflect the “internationalization of production.” In her work *The Mobility of Labor and Capital*, Saskia Sassen explains that the expansion of export-oriented manufacturing in foreign countries led to the mobilization of migrant workers.

When our economy internationalized, “transitional space” was formed, in which workers flowed, following trade patterns in reverse by following investment back to its source. This pattern, and the close economic integration between the United States and countries like Mexico, accounts for the number of immigrants in the United States from Latin American countries. Further, it should be noted that

34 See, e.g., Smith, supra note 12, at 355–56; Justin McDevitt, Note, *Compromise is Complicity: Why There is No Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 A.B.A. J. LAB. & EMP. L. 101, 118–19 (2011); Eidelson, supra note 27.
35 Eidelson, supra note 27.
36 Immigration comes in diverse forms. See Aman & Rehrig, supra note 28, at 48 (writing that “immigration is not a monolithic or single phenomenon, but one that is extremely diverse even within a single country’s experience.”). For this Note, the focus is on immigrants from Latin American countries—particularly Mexico—because Latinos make up the largest percentage of day laborers. See Valenzuela et al., supra note 9, at iii (finding that most day laborers are Latino, with fifty-nine percent from Mexico).
38 Id. at 3.
39 Id. at 15.
when migrant workers come to the United States, they are not necessarily fleeing poverty, but are more likely seeking economic freedom and mobility. Workers have complex reasons for migrating to the United States, but many do not intend to stay. Rather, an increasing number of migrant workers hope to find work in the United States so they can finance economic goals back home. These complex factors perhaps explain why workers like Josue come to the United States in the first place.

The analysis above helps explain why migrant workers are here, but the next step in our analysis is determining why workers like Josue are in such vulnerable positions: Why is day labor needed, and why is it rife with abuses? Ultimately, the demand for day labor is the result of economic pressure for greater labor market flexibility in the United States. Today, low-skilled work is characterized by short-term contracts, temporary placements, and employers’ ongoing demand for cheap labor. This reality is especially present in the construction industry, where many day laborers are concentrated. Additionally, because industrialized jobs have largely moved overseas, where labor is cheaper, day laborers need contingent work just as much as employers need day laborers. The low-skilled, factory jobs of the past are no longer present in the United States as they once were. This ever-growing need for cheap labor, combined with the supply of a migrant-labor workforce in the United States, allows the day labor sector to prosper.

However, it is the contingent and informal nature of day labor, combined with the fact that many day laborers are undocumented, that allows such work to be rife with abuses. Historically, when workers felt oppressed by their employers, they organized. Such collective organization was protected under the National Labor Relations Act (NLRA) as a necessary way to prevent industrial strife. However, the NLRA, and unions by extension, were developed during a time when both workers and the work they performed were intrinsically different than day laborers and the work they perform today. But because of the globalizing forces mentioned above, that reality has shifted. Industries have largely moved overseas, and the service sector jobs that day laborers frequent are both common and essential for the maintenance of our economy. The exploited worker is no longer the industrial laborer of the past; rather, it is the undocumented worker, and by extension, the day laborer.

41 Massey, Seeing Mexican Immigration Clearly, supra note 40.
42 Id.
43 Id.
44 Id. at 6.
45 Id. at 1.
46 See id.
47 See id. at 2.
49 See McCulloch & Borenstein, supra note 22, at 15.
51 See Eidelson, supra note 27.
If labor law was created to protect workers, and if day laborers are a population of workers that need protection, then it is clear that the current labor scheme fails to effectuate its protective purpose because that scheme has not adapted to changes in the US workforce brought on by globalization. In analyzing this failure, this Note next discusses some of the most prominent legal and structural barriers to organizing day laborers. Further, by looking at scholars and organizations that have actively sought to protect day laborers, this Note highlights how the effective organization of the contingent workforce requires activists to go outside of the traditional US labor scheme. Woven through this analysis is recognition of the stark reality before us: that when our protective laws and institutions do not adapt to the changes that globalization brings, then vulnerable sects of our population are excluded from receiving protection. With that in mind, our labor laws, and unions as an institution, must shift to incorporate a global perspective if groups like day laborers are to receive workplace protections.

II. Barriers: Legal and Structural Limits on Unions That Prevent Day Labor Organizing

Domestic labor laws, which were created in light of a different economic reality than we have today, do not adequately protect the new, globalized workforce that day laborers represent. This is because there are certain legal and structural barriers that prevent our laws and institutions from providing undocumented migrant workers with labor protections. Legal barriers include the exclusionary way that our labor law characterizes day laborers and the tension between effectuating immigration controls while promoting workers’ rights—a tension that has been answered by favoring tough immigration policies. Structural barriers refer to traditional exclusionary perceptions of immigrants held by labor unions, and how the nature of day labor work does not readily lend itself to the union model. These barriers show that the traditional union model—and the US labor scheme as a whole—is incapable of effectively responding to the needs of day laborers, and by extension, to the needs of a globalized, migrant workforce.

A. Legal Limitations to Organizing Day Laborers Under the NLRA

The National Labor Relations Act of 1935 (NLRA) governs the relationship between employers and unions. The NLRA was created to facilitate collective bargaining between employers and employees. In the Preamble to the NLRA, Congress noted that the “inequality of bargaining power” between managers and laborers “affects the flow of commerce,” thereby impeding the success of the national

55 Atelson, supra note 22, at 42.
economy altogether.\textsuperscript{56} It was thought that protecting the rights of workers to organize and bargain with employers was a way to eliminate economic warfare.\textsuperscript{57}

There are limits to organizing day laborers under the NLRA, and these limits demonstrate how the NLRA fails to accommodate for a globalized workforce.\textsuperscript{58} First, NLRA protection only extends to those who are considered “employees” under the Act.\textsuperscript{59} Because day laborers are often excluded from the definition of “employee,” such workers cannot organize under the NLRA.\textsuperscript{60} Second, the rise of undocumented workers in the United States has led to a tightening of immigration policy.\textsuperscript{61} Such policy tends to conflict with workers’ rights, because undocumented workers are not legally allowed to maintain employment in the States.\textsuperscript{62} Ultimately, stricter immigration policy has blocked unions from reaching groups like undocumented day laborers. Thus, under current US labor law, day laborers are widely excluded from union representation. Due to these legal barriers, US labor law, created for an industrial workplace that no longer exists, does not adequately protect the undocumented worker and does not reflect changes in the American workforce spurred by globalization.

\textbf{i. Employee/Independent Contractor Distinction}

Though the NLRA protects the rights of employees, under Section 2(3), the Act excludes certain workers from its protections. Specifically, it excludes domestic workers, agricultural laborers, and independent contractors.\textsuperscript{63} Historically, undocumented workers have occupied these areas.\textsuperscript{64} Though the NLRA’s protections generally apply to undocumented workers,\textsuperscript{65} such protections do not extend to the undocumented worker who is classified under one of the three exceptions listed above.\textsuperscript{66}

Day laborers are often classified as independent contractors.\textsuperscript{67} Whether one is an independent contractor is determined by the common law “right to direct and control” test, which looks at various factors regarding the extent of control the employer has over the employee to determine whether the employee is an

\begin{footnotes}
\item[56] 29 U.S.C. § 151 (1935); see also Atelson, \textit{supra} note 22, at 42.
\item[57]  \textit{Id.}
\item[58]  See generally 29 U.S.C. § 152.
\item[59]  29 U.S.C. § 152(3).
\item[60]  McDevitt, \textit{supra} note 34, at 102.
\item[61]  \textit{Id.} at 120.
\item[63]  \textit{Id.} at 102.
\item[64]  McDevitt, \textit{supra} note 34, at 102.
\item[66]  29 U.S.C. § 152(3).
\end{footnotes}
independent contractor.\textsuperscript{68} When enough of these factors are met, courts will classify
the worker as an independent contractor, and thus not afford the worker NLRA protections.\textsuperscript{69}

Because the nature of day labor is often temporary and informal, many
employers of day laborers classify them as independent contractors.\textsuperscript{70} For instance, 
day laborers are often hired by private homeowners to perform discrete, short-term
construction work. Employers will argue that these workers are independent
contractors based on the informality and short length of the project.\textsuperscript{71} In his work \textit{The Rise of the Contingent Workforce: The Key Challenges and Opportunities}, Richard
Belous lists factors that distinguish contingent workers, including day laborers and
independent contractors, from “core” employees.\textsuperscript{72} Specifically, contingent workers
are distinguishable because of their (1) weak affiliations with the employer; (2) lack
of an implicit long-term contract; (3) insignificant stakes in the company; and (4) lack
of relationship with corporate family.\textsuperscript{73} This independent contractor classification is
favorable to the employer—and to an extent, the laborer—because it is not required
that the immigration status of independent contractors be ascertained.\textsuperscript{74}

Additionally, the classification is beneficial to employers of day laborers
because it means they do not have to engage in official, NLRA-controlled collective
bargaining.\textsuperscript{75} Thus, an employer can exercise more control over his workers without
the fear of violating the NLRA’s workplace and union protections.\textsuperscript{76} But ultimately,
classifying a day laborer as an independent contractor is harmful to the worker
precisely because it puts the day laborer outside the scope of the NLRA. Excluded
laborers are denied the legally protected right to organize, and while these laborers
can certainly still organize in an informal fashion, they cannot join or form a legally
recognized union, nor can they create a legally-binding collective bargaining
agreement with their employer.\textsuperscript{77} The NLRA does not contain a private right of
action, so without an official union that can allege employer violations to the National

\textsuperscript{68} See, e.g., Roadway Package Sys., Inc., 326 N.L.R.B. 842 (1998); NLRB v. United Insurance Co. of Am., 
390 U.S. 254 (1968). Factors considered in determining whether one is an independent contractor
include: 1) the extent of control by which an employer may exert over the worker; 2) whether or not the
worker is “engaged in a distinct occupation or business”; 3) the type of occupation, and whether such
work is usually done under the direction of an employer or without supervision; 4) the skill required in
the occupation; 5) whether the worker supplies his own tools; 6) the length of time for which the person
is employed; 7) the method of payment; whether the work is part of the employer’s regular business; 8)
whether or not the parties believe they are creating a master servant relationship; 9) and whether the
principal is or is not in business. Rest. (Second) of Agency § 220(2) (1958).

\textsuperscript{69} Id.; see also Roadways, 326 N.L.R.B. at 849.

\textsuperscript{70} McDevitt, supra note 34, at 102.

\textsuperscript{71} Id.

\textsuperscript{72} Richard S. Belous, \textit{The Rise of the Contingent Workforce: The Key Challenges and Opportunities}, 52

\textsuperscript{73} Id.

\textsuperscript{74} McDevitt, supra note 34, at 102 (Note, however, that federal regulations like the Immigration Reform
and Control Act make it illegal for employers to hire workers who the employer is certain are
undocumented).

\textsuperscript{75} See 29 U.S.C. § 153(3).

\textsuperscript{76} See Griffith, supra note 67, at 139.

\textsuperscript{77} See id.
Labor Relations Board, day laborers who are deemed independent contractors are entirely left out of the sphere of the NLRA’s protections.78

Just as it is problematic for day laborers, the independent contractor classification is also problematic for unions who wish to organize these workers. In fact, many labor advocates believe such workers are often misclassified as independent contractors, when in reality they are “employees” under the NLRA.79 In its written statement on “Employment and Labor Protections” for day laborers, the National Employment Law Project wrote that labor legislation like the NLRA should be read to “broadly protect day laborers and other contingent workers.”80 Further, scholars have noted the difficulty of applying the traditional “right to direct and control” test to day laborers.81 Because the test is “unwieldy” and relies on a variety of distinct factors, day laborers who might be classified as independent contractors by courts in one region might not be considered independent contractors for performing the same work in another location.82 The result is that unions could organize some day laborers under the NLRA, but not others.83 The Department of Labor has highlighted the dangers of misclassifying workers as independent contractors: beyond being exempt from the NLRA, day laborers who are classified as independent contractors are denied access to minimum wage, overtime compensation, medical leave, employment benefits, and workplace safety.84

Essentially, the classification of day laborers as “independent contractors” under the NLRA—and the NLRA’s broader exemptions of domestic laborers and agricultural workers, who often happen to be undocumented immigrants—does not reflect workplace changes catalyzed by globalizing forces. Day labor is an ever-growing sector of our service economy.85 As such, when these workers are considered independent contractors, a significant majority of undocumented workers then fall outside the scope of the NLRA.86 Thus, the independent contractor exception creates a “gap” in workplace protections. The NLRA’s exceptions to the “employee” definition certainly might have worked in our past manufacturing, industrial economy, but it does not conform to today’s service economy, where work is often temporary and informal in the sectors most widely populated by day laborers. Because unions are formed under the NLRA, and the NLRA’s exceptions to coverage often block day laborers from union organization, the NLRA acts as a legal barrier to union organization of day laborers.

78 Id. at 142–43.
79 See Dep’t of Labor, Misclassification of Employees as Independent Contractors (Nov. 15, 2015), http://www.dol.gov/whd/workers/misclassification/#stateDetails.
81 E.g., Griffith, supra note 67, at 142–43.
82 Id.
83 Id.
84 Id.
85 Id.
86 See id. at 3.
ii. Policy Conflicts Between Labor Law and Immigration Law

Even if a day laborer is considered an “employee” so as to fall under the auspices of the NLRA, other legal limits of organizing day laborers under the NLRA exist in the contention between workers’ rights and enforcement of immigration policies. Legal scholar María Pabón López noted that the undocumented workers’ current place in the US legal system is one of “hostile inconsistency.”\(^\text{87}\) The “inconsistency” comes from the tension between the NLRA, which operates with the goal of protecting workers’ rights, and immigration policy like IRCA, which tightens and controls the undocumented workers’ role in US workplaces.\(^\text{88}\) The “hostility” appears in court precedent that considers the place of the undocumented immigrant in the world of workers’ rights.\(^\text{89}\) By analyzing the policy goals of the NLRA and immigration legislation like the Immigration Reform and Control Act (IRCA), and by looking at Supreme Court decisions that limit undocumented workers’ rights, this section illustrates how hostile immigration policy acts as a barrier to organizing day laborers under the NLRA and the US legal system as a whole. As was the case with the independent contractor distinction, the failure of the legal system to extend protections to undocumented day laborers again represents the failure of our legal bodies to adapt a sufficiently global perspective when regarding the rights of such workers.

The tension between labor and immigration policy is most vividly depicted in the Supreme Court’s decision in \textit{Hoffman Plastics Compounds v. NLRB}.\(^\text{90}\) In \textit{Hoffman}, the Supreme Court grappled with whether undocumented workers, who are considered “employees” under the NLRA,\(^\text{91}\) are entitled to the same remedies for unfair labor practice as “legal” workers.\(^\text{92}\) The Court found that while some remedies are still available to undocumented workers, such workers are not entitled to either back pay or reinstatement when subjected to unfair labor practices.\(^\text{93}\) In \textit{Hoffman}, this meant that an undocumented worker who was fired due to his union participation was not entitled to receive pay for three years of work he lost due to his employer’s retaliation for union participation, nor was he allowed to return to his lost job.\(^\text{94}\)

In making its decision, the Supreme Court discussed the tension between immigration policy and workers’ rights. As noted, undocumented workers are broadly considered “employees” under the NLRA (as long as they do not fall under one of the three exceptions mentioned above), meaning they receive the Act’s labor

\(^{87}\) Pabón López, supra note 30, at 303.

\(^{88}\) Id.


\(^{90}\) Id.


\(^{92}\) See generally Hoffman Plastic Compounds, 535 U.S. 137, 142 (noting that “[t]he Courts of Appeals have divided on the question whether the Board may award backpay to undocumented workers.”).

\(^{93}\) Id. at 146.

\(^{94}\) Id. at 146–47.
protections. However, under IRCA, undocumented workers are not legally entitled to work, and it is illegal for employers to knowingly hire undocumented immigrants. Thus, the Supreme Court analyzed two opposing policies: the need for powerful remedies to restore a worker back to the position he was in before unlawful retaliation, or the need to keep undocumented workers out of the workplace. The Court found that between the two legislative schemes, the policy behind IRCA—to prohibit undocumented immigrants from working—was violated by effectuating the remedies envisioned under the NLRA.

In finding that immigration law supersedes the policies behind the NLRA in the undocumented worker context, the Supreme Court in Hoffman effectively “modified the . . . remedial scheme” of the Act. Thus, in a post-Hoffman world, two of the Act’s most powerful remedies are no longer available to undocumented workers. The question becomes: How does this affect unions’ abilities to organize the undocumented workers that now represent a significant portion of our globalized workforce?

First, scholars have noted that the decision in Hoffman essentially makes it economical for employers to violate the NLRA when undocumented workers are involved. Specifically, because undocumented workers are not entitled to the NLRA’s most powerful remedies, employers who hire undocumented workers might find the costs of violating the NLRA less than the costs of workers’ union protections. This greatly diminishes the power of union organization in undocumented worker-heavy workplaces.

Additionally, scholars like Christopher David Ruiz Cameron have speculated that Hoffman essentially created a new Bracero Program. The Bracero Program, which gave Mexican nationals temporary citizenship status based on their affiliation with an agricultural labor force, ultimately resulted in the creation of an “underclass of low-wage Latino immigrants.” In theory, the Bracero Program was intended to provide some workplace protections to workers; in actuality, the laborers were kept outside the scope of our national labor law protections. The decision in Hoffman similarly pushes undocumented workers to the periphery of the US labor scheme. If the Act’s most powerful remedies are no longer available to undocumented workers, it seems less likely that these workers will have an incentive to unionize. Thus, undocumented workers are more likely to remain in the shadows after the decision in Hoffman.

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95 Sure-Tan, Inc. 467 U.S. at 891 (“The Board has consistently held that undocumented aliens are “employees” within the meaning of § 2(3) of the Act.”).
96 Pabón López, supra note 30, at 30203.
98 Id. at 146–47.
99 Pabón López, supra note 30, at 315.
100 E.g., Garcia, supra note 62, at 742.
101 Id.
103 Id. at 4.
Overall, *Hoffman* illustrates the Court’s failure to adopt a sufficiently global perspective.\(^{104}\) In other words, even though the purpose of the Act is to protect workers, the Court placed a significant portion of our labor market outside of the Act’s protections based solely on their legal status, without recognizing the prevalence of undocumented workers, their significance to the US economy, and their vulnerability to abuse. Undocumented laborers are an economic reality of our times, and this is demonstrated by the fact that undocumented workers, as a class, are considered employees under the NLRA. By not granting undocumented workers the right to back pay and reinstatement, the Supreme Court placed the interests of such workers at the periphery of labor law. And ultimately, because the Supreme Court established a broad rule that the policy goals of strict immigration regulation are favored over policy that secures workers’ rights, undocumented workers are blocked from achieving the workplace protections that labor unions and the NLRA provide. By significantly decreasing the cost of unfair labor practices to employers and by making undocumented workers outsiders to US labor protections, the decision in *Hoffman* creates another barrier to organizing undocumented day laborers.

**B. Structural Limitations**

Beyond the legal barriers found in the language of the Act and the tension between labor and immigration policy, certain structural barriers also prohibit the organization of undocumented day laborers under the traditional US labor scheme. Structural barriers refer to the inner-workings of union organization that block unions from reaching day laborers. To explore structural barriers, this section first looks toward the anti-immigration stance traditionally upheld by unions as representing a potential barrier to organization of day laborers. But ultimately, while the traditional protectionist stance taken by unions is significant, the most prominent structural barrier involves the question of whether legally recognized unions organized under the traditional union model can even reach day laborers to organize them. Again, these barriers demonstrate how our labor institutions fail to adapt to a current, globalized reality.

First, the anti-immigration stance historically adopted by most labor unions creates a sort of “moral” barrier (meaning, many union organizers would prohibit such organization as going against the union cause) to organizing undocumented day laborers. Traditionally, union organizers opposed immigration and the free flow of labor across borders.\(^{105}\) This protectionist stance was a result of labor organizers viewing immigrants as a threat to native US workers because immigrants created a cheap labor pool for employers to draw from.\(^{106}\) The idea was that more immigrants

\(^{104}\) See Garcia, *supra* note 62, at 744 (writing that the Supreme Court’s decision in *Hoffman* “illustrates the failure of labor laws originally enacted in the 1930s to respond to a changed global economic landscape”).

\(^{105}\) See Gordon, *supra* note 33, at 531–32.

\(^{106}\) See id. at 517, 550.
meant less jobs for US-born workers, and in turn, less union membership.\textsuperscript{107} Because immigration trends ultimately led to changes in the scale, skill-level, and geographical distribution of the national workforce, labor unions have consistently bound themselves to the goal of tightening immigration laws.\textsuperscript{108} In fact, until the 1980s, unions repeatedly supported legislative initiatives that curbed immigration and created stricter immigration enforcement policies.\textsuperscript{109} Unions maintained an anti-immigrant, or at least an anti-undocumented immigrant, stance through the 1990s.\textsuperscript{110} The advent of immigration, which lessened the power of unions for the reasons noted above, was viewed as antithetical to the labor movement’s call for solidarity among US workers.\textsuperscript{111}

Notably, unions have become less restrictive with regard to immigration in recent years. In 2000, the American Federation of Labor (AFL-CIO) called for “blanket amnesty for undocumented immigrants.”\textsuperscript{112} This policy shift, along with the recognition that undocumented immigrants are especially vulnerable to workplace abuses, led to organization campaigns like Change to Win—a coalition of unions representing workers in migrant-heavy agricultural and service sectors.\textsuperscript{113} Today, the AFL-CIO and its affiliates recognize the need for immigration reform to protect US workers, noting that the most effective way to afford undocumented workers protections is through giving “all workers—immigrant and native-born—... [access] to the protection of labor, health and safety and other laws.”\textsuperscript{114} But despite this shift in perception, unions still face a glaring barrier that they, ironically, promoted in the past: strict regulation of undocumented workers in the workplace. Thus, while the widespread anti-immigrant stance among unions is virtually a thing of the past, unions who wish to incorporate undocumented workers into their protective schemes are still blocked from doing so because of unions’ past legislative lobbying efforts that ultimately led to tighter immigration laws.\textsuperscript{115} Again, the legal barriers mentioned earlier come into play, and unions cannot effectively sidestep the fact that

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\textsuperscript{107} This perception was not totally invalid. Scholars at the Industrial and Labor Relations School at Cornell University have documented the relationship between immigration and union membership. When immigration is high, union membership flounders. In turn, in periods where immigration was low, union membership flourished. See the chart below for more information. Vernon M. Briggs, Jr., \textit{American Unionism and U.S. Immigration Policy}, CTR. FOR IMMIGR. STUD. 1–2 (2001).

\textsuperscript{108} Id. at 1.

\textsuperscript{109} Id.


\textsuperscript{111} Gordon, supra note 33, at 524.

\textsuperscript{112} Lee, supra note 110.

\textsuperscript{113} See About Us, CHANGE TO WIN, http://www.changetowin.org/about (last accessed Nov. 15, 2016) (showing Change to Win is affiliated with the Service Employees International Union (SEIU), United Farm Workers of America (UFW), United Food and Commercial Workers International Union (UFCW), and the International Brotherhood of Teamsters (IBT)).


\textsuperscript{115} See Briggs, supra note 107, at 1.
immigration law does create a place for the undocumented worker in the US workforce.

Additionally, unions face practical barriers to organizing undocumented day laborers. The nature of day labor, as noted earlier, is transitory and temporary.\textsuperscript{116} Undocumented day laborers stay on the job for short periods of time, and work—especially in the construction and agricultural industries—is often seasonal, so day laborers do not have a steady source of income, nor a steady employer.\textsuperscript{117} The informal nature of day labor does not fit easily within the union model. The power of a union is in its ability to set the stage for workers to sit down with employers and negotiate a collective bargaining agreement.\textsuperscript{118} This negotiation process—a union’s primary tool for securing workplace rights and protections—is difficult, if not impossible, to perform considering the informal nature of day labor work. How can unions sit down with employers to negotiate agreements on wages, benefits, and safety when the employers change daily, and the laborers are out of work shortly after receiving it?

Moreover, many undocumented workers might oppose joining the union in the first place based on fears of employer retaliation.\textsuperscript{119} In many instances, employers have deterred undocumented day laborers from contesting violations of labor law by threatening to turn them over to immigration authorities.\textsuperscript{120} Thus, undocumented workers who are victims of workplace exploitation face a catch-22: if they remain silent, they face continued exploitation; but if they speak up, they face deportation.\textsuperscript{121} Threats of deportation, coupled with widespread lack of understanding among undocumented workers about their legal rights, often curtail efforts to organize undocumented workers.\textsuperscript{122}

The above structural barriers, combined with the legal barriers mentioned earlier, work to exclude a significant population of vulnerable workers from labor protections. As noted, these “barriers” can be seen as a result of a legal and structural scheme that failed to adapt to a changing workforce. The most vulnerable and unprotected laborers are no longer the industrial workers of the past: they are the undocumented workers, like day laborers, performing service sector jobs. The failure of legislation and unions to adapt to this change leaves a gap in labor policy, and it is within this gap that day laborers are situated.

\textsuperscript{116} See Valenzuela et al., \textit{supra} note 9, at 6.
\textsuperscript{117} See \textit{id.} at 4.
\textsuperscript{118} \textit{Id.}
\textsuperscript{120} Valenzuela et al., \textit{supra} note 9, at 22; see also Velasquez-Tabir v. Immigration and Naturalization Service, 127 F.3d 456 (5th Cir. 1997) (denying relief to undocumented workers who were arrested and deported pursuant to employer’s complaint to legacy INS shortly after certification of a labor union had taken place); Impressive Textiles, Inc., 317 N.L.R.B. 8 (1995) (preventing employer from beginning to ask for documentation from workers after a successful union election, implying to workers that they would be reported to INS as a result of choosing the union to represent them); Accent Maint. Corp., 303 N.L.R.B. 294 (1991) (preventing employer from discharging undocumented workers who joined the union, threatening to report undocumented worker to legacy INS if he did not withdraw from labor union, and promising to reinstate employees if they withdrew union support).
\textsuperscript{121} Correales, \textit{supra} note 119, at 111.
\textsuperscript{122} \textit{Id.}
III. POTENTIAL SOLUTIONS: HOW ALT-LABOR TRIES TO FILL THE GAPS

Legal and structural barriers prevent unions, in their traditional form, from organizing day laborers. Thus, groups who advocate for day laborers have had to go outside the traditional US labor scheme to find creative ways to protect the rights of undocumented contingent workers. Importantly, these solutions highlight the “gaps” identified above: that both the legal scheme and structural scheme of unionization, as they stand, exclude undocumented day laborers from accessing key labor rights. These solutions demonstrate how groups and policy-makers have learned to adapt to the globalized undocumented workforce in order to afford workers basic labor rights in creative ways that circumvent traditional labor law. For legal solutions, Jennifer Gordon has proposed transnational labor citizenship, explored in Part A below. Additionally, structural solutions have been found in the worker center model, as discussed in Part B. In analyzing these solutions, it becomes clear that the path to organization is not through our current labor laws. Rather, we must look outside our traditional legal structures and find ways to adapt to the new, globalized worker encapsulated by the day laborer.

A. Filling the Legal Gaps Through Transnational Labor Citizenship

Transnational labor citizenship, a concept developed by Jennifer Gordon, attempts to knock down the legal barriers for day laborers in one sweeping reform: by giving migrant workers legal status. In doing so, it becomes less likely that workers will be blocked from receiving workplace protections due to a technicality, such as characterization of day laborers as independent contractors, or due to the tension between enforcing both labor and immigration laws. Transnational labor citizenship is a way of organizing workers as they cross borders, and a method of re-conceptualizing the relationships between nations, institutions, and private actors so as to accommodate the needs of migrant workers. Transnational labor citizenship gives migrant workers legal status through their participation in transnational labor organizations. Through labor citizenship, migrant workers act in solidarity “to achieve recognition of and compensation for their economic contributions to society.” The goal of Gordon’s proposal is to facilitate the free movement of labor while simultaneously setting baseline protections for workers.

In order to work, Gordon’s model requires nations, migrants, and transnational labor organizations to each play unique roles. First, nations—Gordon uses the United States and Mexico as an example—must negotiate a bi-national framework for facilitating transnational labor citizenship. These negotiations would involve input

123 See generally Gordon, supra note 33 (creating the concept of transnational labor citizenship).
124 Id. at 504.
125 Id.
126 Id. at 512.
127 Id. at 504–05.
128 Id. at 565–66.
from nongovernmental organizations and labor unions with experience working with migrant laborers. According to Gordon, the resulting framework would address recruitment of workers, compliance with the program, and sustainable methods of sending and receiving workers between countries. Second, migrant workers must participate in transnational labor organizations to obtain citizenship. Their participation requires compliance with certain standards. For instance, migrant workers would be required to take a “solidarity oath” with the labor organization, where they would promise not to accept work below set labor standards and agree to report employers who violate labor codes established by the organization. Last—and most essential to Gordon’s proposal—networks of transnational unions must develop to organize workers and establish baseline workplace standards. These grassroots groups would not only set rules for the workplace, but would also facilitate the sending and receiving of migrant workers by orienting them to their new workplaces and educating them on their rights. The purpose of these organizations is to organize workers despite divisions among nationality, race, and immigration status. Through workers’ participation in these transnational union networks, they maintain labor citizenship status, and can legally work in the United States.

Initially, it is clear that Gordon’s proposal knocks down some of the barriers to organizing day laborers mentioned earlier. Most noticeably, her proposal finds a way out of the legal obstacles by giving migrant workers legal status. This status perhaps allows workers to avoid the NLRA exclusions for independent contractors mentioned above, but more notably, giving workers legal status helps eradicate the tension between immigration policy and labor policy that provides a significant barrier to organizing under the NLRA. First, as mentioned above, day laborers do not fall under the NLRA if they are considered independent contractors. But under Gordon’s proposal, the entire notion that temporary, informal labor does not require the same protections as more stable work flies out the window. Gordon emphasizes that her proposal applies to all workers and all employers who are members of the network of transnational labor organizations. Thus, for those involved in the network, the distinction between “independent contractors” and full-fledged “employees” would not matter—every worker would be entitled to the same workplace protections.

Additionally, and perhaps most significantly, Gordon’s proposal seems to work around the tension between immigration laws, like IRCA, and labor law by giving undocumented workers legal status. Thus, if the tension between IRCA and the NLRA is that undocumented workers are not legally entitled to work—and thus, not legally entitled to certain workplace protections—because of their undocumented...
status, then transnational labor citizenship solves that problem by giving workers legal status. Under Gordon’s model, it is because of workers’ migrant status and participation in labor organizations—not in spite of their undocumented status—that workers are afforded protections. However, it is unclear whether her proposal is an effective work-around laws like IRCA, or if her policy cannot be implemented without changing strict immigration laws. But overall, her policy would essentially eviscerate the idea that migrant workers are not entitled protection because of their undocumented status, simply because her proposal gives workers legal status.

Of course, there are limits to organizing undocumented day laborers under Gordon’s proposal. For instance, transnational labor citizenship proposes widespread reform for workers who have not yet migrated to the United States, but it is difficult to see how her proposal could help those day laborers already in the United States who are facing continuous abuse from their employers. A retroactive application of her proposal to workers already in the United States is difficult for some of the structural reasons mentioned earlier: day laborers are often transient, living in the shadows of our communities. Further, Gordon’s proposal requires cooperation from major bodies, all with different interests. First, nations must make massive policy overhauls and agree to give legal status to workers who normally would not be afforded any sort of legal recognition at all.137 Second, traditionally hard-bordered labor unions would have to reconfigure themselves to accept large swaths of workers who might normally be seen as a threat to the domestic workforce. And last, migrant workers would have to buy into the idea. Normative to union effectiveness is the idea of solidarity—that unions are only successful if every worker buys into the cause. But in light of past failed guest worker programs—like the Bracero Program, which effectively created an underclass of migrant citizens—migrant workers might be wary of such a proposal.

However, even with these limits in mind, the purpose of this section is not to analyze the effectiveness of Gordon’s proposal, but rather to note how her proposal emphasizes the barriers to organizing day laborers that exist in our traditional legal scheme. Gordon’s proposal introduces creative ways of navigating exclusionary immigration and labor laws in the United States. Gordon creates a method of establishing legal status for migrant workers, and in doing so Gordon does not violate, but goes around laws like the NLRA and IRCA.138 By making baseline workplace rights the norm for workers who are members of the transnational union network, Gordon’s proposal ensures that each migrant worker receives protections despite the nature of the work performed and despite the lack of documentation that the worker holds.139 Additionally, by recognizing the importance of undocumented workers in the US workforce, and by recognizing the globalized nature of this work, Gordon’s model provides a sweeping solution to organizing day laborers.

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137 See id. at 570.
138 See generally Gordon, supra note 33.
139 Id.
B. Filling the Structural Gaps Through Worker Centers

With the decline of union participation and the limits of organizing under the NLRA, a strong “alt-labor” movement has developed in the United States, and its prominence is rising.\textsuperscript{140} This movement is significant for our analysis because alt-labor arose as an alternative to the traditional US labor scheme that failed to provide adequate protections to undocumented workers.\textsuperscript{141} Within this movement, worker centers—small organizations working outside the NLRA to organize day laborers—are considered the “new face” of labor organizing.\textsuperscript{142} These centers are day labor hiring sites run by non-profits and community organizations.\textsuperscript{143} Lawyers and community advocates work with day laborers and their employers to negotiate contracts and ensure workplace protections.\textsuperscript{144} The purpose of these centers is to provide a “safe place” for employers and day laborers to negotiate baseline work standards.\textsuperscript{145} As of 2013, there were 214 known worker centers in the United States.\textsuperscript{146}

Notably, worker centers are located directly in the communities where day laborers work to facilitate the bargaining process.\textsuperscript{147} Not only do these centers protect laborers’ workplace rights, but they also attempt to integrate day laborers into the broader community.\textsuperscript{148} CASA de Maryland, located just outside of D.C., has been especially successful on this front.\textsuperscript{149} The worker center’s organizing model extends beyond merely facilitating negotiations with employers to providing workers with English language classes and lessons on industry-specific skills.\textsuperscript{150} By providing educational, social, and cultural services, in addition to advocating for workplace rights, worker centers shed a light on laborers who most often work in the shadows of our communities.

In many ways, worker centers have been quite successful in providing protections for day laborers. By acting in a similar manner to union “hiring halls,” employers who want to hire day laborers will go to worker centers, where advocates bargain for fair wages and safety standards.\textsuperscript{151} By setting workplace baselines, worker centers ensure that day laborers receive some basic protections.\textsuperscript{152} Further, many worker centers provide legal services to laborers. In 2006, CASA de Maryland

\begin{footnotesize}
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\item Eidelson, supra note 27.
\item See id.
\item Id.
\item See id.; see also Smith, supra note 27, at 361.
\item See Smith, supra note 12, at 361.
\item Id.
\item Eidelson, supra note 27.
\item See Gordon, supra note 33, at 582–83.
\item David Rosenfeld, Worker Centers: Emerging Labor Organizations Until They Confront the National Labor Relations Act, 27 Berkley J. Empl. & Labor L. 470, 472 (2006).
\item Services, CASA DE MARYLAND, http://wearecasa.org/what-we-do/services/ (last visited Aug. 18, 2016).
\item DePillis, supra note 149.
\item Id.
\end{enumerate}
\end{footnotesize}
recovered over $200,000 in back wages for day laborers. In light of the successes of groups such as CASA de Maryland, the National Day Laborer Organizing Network (“NDLON”) was established in 2001 as an umbrella group for worker centers and day laborer allies. Today, NDLON-member organizations undertake local and regional campaigns and promote legislative changes on behalf of day laborers.

Despite the widespread success of worker centers and NDLON, these organizations face significant challenges. While the NLRA certainly provides obstacles to organizing day laborers, it also provides legitimacy. Once a union recognizes a group of workers, those workers are party to a collective bargaining agreement that employers and workers alike are required to negotiate periodically. Alt-labor groups are potentially limited by this lack of collective bargaining rights. Additionally, while unions are financially supported by their members, worker centers are supported by outside donors. They thus lack the same financial stability that comes with being in a union. And last, these centers face widespread backlash from communities and politicians. Communities often think that day labor, and worker centers by extension, brings crime into cities. Additionally, politicians and anti-labor groups have criticized worker centers as end-runs around the NLRA. Groups like Worker Center Watch view worker centers as a tactic by “Big Labor” to circumvent legal restrictions placed on unions.

Despite these limitations, worker centers have been able to do what unions did with a traditional workforce, but have thus far been unable to do with day laborers. In other words, worker centers have protected workers by sitting down with employers and laborers and negotiating workplace terms. In this way, the worker center model, as a development outside the traditional union sphere, knocks down some of the structural barriers mentioned earlier. As noted, unions face structural barriers to organizing day laborers because of past anti-immigration perspectives, but more significantly, because of the temporary, informal nature of day labor work,

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155 See id.
157 See Eidelson, supra note 27. However, it should also be noted that falling outside the NLRA is precisely one reason why worker centers have been so successful. See also Rosenfeld, supra note 148, at 509 (noting that “no worker center wants to be labeled a labor organization under the NLRA, considering all the restrictions and obligations that would apply.”).
160 These restrictions refer to financial reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA) and picketing limitations under the NLRA (for instance, unions cannot picket “secondary”—those not directly responsible for alleged unfairness—employers, while non-union organizations can). See id.
and because undocumented workers might not join a union in the first place because doing so opens the door to employer retaliation and potential deportation.

Worker centers have found ways around each of these barriers. First, because these centers were created with the needs of the most vulnerable workers in mind—undocumented day laborers—past animus is not an obstacle to organizing. Additionally, because worker centers are typically located in the center of day labor-heavy communities, they are not out of reach for transient, temporary workers. Often, these centers are located at informal sites, like strip malls.\(^{161}\) Thus, worker centers, which are small and localized, are visible to day laborers. Finally, worker centers promote solidarity among undocumented workers, giving them security despite their undocumented status. By providing not only workplace advocacy and direct legal services, but also other social services like language classes and job skills training,\(^{162}\) worker centers create a supportive community for undocumented workers to find protection and assistance.

Analyzing the worker center model illustrates how, in order to effectively organize day laborers, advocates have had to go outside of the traditional union model and labor law scheme, as did Gordon’s proposal for transnational labor citizenship. Worker centers work around barriers by providing an alternative to labor unions. This alternative takes the form of small groups of advocates who situate themselves among day laborers in order to provide them with representation. Ultimately, worker centers—despite their limits—found a way to knock down some of the most significant structural barriers that keep unions from reaching day laborers. The success of the worker center movement emphasizes the failures of our current labor system. Our current system, as it stands, cannot reach day laborers, because its rules and regulations do not comport to a globalized workforce and a changed workplace. The worker center movement, and the alt-labor movement as a whole, recognizes these limitations. By providing on-the-ground services to day laborers, alt-labor not only protects some of our nation’s most vulnerable workers, but also demonstrates the need for mainstream labor to adapt to changes spurred by globalization in order to effectively protect day laborers, and undocumented workers as a whole.

**Conclusion**

Under our existing labor scheme, the organization of day laborers by unions and under the NLRA is impossible because of the legal and structural barriers that stand in the way. First, legal barriers like definitional restrictions under the NLRA and the enforcement of strict immigration policy over workers’ rights prevent day laborers from receiving the labor protections the NLRA was created to provide. Further, structural barriers like the traditional hard-bordered union model and the nature of day labor itself make it unlikely that unions would be able to reach day laborers to organize them. Thankfully, proposals like transnational labor citizenship

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162 See CASA DE MARYLAND, supra note 150.
and worker centers exist to overcome the most significant of these barriers. But by analyzing these potential solutions, the gaps in our current labor policy are further illuminated, and it becomes clear that in order to organize day laborers, one must go outside the traditional US labor scheme. Perhaps the best and only solution is to revamp this labor scheme entirely.

In order for our current labor scheme to protect day laborers, our governing laws and institutions must adapt to changes brought on by globalization. The current, global reality of our time involves a growing rise in the number of undocumented workers, coupled with the continued depletion of union membership. Despite these significant changes, the laws on the books for labor protections have not changed, even though these laws were created in the 1930s for an entirely different type of worker. However, the face of the domestic worker has evolved, and undocumented workers—including day laborers—now make up a significant portion of our workforce. Based on the analysis engaged in above, which attempts to identify the most significant barriers to organizing undocumented day laborers, it is clear that outmoded labor laws like the NLRA are not readily adaptable to this new, globalized workforce.

Now that we know that barriers exist, and that groups have recognized these barriers and tried to work around them, the question becomes: What does the existence of these barriers say about our legal structures? Most notably, these barriers demonstrate that the result of not adapting to change is exclusion. Our laws and institutions do not effectively reach a workforce that did not exist at the time those laws and institutions were created. By failing to adapt to changes brought on by globalization, our labor law cannot be harnessed to protect vulnerable day laborers. Thus, those day laborers are excluded from the protections that labor laws provide. Moving forward, lawyers and policymakers will have to determine how legislation can be reformed to conform to the realities of a global workforce. For instance, scholars like Kati Griffith have argued that the first step toward securing workplace protections for undocumented workers is through immigration reform. By incorporating undocumented workers into our legal system, as opposed to seeing them as illegal “outsiders,” perhaps such workers will become entitled to essential labor protections. If such policy changes can be made, unions could incorporate undocumented day laborers into their reaches and hold true to the battle cry that encapsulates the union experience: “solidarity forever.”

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163 Garcia, supra note 62, at 744.
164 See Valenzuela et al., supra note 9, at i.
166 RALPH CHAPLIN, SOLIDARITY FOREVER (The Little Red Songbook 1915).
From Suspended to Destitute: The Disproportionate Effect of Out-of-School Suspensions on Low-Income Families

Francesca Hoffmann*

Introduction

While America’s dark history of institutionalized racism might seem like an ancient skeleton in a red, white, and blue painted closet, “extra-judicial killings by the police . . . now number more than . . . four times the number of people lynched or executed by capital punishment in the worst of years.”1 “No justice, no peace,”2 reverberated throughout America in recent years as Trayvon Martin, Michael Brown, Eric Garner, Walter Scott, Freddie Gray, Samuel DuBose, Laquan McDonald, Alton Sterling, and Philando Castille were killed by the police, seemingly one after the next. But it’s not just an issue with police. There’s more to the story. The first thing Lesley McSpadden, Michael Brown’s mother, said to the media as she stood next to where her deceased son’s body laid for hours was, “You took my son away from me. Do you know how hard it was for me to get him to stay in school and graduate? You know how many black men graduate? Not many!”3

According to the Shriver Center, “The killing of racial minorities by police is but one violent example of racial injustice. But there are thousands of other examples of racial injustice that slowly and systemically deprive racial minorities of their rights, their opportunity, and of their belief in a free and just society.”4

The systemic deprivation of minority opportunity and rights begins with America’s school system. Much of the nation was outraged when police arrested Texas ninth grader Ahmed Mohamed in September 2015 for bringing a homemade clock to school that

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3 This American Life: The Problem We All Live With, CHI. PUB. RADIO (July 31, 2015), http://www.thisamericanlife.org/radio-archives/episode/562/transcript.
was mistaken for a bomb. “#IStandWithAhmed” was mentioned on Twitter 209,000 times, and Barack Obama, Hillary Clinton, Mark Zuckerberg, and Shonda Rhimes were just a few of the high-status individuals who joined the Twitter crusade in expressing their support for the innovative teen. More recently, a White school resource officer, Ben Fields, was captured on video grabbing a Black student by the neck and throwing her across a classroom after she refused to leave class for having her cell phone out. The footage of the incident was viewed well over one million times. While headline spectacles such as Mohamed’s arrest and the South Carolina teen’s school confrontation raise questions of overt discrimination and often rally national attention, there is a more subtle form of racial discrimination in school discipline that is steadily building traction: the disproportionate discipline of minority students.

The disproportionate discipline of minority students, in particular black students, is a real problem that plays out for millions of kids and families each year. Tunette Powell’s four-year-old son, J.J., was suspended from preschool three times. While J.J. was suspended for acts such as “pushing a chair,” the White students at the school experienced less serious punishments for more serious offenses. Stories like that of Tunette Powell are beginning to make their way into the headlines, and as a result, disproportionate discipline is amassing attention.

School districts, legislators, education scholars, and the Obama Administration are plunging headfirst into the fight against disproportionate discipline within K-12 schools, making disproportionate discipline a hot topic in the education and school law world today. Numerous school districts across the county are modifying their discipline policies to curtail the use of suspensions and

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11 See id. (“And they said, they suspend kids? They were shocked. And I said, absolutely. I said, he’s been suspended, and I started telling them all the things that he had done. And then one parent’s like, I wonder why my kid hasn’t been suspended. And I’m like, hm? What? So then she says, well, my son, he hit this kid on purpose, and they had to rush that kid to the hospital, and all I got was a phone call. And I was like, hm. And one after another, they kept telling me different stuff—my kid did this, my kid did that, my kid bit somebody, my kid—all these things. And my kids, they’re all the same age, all the same class. And only JJ had been sent home. So I was like, what is going on? That’s when I thought to myself, something is not right.”).
expulsions in their arsenal of student discipline tools, often in conjunction with new legislation. Some school administrations and an overwhelming number of advocacy groups are calling for suspension and expulsion freezes altogether, no matter how serious the infraction. The discussion on disproportionate discipline is not limited to the K-12 education community. Today, psychology and sociology scholars frequently write about the unintended sociological and psychological effects of disproportionate suspension and expulsion rates for minority students, as well as the ineffectiveness of suspensions as a deterrent in general. Legal scholars examine potential legal protections—or lack thereof—through disparate impact analysis. A Department of Education “Dear Colleague” letter pinpoints the legal ramifications for disproportionate discipline within schools.


In 2015, Chicago passed SB 100—a state law that, among other things, prohibits schools in Illinois from using zero tolerance policies and only allows suspensions over three days in certain contexts. See Pub. Act. No. 099-0456 (2015) (codified as amended at 105 ILCS §§ 5/10-20.14, 5/10-22.6 (2015)); see also Bump, supra note 12. In 2015, New York assemblywoman Catherine Nolan proposed the Safe and Supportive School Bill in front the New York General Assembly. The Bill would “put an end to indiscriminate suspensions at public schools across the state” by prohibiting teachers from making a student leave the classroom for behaviors such as “tardiness, inappropriate language or dress code violations.” Id.


See generally Brea L. Perry & Edward M. Morris, Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools, 79 AM. SOC. REV. 1067 (2014) (discussing the negative impact of suspensions on students’ reading and math improvement.).


investigation of a record number of disproportionate discipline claims in the past few years.\textsuperscript{18} The conversation surrounding disproportionate discipline is flourishing. However, there is a gaping hole in the literature and an invaluable perspective left out of an important narrative that renders the disproportionate discipline conversation incomplete. It is true that the disproportionate suspensions and expulsions of minority students can have the unintended consequences of depleting a student’s sense of school belonging, causing underperformance in academics, and increasing likelihood of juvenile delinquency.\textsuperscript{19} Nevertheless, disproportionate discipline also has grave unintended consequences on the family,\textsuperscript{20} which have not yet been fully explored.

When a student is suspended for fewer than ten days, constitutional due process merely entitles a student to informal notice and an opportunity to explain oneself prior to being suspended.\textsuperscript{21} The Supreme Court came to this conclusion in \textit{Goss v. Lopez}\footnote{419 U.S. 565 (1975).} by weighing the school’s interest in efficiency against the child’s loss of fewer than ten days of education.\textsuperscript{23} As a result of the Court’s 1975 ruling, a standard narrative generally unfolds when a student is issued a short-term suspension.\textsuperscript{24} Typically, a child is first sent to the principal’s office for disrupting the class, in some form or another. The principal next explains to the child what he or she is in trouble for (notice) and asks whether the child has anything to say about the matter (opportunity to explain oneself). Ultimately, the principal calls the child’s parent to inform her that she must come pick the child up for the resulting suspension. Clearly, this practice has profound implications for not just the child, but also for the child’s family.

Families headed by low-income minority single mothers, by the nature of disproportionate discipline, are the families who are most greatly affected by the unequal distribution of suspensions and expulsions of minority students. Because low-wage minority single mothers experience inflexibility in the work place, overwork due to the necessity to hold multiple jobs, lack of child-care options, limited resources, and single-motherhood, these women are arguably the least

\begin{footnotesize}
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\item[\textsuperscript{20}] It is important to note that other scholars have acknowledged that disproportionate discipline has the unintended consequence of affecting families; however, scholars have not explored the full effects of disproportionate discipline, demographics of what families it most greatly affects, and possible solutions. See Skiba et al., supra note 16, at 1079 (citing Am. Psychol. Ass’n Zero Tolerance Task Force, \textit{Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations}, 63 AM. PSYCHOL. 852, 860 (2008)). Although Skiba’s article pertains to zero-tolerance policies, the authors refer to zero-tolerance policies in the context of suspensions.
\item[\textsuperscript{21}] See \textit{infra} Part I.B.
\item[\textsuperscript{22}] 419 U.S. 565 (1975).
\item[\textsuperscript{23}] See \textit{infra} Part I.B.
\item[\textsuperscript{24}] See \textit{infra} Part I.B.
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equipped to deal with their children being suspended on a whim; however, the nature of disproportionate discipline tells us that low-wage minority single mothers are the parents who are most greatly affected. Existing protections that provide limited workplace flexibility, such as the Family Medical Leave Act (FMLA), are only applicable in medical-related emergencies. Low-wage workers who leave their jobs last minute are at an extremely high risk of losing their jobs. Due to higher suspension rates for minority students, minority students are not only losing out on education time, but their families might possibly be losing their livelihoods.

This Note argues that disproportionate discipline’s effect on families, particularly low-income single minority mothers, is an additional consideration that deserves more weight in thinking about suspension policies within schools. This argument does not seek to minimize the importance of the effect of suspensions on students themselves. Rather, it proposes that considering the additional effect of disproportionate discipline on families might bolster support for legislative proposals that seek to constrain suspensions. Part I of this Note lays the factual background for disproportionate discipline and addresses current due process requirements for short-term suspensions. Part II explains how current notions of due process for short-term suspensions are inconsistent with current workplace norms and policies, especially for families headed by minority low-income single mothers. Part III addresses possible non-solutions and solutions. This Note ultimately proposes that considering the disproportionate effect of suspensions on low-income families could provide additional support for lobbyists and advocacy groups to push legislation that centers on the reduction of out of school suspensions as a discipline norm within the education realm.

I. LAYING THE LANDSCAPE FOR DISPROPORTIONATE DISCIPLINE

A. What is Disproportionate Discipline?

The disproportionate discipline of minority students is not a new phenomenon; however, the disproportionate use of exclusionary practices such as suspensions for minority students is relatively recent. Historically, corporal punishment was the dominant form of discipline within schools until the late 1960s. Today, the era of corporal punishment has nearly come to an end.

25 See infra Part II.  
26 See infra Part II.A.i.  
27 See infra Part II.  
28 Id.  
30 Skiba et. al., supra note 16, at 1073.
physical force as a means of a bad behavior deterrent amasses more and more negative stigma,\textsuperscript{32} out of school suspensions are the most prevalently used student discipline tool.\textsuperscript{33} It is estimated that during the 2009–10 school year, over two million students were suspended in middle and high school alone; a majority of these suspensions were for minor infractions of school rules.\textsuperscript{34}

Today, the term “disproportionate discipline,” also referred to as the “discipline gap,”\textsuperscript{35} generally refers to the overrepresentation of minority students receiving “differential administration of exclusionary and punitive discipline.”\textsuperscript{36} The differential administration of punitive discipline can take place at either the classroom level or the administrative level. Research shows that, at the classroom level, educators make more frequent initial referrals for minority students for less serious disciplinary infractions, which commonly result in suspensions.\textsuperscript{37} Once referred to the administrative level, Black students are three times more likely to be suspended than White students, as 16.4% of Black students are suspended compared to 4.6% of White students.\textsuperscript{38} It is also noteworthy that over seventy percent of resulting school-related law enforcement referrals and arrests involved Black and Hispanic students.\textsuperscript{39} Some geographic-specific figures are even more

\textsuperscript{31} See Elizabeth T. Gershoff et al., Corporal Punishment in U.S. Public Schools 10–11 (2015) (pointing out that the most recent OCR data shows .5% of students received corporal punishment in the 2009-2010 school year).

\textsuperscript{32} Public instances such as that of Vikings running back Adrian Peterson and surrounding debates clearly err on the side of eliminating or not utilizing existing corporal punishment statutes in the existing nineteen states that still legally allow corporal punishment. Valerie Strauss, 19 States Still Allow Corporal Punishment in School, Wash. Post (Sept. 18, 2014), https://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school; See also DeNeen L. Brown, A Good Whuppin? Adrian Peterson Child Abuse Case Revives Debate, Wash. Post (Sept. 13, 2014), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/13/a-good-whuppin-adrian-peterson-child-abuse-case-raises-old-debate/. The arrest of a Floridian pastor for spanking a child for refusal to eat a strawberry further contributes to the revival of the age-old debate of whether or not spanking is an effective method for punishing a child or constitutes child abuse. Numerous groups, including the American Academy of Pediatrics, came out earlier this year to declare their stance against corporal punishment because of its proven link to mental illness. Id.

\textsuperscript{33} Skiba et al., supra note 16, at 1073.


\textsuperscript{35} See Anne Gregory et al., The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?, 39 Educ. Researcher 59 (2010) (discussing how disproportionate discipline of minority student contributes to the academic achievement gap and thus becomes a “discipline gap”).


\textsuperscript{37} Skiba et al., supra note 29, at 16.


\textsuperscript{39} Tom Rudd, Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated, Kirwan Inst. Issue Brief, Feb. 2014, at 1 http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf. It is important to note that schools’ over-referral of black students to law enforcement is a whole separate issue that deserves equal attention and is commonly referred to as the “school-to-prison pipeline.” Madeleine Cousineau, Institutional Racism and the School-to-


alarming. For example, Black students make up thirty-seven percent of the K-12 student body in Georgia but sixty-seven percent of all suspensions and are five times more likely to be suspended than White students in the South. The overrepresentation of minority students in exclusionary discipline practices is not limited to the sphere of K-12 education. Even the nation’s Black preschoolers—a group of children who are arguably not even developmentally capable of comprehending exclusionary discipline practices—experience discipline at a rate greater than their white-peer counterparts. Black children comprise eighteen percent of preschool enrollment yet make up nearly half of all preschoolers receiving more than one out of school suspension. Given these statistics, it makes logical sense to wonder, are black students disproportionately disciplined because their behavior actually is more suspension-worthy? If this were the case, higher suspension rates for minority students would not reflect racial bias—whether overt or implicit. Instead, disproportionate suspension rates would be “a relatively appropriate response to disproportionate behavior.” Studies show that actual misbehaviors of minority students do not account for racial disparities in school discipline. To the contrary, most suspensions result from small instances of misbehavior, such as failure to wear a school uniform or refusal to take off a hat.

Regardless of the underlying causes of the disproportionate discipline of minority students—as there are numerous interconnected ideas that attempt to explain the “why” of disproportionate discipline—the uneven distribution of suspension amongst racial groups in schools around the country has severe costs for minority students and society as a whole. In a study of one million students in

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See Donna St. George, *Suspended from School in Early Grades*, WASH. POST (Feb. 12, 2012), https://www.washingtonpost.com/local/education/suspended-from-school-in-early-grades/2012/02/02/gIQA3H0X9Q_story.html. (“[S]uspension is at odds with teaching the social and behavioral skills many young students lack. ‘We would never send a child home because that child was struggling at reading,’ he said. ‘We would never send a child home if that child was struggling with math. Why would we send a child home for struggling with social-emotional skills?’”).


Id. at 6.

Of the 710,000 suspensions in California schools during the 2011–12 school year, 48% of suspensions were for “willful defiance,” which included instances such as failing to wear a school uniform and refusal to take off a hat. Rudd, *supra* note 39, at 4.

Texas, thirty-one percent of students who were suspended or expelled were held back a grade at least once, ten percent of students who were suspended between seventh and twelfth grade dropped out of school altogether, and half of the students who were disciplined over eleven times entered the juvenile justice system the following year.\textsuperscript{48} Pedro Noguera, a leading scholar in the field of disproportionate discipline, sums up the concern of the effects of suspensions: “There’s this assumption that, if we get rid of the bad people, that the good people will be able to learn, the good people will be safe. What we continue to ignore is that we are producing the bad people. We’re producing in school the bad behavior.”\textsuperscript{49}

**B. Current Due Process Requirements for Short-Term Suspensions**

There is no denying the fact that the disparate disciplining of Black students occurs every day in schools around the country, but it is important to consider what series of actions lead up to the issuance of a suspension. Even in a short chain of events, there is an important stage in the suspension process that is often overlooked: the period between the initial discipline referral of a student and the resulting suspension. Under the Fourteenth Amendment Due Process Clause, an individual has a substantive right to certain constitutionally protected liberties that cannot be abridged without substantial justification.\textsuperscript{50} In addition to substantive rights, an individual also has the procedural right to not be deprived “of life, liberty, or property, without due process of law.”\textsuperscript{51} It is well established under the theory of \textit{in loco parentis} and related case law that schools generally have blanket authority to discipline students.\textsuperscript{52} This includes the authority to use suspension and expulsion as discipline tools.\textsuperscript{53} Thus, a student’s substantive rights in the realm of school discipline are, at most, extremely minimal and, at minimum, nonexistent. Procedural due process rights, on the other hand, are guaranteed to all students prior to being subject to certain disciplinary measures in order to ensure fairness and impartial treatment for students.\textsuperscript{54}

\textsuperscript{48} Tony Fabelo, Michael D. Thompson, Martha Plotkin, Dottie Carmichael, Miner P. Marchbanks III & Eric A. Booth, \textit{Council of State Governments Justice Center & Public Policy Research Institute, Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement xi-xii} (2011), https://esgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf. This was a groundbreaking, statewide study done in Texas, whereby all Texas seventh grade students’ school records were tracked for six years and then compared to their matching juvenile records. \textit{Id.} at 6.


\textsuperscript{51} U.S. CONST. AMEND. XIV, § 1.

\textsuperscript{52} Skiba et al., \textit{supra} note 16, at 1072–73. \textit{See also} Daniel & Bond Coriell, \textit{supra} note 50, at 6 (discussing the court’s general deference to school authority based on the school’s legitimate state interest in maintaining order and discipline).

\textsuperscript{53} Skiba et al., \textit{supra} note 16, at 1072–73.

\textsuperscript{54} Daniel & Bond Coriell, \textit{supra} note 50, at 7.
There are generally two different procedural due process standards; both were concurrently established by the Supreme Court in its landmark 1975 case, *Goss v. Lopez*.55 This Note focuses on due process for “short-term” suspensions because an overwhelming majority of suspensions in schools today are less than ten days.56 In the *Goss* analysis, which is still applicable today, the Court first asked whether a student’s liberty or property interest were at stake.57 Because suspension implicated the student’s statutorily created property interest in an education and liberty interest in sustaining “a person’s good name, reputation, honor, or integrity,”59 the students were entitled to constitutional due process under the Fourteenth Amendment.60 More importantly for the purpose of this Note’s analysis: once the *Goss* court decided that suspension did indeed trigger procedural due process protection, it set forth *how much* due process students are entitled to.61

Because “due process is flexible and calls for such procedural protections as the particular situation demands,”62 the amount of process afforded to each claimant can range from formal to informal procedural rights. Courts traditionally use the factors-based test established in *Mathews v. Eldridge*63 to determine the exact “amount” of due process an individual is entitled to.64 Under this test, all courts consider: (1) the private interests that will be affected by the government action, (2) the risk of erroneous deprivation of such interest and probable value of additional procedural safeguards, and (3) the government’s interest, including the administrative burden and the suitability of the case for trial-like procedures.65 “Amount” of due process means more than meets the eye. The right to an evidentiary hearing, right to notice, right to have an attorney present, and right to cross-examine witnesses, among others, are what typically come to mind when thinking of procedural due process protections.

Importantly, however, courts also have discretion in regard to the timing of *when* a claimant can access procedural due process rights under the *Mathews* test.66

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56 The *Goss* standard for suspensions has been codified by most states today. A majority of states consider any suspensions over ten days to be expulsions. See IND. CODE § 20-33-8-3(a)(1) (2015) (In Indiana, “expulsion’ means a disciplinary or other action whereby a student: (1) is separated from school attendance for a period exceeding ten (10) school days.”).
57 See also Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972) (establishing that the first step in the legal analysis in determining whether due process is triggered after adverse state action is to determine whether an individual has a protected liberty or property interest, and further shifted away from the rights/privilege distinction previously used to trigger due process).
58 *Goss*, 419 U.S. at 573.
59 *Id.* at 574 (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).
60 *Id.* at 576.
61 *Id.* at 577–79 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
63 *Id.* at 334–35.
65 *Mathews*, 424 U.S. at 335.
66 For example, in *Goldberg v. Kelly*, the Court determined that a welfare recipient’s interest in continued benefits entitled him to a pre-termination hearing before the benefits (a property right) could be taken away, because the recipient’s interest of uninterrupted financial assistance needed to survive
In the context of suspensions, the *Goss v. Lopez* Court weighed the nature of the competing interests involved and found that a school’s interest in efficiency and maintaining order outweighed the child’s interest in avoiding the “unfair or mistaken exclusion from the educational process” for less than ten days of school. As a result, the Court found that suspensions for less than ten days merely required oral or written notice and “some kind of hearing” prior to a suspension. This is still the due process standard for suspensions today. No time must pass between when “oral notice” is given and the time of the “hearing,” and the situation typically plays out in the following way: an administrator tells the student what he or she has done wrong, and the student is “given an opportunity to explain his version of the facts.” The *Goss* Court acknowledged that “in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required;” however, courts today rarely, if ever, allow for more formal due process procedures under this exception. The Court also recognized that the due process requirements it imposed for suspensions are “less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” Still, most school suspension policies are modeled after the minimal requirements laid forth in *Goss v. Lopez*. After the student is given oral notice and an opportunity to explain his or herself, the parent is called to come pick the child up from school before the end of the school day. Rarely, if ever, does a child’s explanation change an administrator’s decision to suspend.

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67 *Goss*, 419 U.S. at 583 (emphasizing that the formalization of due process rights for suspensions “might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”).

68 *Id.* at 580 (“Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.”).

69 *Id.* at 579.

70 *Id.*

71 *Id.* at 582.

72 *Id.*

73 *Goss*, 419 U.S. at 584.

74 See Paredes v. Curtis, 864 F.2d 426 (7th Cir. 1988) (holding that drug charges resulting in a ten-day suspension did not constitute an “unusual situation”); see also Lamb v. Panhandle Cmty. Unit Sch. Dist., 826 F.2d 526 (6th Cir. 1987) (holding that a suspension at the end of the school year that prohibited the student from taking final exams and graduating was not an “unusual situation” that necessitated additional due process rights than laid out in *Goss v. Lopez*).

75 *Goss*, 419 U.S. at 583.
Because some school districts are sanctioned for issuing over a certain number of suspensions, schools, in practice, also issue “undocumented suspensions.” Undocumented suspensions informally require parents to come pick their children up from school early without classifying the incident as a “suspension.” In those instances, no procedural due process rights attach. Whether short-term or undocumented, all forms of suspension have profound implications for families because of the non-existent notice required under current due process standards.

II. THE INTERSECTION OF PROCEDURAL DUE PROCESS REQUIREMENTS FOR SUSPENSIONS AND THE CURRENT JOB-PLACE REALITY

A. The Families Most Affected by Disproportionate Discipline

Although there are other family populations whom disproportionate discipline also affects, the focus of this Note is the effect of suspensions as a discipline tool on low-income, single, Black mothers. Based on the nature of disproportionate discipline and the student population it affects, the large percentage of single, Black mothers in the United States and statistics that show more mothers are working today than ever before, this Note makes the assumption that single Black mothers are most greatly affected by disproportionate discipline.

Non-Black minority students, and as a result, their families, are not as greatly affected by disproportionate discipline as Black students. Black students represent sixteen percent of the school-age population but thirty-three percent of out of school suspensions. They also represent forty-two percent of students receiving more than one out of school suspension. Conversely, Hispanic/Latino students make up twenty-four percent of school-age population but only twenty-three percent of out of school suspensions; they also represent only twenty-one percent of students receiving more than one out of school suspension. Similarly, Asian students make up five percent of the school-age population but represent only two percent of all out of school suspensions.

77 See Parents and Students Applaud San Francisco School Plan to Eliminate Suspension Gap for Students of Color, Press Release, PUBLIC COUNSEL, (Dec. 11, 2013), http://www.publiccounsel.org/press_releases?id=0076. It is noteworthy that some school districts, such as San Francisco, are taking active steps to eliminate “undocumented suspensions” by acknowledging their unlawfulness and requiring data collection and reporting for all “permits to leave.” S.F. UNIFIED SCH. DIST. BD. OF ED., RESOL. NO. 1312-10A4, ESTABLISHMENT OF A SAFE AND SUPPORTIVE SCHOOLS POLICY IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, 6 (Feb. 25, 2014).
79 Id.
80 Id.
81 Id.
82 Id.
It is clear that Black students, and therefore Black families, more frequently experience suspensions, but a closer look at the average composition of the Black family today reveals why higher suspension rates are so devastating. Statistics show that an overwhelming majority of children born to black mothers are born out of wedlock.\textsuperscript{83} In 2010, seventy-three percent of all non-Hispanic Black births were to unmarried women.\textsuperscript{84} In comparison, the out of wedlock birth rate is fifty-three percent for Hispanic and twenty-nine percent for non-Hispanic White births.\textsuperscript{85} It is important to acknowledge that fifty-eight percent of the non-Hispanic Black women who gave birth outside marriage were in cohabitating relationships;\textsuperscript{86} however, one study showed that these relationships typically do not last until the child reaches school-age.\textsuperscript{87} Even though 63.27\% of unwed Black mothers believed “there [was] a pretty good or almost certain chance” that they would eventually marry their cohabitating partner,\textsuperscript{88} only 16\% of women in cohabitating relationships were married to the father of their child five years after the baby’s birth; only 26\% of couples were still cohabitating.\textsuperscript{89} Given that most school-aged children begin kindergarten around the age of five, seventy-four percent of the Black mothers giving birth out of wedlock are truly “single mothers” when their children enter the education system.\textsuperscript{90} Even those women that are married might be raising their children alone. In 2007, U.S. prisons held 744,200 fathers of 1,559,200 children, nearly half of whom were Black children.\textsuperscript{91}

The idea that Black, low-income single mothers are more greatly affected by suspensions only stands true if these mothers are active participants in the workforce. While some scholars are quick to point out that twenty-seven percent of poor single mothers do not work,\textsuperscript{92} seventy-three percent of poor, single mothers are in the labor force. Women are also the “sole or primary breadwinners in forty percent of households with children.”\textsuperscript{93} Images of the stereotypical “welfare queen,” regardless of whether this typecast was ever accurate, is certainly inaccurate today. The 1996 welfare reform requires most women to work to receive Temporary Aid to

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{89} Center for Research on Child Wellbeing, supra note 87.
\textsuperscript{90} See id.
\textsuperscript{92} Joan C. Williams & Heather Boushey, The Three Faces of Work-Family Conflict 6 (Ctr. for Am. Progress 2010).
Needy Families (TANF) benefits,94 as well as limits the number of years an individual can receive TANF benefits to five years.95 The full-time employment of mothers with children under age eighteen increased from nineteen percent to fifty-seven percent between 1965 and 2000,96 arguably, in part, as a result of the need for low-income women to work to receive TANF benefits and support their families at the end of the five-year period.

B. The danger of suspensions for low-income workers

Given that 1.2 million Black students were suspended in 2014,97 there is a constant possibility that a school administrator could call a working mother and inform her that her child was suspended and in need of being picked up from school. A majority of Black mothers of school-aged children are raising their children without a partner, immersed in the workforce, and still low-income;98 this trifecta makes current suspension practices particularly dangerous to low-income single Black mothers. Current procedural due process requirements for short-term suspensions are misaligned with the job-place reality for low-income parents generally, but particularly for single, Black mothers.99 Job inflexibility, high costs of childcare, gender expectations, and extremely limited workplace policy protections make leaving a job in the middle of the day to pick up a suspended child a risk to the wellbeing of the entire family. To illustrate: Rajuawn Thompkins’ four-year-old son was suspended from Imagine Hope Community Charter School in Washington D.C. for “kicking off his shoes and crying in frustration.”100 As a result of her son’s frequent formal suspensions, coupled with additional “undocumented suspensions,” Thompkins lost her job.101

There are a multitude of workplace-related factors that make the way current suspension practices operate highly problematic for mothers such as Thompkins.

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94 TANF (Temporary Assistance for Needy Families) benefits are also known more generally as welfare and were part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA); PRWORA “ended entitlement to welfare benefits” under the Aid to Families with Dependent Children Act. Hope Corman et al., Effects of welfare reform on women’s crime, 40 Int’l Rev. L. & Econ. 1, 1 (2014).


97 SMITH & HARPER, supra note 41. This figure does not even take into account the number of preschoolers suspended. See id.

98 See discussion supra, Part II.A.

99 See also STEPHANIE BORNSTEIN, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS 17 (U.C. Hastings Center for WorkLife Law, 2011) (“[T]he daily responsibilities of caring for young children, aging parents, or ill spouses continue to conflict with the way in which low-wage jobs in the United States are currently structured.”).

100 St. George, supra note 42.

101 Id.
i. Job Inflexibility

Low-wage workers experience a “lack of even minimal [job] flexibility”\(^\text{102}\) and have extremely limited workplace protections. Low-wage workers are less likely to have employer-provided benefits, more likely to be subject to mandatory overtime, and rarely have access to paid time off.\(^\text{103}\) Only thirty-nine percent of low-wage workers report that their employers allow for some type of paid time off (“PTO”) for personal illness; in comparison, over seventy-nine percent of mid and high-wage employees report access to sick-leave related PTO.\(^\text{104}\) As a result, over fifty-nine million workers in the U.S. have no sick leave coverage, and over eighty-six million workers do not have paid sick leave to care for sick children.\(^\text{105}\) Even if a worker did have access to sick leave, it might not be usable. Most employers require employees give advanced notice to take time off, and existing laws that require employers to provide sick leave only apply to limited groups of employees.\(^\text{106}\) Additionally, many low-wage jobs require workers to abide by strictly enforced attendance policies and unyielding schedules that “penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”\(^\text{107}\) Low-wage workers are also punished for not fulfilling mandatory overtime requirements, even if such assignments are given without notice.\(^\text{108}\) Under no-fault attendance policies, women who are late or miss work, regardless of the reason, are subject to a strike system. Strikes for late arrival often collectively add up and result in termination. The U.C. Hastings Center for Worklife Progress recounts the story of Tameeka, a single low-income mother who was demoted from her training supervisor job in spite of twelve out of thirteen positive evaluations during her six-month probationary period.\(^\text{109}\) Tameeka was working the midnight shift when her babysitter suddenly quit. Initially, she requested to change shifts but was denied. Thereafter, Tameeka left work early three days per week to meet the needs of her children. Altogether, she only accrued one day and one hour of unpaid, authorized sick leave.\(^\text{110}\) While Tameeka’s demotion did not result from missing work for repeated suspensions, her

\(^{102}\) Bornstein, supra note 99, at 18.


\(^{104}\) Id. at 272.

\(^{105}\) Vicky Lovell, No Time to be Sick: Why Everyone Suffers When Workers Don’t Have Paid Sick Leave 1, 3 (Inst. Women’s Policy Research, 2004), (explaining this is even more problematic for low-wage workers because “[w]orkers in lower-income families miss more days than those in higher-income families; this is consistent with well-established disparities in health that are correlated with income.”).

\(^{106}\) For example, the New York Paid Sick Leave Act requires employees to have worked for an employer for at least 120 days in order for an employee to be entitled to the paid sick leave mandated by the act. Furthermore, the law does not apply to federal, state, or municipal workers, or independent contractors. N.Y.C., N.Y., Local Law 46 (Jun. 26, 2013).

\(^{107}\) Bornstein, supra note 99, at 19.

\(^{108}\) See also Gwin, supra note 103, at 272.

\(^{109}\) Bornstein, supra note 99, at 20.

\(^{110}\) Id.
story still portrays the imminent risk that low-wage working mothers face when faced with a childcare emergency outside of their control.

The problem of low-wage worker turnover from inflexible attendance policies can “wreak havoc” for employers, as well.\textsuperscript{111} High turnover rates within the low-wage labor force are detrimental to businesses: costs to train a new employee making under $30,000 per year averages 16.1% of the employee’s yearly salary.\textsuperscript{112} It is without a doubt that the issue of sick children and consequential looming risk of parental job loss escalated to the national spotlight in recent years;\textsuperscript{113} however, the right to time off for student discipline remains under-considered. If “being female doubles the odds of experiencing job termination related to family illness,”\textsuperscript{114} suspensions certainly have a similarly detrimental effect on women and low-wage workers.

\textbf{ii. Limited Job-Protected Leave}

There are limited workplace policies in place for protecting low-wage, working parents in general; even state and federal policies specifically created to address the tightrope walk of balancing parent and work responsibility fall woefully short. A lack of job-protected leave exacerbates the problem of suspensions not only for low-income, single, black mothers but also for parents working at inflexible jobs, in general. Congress passed the Family Medical Leave Act of 1993\textsuperscript{115} (FMLA), in part,\textsuperscript{116} “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”\textsuperscript{117} The implementing regulations further recognize the purpose of the FMLA: they state that “workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.”\textsuperscript{118} Under

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 18.
  \item \textsuperscript{112} \textit{See} HEATHER BOUSHEY & SARAH JANE GLYNN, \textsc{There are Significant Business Costs to Replacing Employees} (Center for American Progress, 2012), https://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/.
  \item \textsuperscript{113} \textit{See generally} Susan Perry, \textsc{A Third of Working Parents Risk Pay or Job Loss When Child Gets Sick, Survey Finds}, MINNPOST (Oct. 24, 2012), https://www.minnpost.com/second-opinion/2012/10/third-working-parents-risk-pay-or-job-loss-when-child-gets-sick-survey-finds (discussing a survey done by C.S. Mott Children’s Hospital that revealed 33% of parents reported taking time off of work to care for their sick children put their job at risk or resulted in loss of pay); Danielle Shapiro, \textsc{For Working Moms, One Sick Kid Can Spell Disaster}, THE DAILY BEAST (Jan. 26, 2014), http://www.thedailybeast.com/articles/2014/01/26/for-working-moms-one-sick-kid-can-spell-disaster.html (telling the story of various low-income women who are “one sick child away from being fired”).
  \item \textsuperscript{114} LOVELL, \textit{supra} note 105, at 5.
  \item \textsuperscript{115} 29 U.S.C.A. §§ 2601–54 (2014).
  \item \textsuperscript{116} \textit{See} O’Leary, \textit{supra} note 95, at 38 (noting that the FMLA was also passed out of “recognition of the limits of Title VII and the Pregnancy Discrimination Act”).
  \item \textsuperscript{117} 29 U.S.C.A. § 2601(b)(1) (West 2014).
  \item \textsuperscript{118} 29 C.F.R. § 285.101(b) (2011).
\end{itemize}
the FMLA, an employee is entitled to up to twelve weeks of leave from work to tend to one of five circumstances surrounding birth, adoption, and family illness-related needs without fear of losing her job; however, the FMLA has extreme limitations. Implementing regulations define “vital needs” and “family obligations” extremely narrowly. “Vital home needs,” for the purpose of this Note, only encompasses “serious health condition[s],” and “family” is limited to “a spouse, son, daughter, or parent.” In its current state, the FMLA does nothing to protect low-wage parents—or any parents for that matter—who are forced to leave work for a suspension. Even if the FMLA is amended to allow for absences from work for a wider range of circumstances, such as school suspensions, the FMLA does not protect all private employees and does not allow for any paid time off—a luxury that many low-wage workers cannot afford.

Rightfully acknowledging the vital importance of parental involvement in a child’s education, some states have attempted to address the challenge of balancing a parent’s responsibility to support her child academically and financially. Because of the proven effects of parental involvement in a child’s academic success, a majority of states have some form of family engagement provisions within state education laws. Additionally, under the No Child Left Behind Act (NCLB), schools receiving Title I assistance were required to create

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119 29 U.S.C.A. § 2612(a)(1) (“Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .”).
120 See 29 U.S.C.A. § 2612(a)(1)(A)-(E) (An individual is entitled to twelve workweeks of leave for (1) the birth of a son or daughter of the employee to care for the son or daughter; (2) if an employee adopts or fosters a child; (3) to care for an ill spouse, son, daughter, or parent who has a serious health condition; (4) because of an employee’s own serious health condition; or (4) because of “qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty in the Armed forces.”).
121 The FMLA also allows up to twelve weeks of leave for “the birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care,” for the employees own serious health condition that impairs his or her ability to work, and for “any qualifying exigency arising out of the fact that [a family member] is a military member on covered active duty status.” U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT (2012), http://www.dol.gov/whd/regs/compliance/whdfs28.pdf.
122 Id.
123 Id.
124 The FMLA only protects private employees who work for private employers that have 50 or more employees and have been employed full-time (1,250 hours) by the employer for the past 12 months. Id.
125 This is not to suggest that the legislature should amend the FMLA to require paid leave to pick up a suspended child. It is merely to illustrate the multi-dimensional challenges that low-income parents face when it comes to taking time off from work.
127 See generally id. (detailing the current national landscape for family engagement and labor laws by state).
128 See id. at 3.
129 The NCLB was repealed in December, 2015, and replaced with the Every Student
family and parent engagement policies in an effort to bolster academic achievement. Generally, these laws attempted to “create policies, strategies, and practices that build on the strengths and wisdom of families to support their child’s learning and improve student achievement.” Forty states have education laws requiring school districts to implement family engagement policies, and five states mandate pilot family engagement projects. A select number of states also have labor laws that aim to “facilitate family engagement by protecting employees with school-age children from being terminated or otherwise penalized for attending parent-teacher conferences or other important school meetings.” These laws recognize that taking time off of work for a school-related activity can endanger the family’s livelihood.

Family engagement and labor laws are a step in the right direction, but most labor and family engagement laws fail to fully rectify the inconsistency of harsh workplace policies and the unpredictable nature of parenthood. There are only sixteen states with labor laws that allow employees with school-aged children to take leave from work for school-related purposes; two of those states’ labor laws only apply to public sector employees, four states only “encourage” workplaces to grant employees with children time off for school conferences only, and some states allow time off for school-related activities but require advanced notice—a requirement far from helpful for parents dealing with unpredictable suspensions. Even those states that do offer general protections for school-related activities other than conferences only allow for minimal time off. Alarmingly, California and


131 See BELWAY ET AL., supra note 126, at 15.

132 Id.

133 Id. at 147.

134 BELWAY ET AL., supra note 126, at 147.

135 Hawaii and Texas both have a labor law that allows limited leave for school functions, but the laws only protect public-sector employees. Both states also only allow a maximum of two hours of paid leave, two times per year for each child. Id.

136 Alabama, Louisiana, Oklahoma, and Utah encourage, rather than mandate, time off for employees with children to attend limited school functions. Id.

137 Id. at 148 (“Illinois law sets forth highly specific guidelines regarding the circumstances under which employees may exercise their right to leave time. The specifics include the amount of time an employee may use both during the school year and on any given day. The law further stipulates the amount of notice required from employees, which must be done in writing seven days in advance, among other requirements.”).

138 North Carolina grants four hours of leave per year to “attend or otherwise be involved in the child’s school.” Id. at 157 (citing N.C. GEN. STAT. ANN. § 95-28.3(a) (West 2016).
Nevada are the only states that explicitly prohibit employers from firing employees who choose to make use of policies granting parental leave for school activities. Even though thirty-five of the states that lack labor laws have laws that support family engagement, most family engagement statutes mandate schools provide opportunities for things such as more parent teacher conferences, contracts between parents and schools, and parent education classes. Engagement policies could even potentially exacerbate the difficulty for a working parent by requiring her to attend more school-related functions without having analogous labor protections for education-related activities.

Although not exemplar, California and Nevada are two states worth turning to as strong models for labor laws that better protect single working mothers. Both states have labor laws that explicitly forbid employers from taking any sort of adverse action against employees who take time off to participate in school activities. California allows employees to take off up to forty hours every year for school-related activities, and Nevada forbids an employer from “terminat[ing], demot[ing], suspend[ing] or otherwise discriminate[ing] against the employment of a person who . . . is notified during his work by a school employee of an emergency regarding the child.”

It is worth pointing out that even states such as California and Nevada that have the most liberal labor law protections lack adequate enough laws to account for the disproportionate suspension of black students. California, one of the states that allows for the most leave time (forty hours per year), allows an employee a maximum of eight hours off per month to “participate in their children’s education.” The eight hours would be sufficient for a single mother to leave from work to pick up the child if suspended, but what then? The child could possibly be suspended for up to ten days, which would well surpass the eight-hour allotted monthly limit. Even in California a single mother is forced to choose between staying home and possibly losing her job or paying for childcare. That said, California and Nevada are still the states with the most comprehensive labor laws, which is better than the alternative prevalent in most states—no labor protections at all.

### iii. Other Factors

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139 *Id.* at 148 (“Nevada’s law renders it unlawful for employers to either terminate or threaten to terminate parents for attending meetings requested by school administrators.”).

140 *See id.*

141 For example, the family engagement statute in Illinois permits school districts to conduct “parental institutes” to generally increase parental engagement levels. *Id.* at 17.


143 *Belway et al., supra* note 126, at 151.


145 *Belway et al., supra* note 126, at 148–49. A further point of inquiry would be examining whether or not staying home with a suspended child qualifies as “participating in children’s education.”
A low-income woman’s financial insecurity further makes her more at-risk if her child is suspended. Once a low-income single mother loses her job, it is much more difficult for her to find a new one. This challenge makes the risk of losing her job all the more dangerous for her family. All mothers, regardless of socioeconomic status, are less likely to be hired for jobs, to be perceived as competent at work, or to be paid as much as their male colleagues with the same qualifications.\textsuperscript{146} Low-income mothers with children under six, however, “[p]ay a wage penalty five times as great as that of higher-paid women with young children” and lose six percent in wages per child.\textsuperscript{147} Not only do these women lack job protections, they also do not have financial protections to fall back on. Prior to the 1996 welfare reforms, welfare “served as a form of paid leave between jobs . . . . [and] many women were working while on welfare.”\textsuperscript{148} Now, when a woman loses her job, she has very limited assistance to support her family. Additionally, her family’s situation is likely to be exacerbated by a lack of child support payments.\textsuperscript{149} Twenty-six percent of noncustodial fathers earn an average of $5,627 per year, and eighty-eight percent of those fathers do not pay court-ordered child support.\textsuperscript{150} This means that low-income single mothers, in addition to making the lowest wages, likely do not have access to child support payments to support their children in case of job-loss. If a single mother doesn’t have access to affordable childcare, as many low-income individuals do not,\textsuperscript{151} a suspension could also cause a parent to either go into financial debt or stay home with her child. Not only could a suspension cause a child to lose out on educational learning opportunities, it could also cost the child’s entire family its livelihood.

III. Possible Solutions

There is no one single fix that addresses the numerous competing interests that school suspensions evoke: the school district has an interest in efficient administration;\textsuperscript{152} the students have an interest in remaining in the classroom;\textsuperscript{153}
teachers have an interest in maintaining effective learning environments for all students without disruptions; 154 other students have an interest in an uninterrupted education; 155 and parents have an interest in not being forced to leave work for small student infractions. 156 Therefore, coming up with a “solution” to the problem school suspensions raise involves striking a delicate balance with various conflicting interests. “Solving” the problem also involves considering a variety of possible avenues, including legal avenues, legislative avenues, and policy implementation at the school level.

A. Non-Solutions: Available Remedies That Do Not “Solve” the Problem

i. Legal Remedies

Ensuring evenly distributed suspensions and expulsions of all students using the law as a tool for leveling the playing field would not eliminate the problem suspensions pose for all low-income families, but it could help. 157 Under current legal standards, students or parents disproportionately affected by suspension policies are unlikely to avail themselves using legal remedies. Although legal remedies might be technically available, gathering evidence to make a showing of disparate treatment under Title IV; Title VI; or the Equal Protection Clause, or disparate impact under Title VI and Title IV can be extremely cumbersome. A parent could potentially bring two legal claims to seek redress for school discipline that is perceived as discriminatory: disparate treatment or disparate impact. First, a parent could argue that the school’s suspension of a minority student was motivated by racial animus, which is a form of disparate treatment. Under a disparate treatment claim, a parent would have to be able to show that teachers or administrators administered a facially neutral discipline policy in a discriminatory way. 158 A parent could bring a disparate treatment claim under the Fourteenth Amendment Equal Protection Clause, 159 Title VI of the Civil Rights Act

153 See supra Part I.B.
154 See infra Part III.A.ii.2.
155 See Adrienne Green, When Schools are Forced to Practice Race-Based Discipline, THE ATLANTIC (Aug. 26, 2015), http://www.theatlantic.com/education/archive/2015/08/teachers-say-no-disparate-impact-discipline/402144/. (Some argue that “guidelines [eliminating exclusionary discipline] “will encourage schools to tolerate disruptive and dangerous behavior lest they have too many students of one race being punished,” wrote the education-law expert Joshua Dunn in a Fordham Institute blog post last year. “The effect will be to punish students who behave and want to learn since their education will be sabotaged by troublemakers. And the disruptive will certainly learn, and learn quickly, that their schools are now tolerating even more disruptive behavior.”). Id.
156 See supra Part II.
157 The problem of suspension for low-income families would not be alleviated if suspension rates for white students increased and suspension rates for minority students stayed the same; however, it would be more probable to assume that suspension rates for minority students would go down if laws ensured evenly distributed suspensions among races.
159 U.S. CONST. amend. XIV § 1.
of 1964 (Title VI),\(^{160}\) or Title IV.\(^{161}\) Courts typically allow schools the authority to discipline a student under the Fourteenth Amendment Equal Protection Clause if the school’s actions are reasonably related to a legitimate educational interest; however, a court will apply strict scrutiny if the school was motivated to discipline a student out of racial animus.\(^ {162}\) Because most teachers and administrators do not disproportionately refer or suspend students based on overt racial animus, but rather might do so because of implicit bias,\(^ {163}\) Fourteenth Amendment Equal Protection Clause and Title VI and IV disparate treatment claims are near impossible to prove absent a showing of intentional discrimination.\(^ {164}\)

There are instances where circumstantial evidence can be used to show discriminatory intent necessary to bring a successful disparate treatment claim (either under Title VI or the Equal Protection Clause).\(^ {165}\) A court might infer discriminatory intent if a parent is able to show: (1) a Black student was more harshly punished than a white student for the same offense; or (2) the parent could use circumstantial evidence that “allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances;”\(^ {166}\) however, student privacy laws limit the amount of information a parent has access to, including the consequences different students received for similar punishments.\(^ {167}\) New discipline reporting mechanisms under ESSA report

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160 Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000(d) (2006). Title VI prohibits discrimination based on “race, color, or national origin” in any institutions or activities that receive federal financial assistance. Id.
162 Skiba et al., supra note 16, at 1090.
163 See Johanna Wald, Supplementary Paper II: Can “De-Biasing” Strategies Help to Reduce Racial Disparities in School Discipline? 1-2 (Harvard Law School Institute for Race & Justice, 2014) (“As our knowledge about how implicit racial bias is triggered, and how its impact on our decisions and actions has grown, a strong hypothetical case can be made for its contribution to the stark racial disparities that figure so prominently in school discipline data. We underline the term hypothetical because there is not yet, to our knowledge, any direct evidence that the implicit racial bias held by decision-makers in the disciplinary chain contributes to the disproportionate numbers of children of color who are severely punished in schools. That said, there is clear evidence that children of color are punished more severely than White children for relatively minor, subjective offenses in schools”).
164 See generally Skiba et al., supra note 16, at 1099.
165 See U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., supra note 17.
166 Id. (list of questions the Department of Education typically asks after an allegation of intentional discrimination in school discipline to figure out whether the discipline was intentionally discriminatory. It is important to note that the Harvard Civil Rights Project points out that “Title VI has been “ineffective and [is] rarely enforced” in discipline cases.” Skiba et al., supra note 16, at 1091 (citing the Civil Rights Project); However, the Department of Justice and Department of Education Joint “Dear Colleague” letter explicitly allows for more circumstantial evidence to be used to show discriminatory intent. More research is needed to decipher whether recent DOE guidance, in actuality, allows for more successful Title VI disparate treatment claims.).
167 The Family Educational Rights and Privacy Act prohibits schools from disclosing “student records” without written parental consent. “Student records” include student discipline records. Although there are limited exceptions where parental consent is not required to release student discipline information, the exceptions only allow for disclosure of final outcomes of a disciplinary proceeding for violent crimes or non-forcible sex offenses. 34 C.F.R. §§ 99.31(a)(13)–(14); see also, U.S. DEP’T OF EDUC., BALANCING
card requirements may allow parents to use broad, district-wide statistics to more easily make these comparisons.  

Second, a claimant could bring a disparate impact claim if he or she believes a neutral discipline policy's administration was not motivated by racial animus, yet still had a discriminatory effect. Because the Supreme Court held in Washington v. Davis that disparate impact alone is not enough to show racial animus under the Fourteenth Amendment Equal Protection Clause, a parent must bring a disparate impact claim under Title VI or Title IV. Even though Title VI's accompany regulations allow for a parent to bring a disparate impact claim absent evidence of intentional discrimination, Alexander v. Sandoval ended private rights of action under Title VI in 2001. As a result, enforcement of Title VI claims is left to the federal government.

Additionally, low-income parents still face the structural barrier that they are not entitled to a civil attorney absent a showing of effect on physical liberty. Some might contend that parents can still file complaints through the Department of Education Office of Civil Rights; however, the complaint form contains procedural complexities, numerous time-sensitive deadlines, and encourages parents to file internal grievances prior to filing a complaint. Most disproportionate discipline claims today are brought by large advocacy groups, many of which do not take on individual clients.

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170 426 U.S. 229 (holding that a police admissions exam did not violate the 14th Amendment Equal Protection Clause in spite of a showing that it had a disparate impact on the admission of black police officers.).
171 Title VI, supra note 160.
172 Skiba et al., supra note 16, at 1091 (citing Alexander v. Sandoval, 532 U.S. 275 (2001)).
173 Id. at 1099.
175 See U.S. Department of Education, OCR Complaint Forms (last updated Nov. 5, 2015), http://www2.ed.gov/about/offices/list/ocr/complaintintro.html (detailing the procedures necessary to file a discrimination complaint through the Office of Civil Rights).
176 See generally American Civil Liberties Union of New Jersey, South Orange-Maplewood School District Office of Civil Rights Complaint, ACLU (Oct. 9, 2014), https://www.aclu.org/legal-document/south-orange-maplewood-school-district-office-civil-rights-complaint (example of an OCR complaint filed by the New Jersey ACLU, demonstrating the complexity of filing a claim as compared to a parent filling out the form).
177 See also Columbia Law School, supra note 174, at 3. Because “the majority [of a survey of trial judges from 37 states] reported that pro se litigants were ineffective in their self-advocacy because they failed to present necessary evidence [and] committed procedural errors . . . it seems likely that the same pitfalls in pro se court would manifest in the filing of a disproportionate discipline complaint with the DOE Office Of Civil Rights, as well, although more research is needed to back this contention.
ii. Elimination of Exclusionary Discipline Altogether

Some school districts and policy makers are moving towards precluding suspensions entirely, but this is not a realistic solution. One might well say, “What? Eliminating exclusionary discipline altogether is a non-solution? Isn’t that contrary to the entire premise of this Note?” Yes and no. It might be true that school exclusionary discipline practices have little or no value as a discipline tool to the student, but teachers still need a way to remove a student from the classroom if the student’s behavior is disrupting the classroom culture and learning environment of other students. There is space for better teaching strategies to minimize the need for suspensions, but a student’s interest in a disruption-free classroom, the school’s interest in “promot[ing] safe and orderly school environments,” and the teacher’s interest in maintaining class order dictate that exclusionary practices should not entirely disappear. Even with preventative measures such as Positive Behavior Supports in place, there will still be, on occasion, a student who needs to be physically taken out of the general education classroom.

Elimination of all exclusionary practices might sound great in theory, but it simply is not a practical solution for teachers, especially when the teaching profession is suffering in numbers as greatly as it is. Discipline-related problems

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178 See supra note 12 discussion.
180 See infra note 191.
181 See infra note 191.
182 My own teaching experience confirms this. In my third year of teaching at one of the highest performing charter schools in Washington, D.C., my school did attempt to keep one student in particular in the classroom at all costs. Among other problematic patterns of behavior, his everyday mission in life seemed to be to unplug my projector while I was teaching a whole-class guided reading lesson, which might seem comical now, but it wasted nearly twenty to thirty minutes of class time every day. This amount of time might seem trivial, but thirty minutes of instruction for students already behind their higher-socioeconomic peers across the city can add up to a large amount of time over the course of the school year. After countless behavior intervention plans (at a school that already had a character education program and PBIS) extensive parental involvement, attempts at strengthening my personal relationships with him, and numerous personal aides (whereas this would not even be possible in most traditional public schools without a special education diagnosis under IDEA), this student continuously disrupted an entire classroom of twenty-eight first graders. It was definitely not to this student’s benefit to be excluded from class, but keeping him in class at all costs was also not fair to the other twenty-something students in class who were losing precious learning time.

183 See Eric Westervelt, Where Have All the Teachers Gone?, NPR (Mar. 3, 2015, 2:03 PM), http://www.npr.org/sections/ed/2015/03/03/389282733/where-have-all-the-teachers-gone (Enrollment is drastically declining at some of the leading teacher training programs. Enrollment is down fifty-three percent over the past five years in California and twenty percent over the last three years in North Carolina due to the “erosion of teaching’s image as a stable career.”); see also Dan Carden, Interest in Indiana Teaching Careers Declines Sharply, NWITIMES.COM (Sept. 24, 2015), http://www.nwitimes.com/news/local/govt-and-politics/interest-in-indiana-teaching-careers-declines-sharply/article_a6c856843-53d4-5248-9b72-76a829136925.html (The issuance Indiana teaching licenses dropped thirty-three percent in the 2014–15 school year, and between 2009–13 the number of college students in Indiana taking teacher education courses dropped fifty percent).
are the “prime stress-producing factor in teaching.”184 It is no surprise that over three quarters of teachers disagree with policies that prevent minorities from being expelled at greater rates (likely also in part because of teachers’ preference for classroom autonomy).185 Prospective educators do not need another reason not to go into the teaching profession.

a. Possible (Though Admittedly Far-Fetched) Solution: Change Procedural Due Process Requirements for Suspensions

There are certainly a multitude of details to be worked through, but changing the way courts conceptualize the amount of due process a student is entitled to for suspensions under Goss v. Lopez186 may affect positive change for families and students. Under the Mathews v. Eldridge test,187 courts currently weigh (1) the child’s interest in ten or fewer days of education against (2) the school’s interest in efficiency.188 If courts instead weighed: (1) the amount of educational harm resulting from losing less than ten days of school plus the interest of a parent in keeping her job for the benefit of the family against (2) the school’s interest in efficiency, the scales would likely tip in favor of necessitating more formal due process procedures. By recognizing these additional harms, schools might be less likely to use out of school suspensions for non-suspension worthy behaviors because courts could necessitate more procedural requirements. For example, a court could shift the burden onto the school to prove that the behaviors resulting in suspension actually occurred and were truly suspension-worthy.189 Requiring the school to affirmatively justify how the suspension was fair and consistent would make school administrators less likely to engage in unnecessary suspensions as a behavior control mechanism, as well as make it more difficult to disprove. Additionally, the court could also require more formal notice and opportunity to present the student’s side prior to calling the parent for a midday pick-up. Perhaps having this additional safeguard would also prevent teachers and administrators from using out-of-school suspensions, as they would have to devote more time and resources to utilize suspension as a discipline tool. Although this is not the traditional way of thinking about due process analysis—nor would it likely be adopted given the immense

185 Green, supra note 155.
187 See supra discussion Part III.A.i.
188 419 U.S. 565.
189 See Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (using the Mathews v. Eldridge test to find that a U.S. citizen-detainee had a due process right to notice of the factual basis for his classification as an enemy-combatant, but the circumstances demanded that the burden could be shifted to a rebuttable presumption in favor of the government’s evidence). Although the circumstances in Hamdi were more extreme (post-September 11th detention of an alleged enemy combatant), this case still shows that the amount of due process given under the Mathews Test can include a court’s ability to burden-shift based on the weight of the three factors. Id.
complexity in reconfiguring current due process notions—it is worth thinking through for important policy reasons.

b. Feasible Solutions

With so many competing interests at stake, there is no easy or single “fix” for exclusionary discipline practices that would eliminate all costs for all parties involved. Rather, a patchwork of strategies can reduce the current costs of suspension. No one cost can entirely be eliminated, but competing interests can be more adequately balanced so no one party—such as the families of suspended students—bear the brunt of school discipline policies. Teachers and students share a common interest (albeit for different reasons): the interest in having a positive classroom culture void of significant learning disruptions. There are numerous preventative strategies that schools can implement in order to alleviate student discipline problems before they begin. Having a strong classroom culture that rewards students’ positive behavior, rather than punishes students for disruptive behavior, is one way to go about this.

Positive Behavior Supports (PBS) and the Safe and Responsive Schools Project aim to help schools develop preventative strategies for addressing student behaviors. Not only is it proven that these preventative programs can improve student behavior, they also increase teacher perceptions of student misbehaviors. Teachers felt more aware of strategies to change student behaviors and “increased options for keeping students in school.” It is important to note that the implementation of preventative programs should be a school-wide, not a top-down, effort in order to create community buy-in. Standing alone, PBS is not enough.

It would also benefit low-income students if schools recognized trauma as a factor that impacts student behavior. Given that one out of four children have

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190 Re-configuring due process still raises numerous valid questions: would schools instead use in school suspensions to avoid lengthy due process requirements? Would working parents be the only parents get these additional due process safeguards? If so, is that fair?
192 See id. at 645.
193 Id.
194 Id. at 646.
195 PBS is already implemented in sixteen thousand schools around the country, yet disproportionate discipline is still a pervasive problem. See Jane Ellen Stevens, Massachusetts, Washington State Lead U.S. Trauma-Sensitive School Movement, ACES TO HIGH (2012), http://aces toohigh.com/2012/05/31/massachusetts-washington-state-lead-u-s-trauma-sensitive-school-movement/.
196 A growing body of research suggests that children’s brains respond to trauma (defined as “multiple traumas including physical or sexual abuse, abandonment, and domestic and neighborhood violence”) in ways that dramatically affect their behaviors. See Jane Meredith Adams, Schools Promoting Trauma-Informed Teaching to Reach Troubled Students, EDSOURCE (Dec. 2, 2013) (“In the brains of traumatized youth, neural pathways associated with fear and survival responses are strongly developed, leaving some children in a state of hyperarousal that causes them to overreact to incidents
witnessed a violent act, programs such as the ARC Framework can significantly prevent student misbehaviors and alleviate the need for suspensions. The limited number of schools that have already implemented trauma-informed improvement plans have shown up to forty percent reduction in suspension since their implementation. Newly emerging strategies such as meditation within schools has also had profound effects on students. For example, a “Quiet Time” meditation program in San Francisco schools reduced the suspension rate by as much as forty-five percent in one school during the program’s first year, and a similar study in Connecticut showed significantly lower stress-hormone levels in high school students. Lastly, the implementation of restorative justice models to teach students improved conflict-resolution skills can also contribute to alleviating discipline problems within the classroom. These preventative measures are all necessary, long-term solutions to preventing behavior issues from arising in the first place. Preventative approaches aimed at improving classroom management and student behaviors address students’ interests in maintaining disruption-free classrooms, the disciplined student’s need to remain in the classroom, and the teacher’s need to maintain order.

Prevention of misbehavior will not always be enough for two reasons: (1) if a teacher can’t recognize behavior that is truly “disruptive,” preventative efforts are useless, and (2) misbehaviors are inherently bound to occur sometime. Because White teachers can perceive different cultural behaviors as “misbehaviors,” teachers can mislabel minority student behavior as discipline-worthy; this practice undermines any preventative efforts the school might have in place. In order to prevent this phenomenon, culturally responsive teaching, implicit bias trainings, and law in education courses need to be taught in teacher training programs and reinforced through professional development sessions throughout a teacher’s career. Additionally, schools should turn to suspension policies such as California’s and Illinois’ which eliminated suspensions for minor misbehaviors and require exhaustion of preventative strategies before schools may issue suspensions.

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198 Stevens, supra note 195.


200 See Townsend, supra note 36, at 383 (“Cultural conflicts may exist between African American students’ culture and schools’ mainstream culture. For example, many African American students are accustomed to engaging in multiple activities simultaneously in their homes and communities. They can be involved in multiple conversations while eating, studying, watching television, or participating in other recreational activities. Thus, those students may prefer activities that allow them to socialize with others while completing tasks. At school, teachers usually expect and reward students’ individual engagement in one activity at a time, as opposed to managing multiple tasks and working with others”).

Even after refining what constitutes a suspension-worthy “misbehavior” through policy reform and implementing preventative strategies at the school-level, misbehaviors are still bound to occur. Therefore, suspensions should not be altogether eliminated. In order to address parents’ interest in continued employment and the teacher’s need to maintain a disruption-free environment, schools should turn to in-school suspensions (ISS) (termed something different so as to eliminate the negative stigma) as an alternative to out-of-school suspensions; however, “schools need more than a room and a teacher for in-school suspension to change behavior.” According to the Education Pipeline Project at Boston College, ISS can offer a “teachable moment” to connect with students and show them that they belong in school. Certain characteristics of ISS programs, such as term limits, problem-solving/mediation focus, professional staffing, and structured programs can lead to reductions in school discipline rates, overall.

Schools should continue to implement preventative strategies and still allowing for in-school suspensions while these measures take effect. Parents would not have to risk losing their jobs, students could still get some sort of educational benefit—an issue that is beyond the scope of this Note—and teachers would still have the necessary relief for a student who really did need to be removed from the classroom.

CONCLUSION

With 1.2 million black children suspended annually, a majority of whom are children of low-income single mother households, the use of suspensions as a discipline tool is clearly misaligned with the needs of vulnerable families. When a low-income single mother is called to pick up her child from school—or any parent with inflexible job schedule for that matter—inflexible schedules and lack of policy protections for education-related emergencies create a strong likelihood that she will suffer some sort of penalty. If she does not lose her job the first time, given a black child’s statistical likelihood of frequent suspensions, it is likely that she will eventually. Clearly, suspensions have far more grave implications than currently given credit for. Taking into account the supplementary consideration of the nation-law-eliminate-student-suspensions-minor-misbehavior. (After the enactment of AB420, “California became the first state in the nation to eliminate suspensions for its youngest children, and all expulsions for all students for minor misbehavior such as talking back, failing to have school materials and dress code violations).


See id. (“At Falcon Middle School in Peyton, Colorado, safety and discipline incidents dropped dramatically after the school introduced an in-school suspension program in 2001-2002. ‘We had 437 safety and disciplinary incidents in 2000-2001 [before in-school suspension],’ principal Bill Noxon told Education World. ‘In 2001-2002, we had 74.’”).
disproportionate affect of suspensions on low-income families could provide additional support for lobbyists and advocacy groups to push legislation that centers on the reduction of out of school suspensions as a discipline norm within the education realm.
Fair Representation in Local Government
Ruth Greenwood*

ABSTRACT

This Article focuses on my work in Illinois to use the Voting Rights Act (VRA) to improve minority representation at the local level, but the themes and findings are applicable across the country because many states have growing minority populations in the suburbs just outside of large city centers. These minority populations tend to be much less segregated than the minority communities in the cities, and so it is more difficult to use Section 2 of the VRA (“Section 2”) to ensure both descriptive and substantive representation. I recommend the use of fair representation systems like ranked choice and cumulative voting (with multi-member districts) to improve minority representation in these decreasingly segregated areas. I introduce three case studies from Illinois to highlight the numerous burdens facing those that seek to reform their local government redistricting systems. I finish with some thoughts on how litigation and legislative advocacy may be used to promote fair representation systems in local government.

INTRODUCTION

“It is an essential part of democracy that minorities should be . . . represented. No real democracy, nothing but a false show of democracy, is possible without it.”

John Stuart, Mill 1862

Representation in a democracy is “a substitute for the meeting of citizens in person.” Federal, state, and local governments could not function if all of the millions of citizens with a stake in the decisions of government were involved in every decision. Americans long ago decided that they did not want a single leader to determine issues

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of the commonwealth. Thus, governmental systems were chosen whereby some people represent others to determine the rules by which we live.

To be represented has four relevant meanings in the context of voting rights.\(^7\) One can be said to be represented if:

1. she can register, vote, and have that vote count;
2. she can join with her community to elect candidates of their choice;
3. people with the same demographic or social characteristics are part of a governmental decision making body (I will refer to this as descriptive representation); and
4. there is a congruence between the actions and behavior of a representative and one’s policy preferences (I will refer to this as substantive representation).

The first form of representation is not a focus of this Article but has been a focus of recent successful litigation efforts across the country.\(^9\) It is the latter three types of representation that this Article discusses.

Recognizing that representation is required in a democracy is only the first step. A community must then decide how it will choose its representatives. What mechanism is chosen will depend on a community’s conception of democracy and of representation. Is democracy served by a purely majoritarian representative body whereby representatives do only what those they represent want and the decision made in each case is by majority rule (majoritarianism)?\(^10\) Is it served by a representative body where the most talented members of society are trusted to deliberate and act in favor of the national interest, even if it involves unpopular choices (trusteeship)?\(^11\) Is it served by a representative body that is a vibrant marketplace of ideas, where every demographic and interest group is represented, and decision makers form different coalitions come to different compromises depending on the issue (pluralism)?\(^12\) Perhaps a little of each of these drove the decisions of the Founders to establish the decision-making structures of federal government.

The federal government structure is laid out in our almost-unamendable Constitution,\(^13\) but the structure of a local government is, in many states, relatively

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7 For a full discussion of definitions of representation, see Pitkin, supra note 6, at 1–11.
8 Adapted from Pitkin, supra note 6, at 38–59.
10 See Pitkin, supra note 6, at 30.
11 Id. at 181.
12 Id. at 191.
easily amended. For example, in Illinois, home rule jurisdictions can change their system of government (that is, their county, town, or school board) by majority vote at a general election after collecting a relatively small number of signatures to place the question on the ballot. At the local level then, we are all potential founders.

In a world of relatively infinite choice, what system of democracy suits local government? And, therefore, what system of representation is preferable? Some guidance can be drawn from Hanna Pitkin’s seminal 1967 book, *The Concept of Representation*. Pitkin found that political decisions are “questions about action, about what should be done; consequently they involve both facts and value commitments.” While decisions based on facts may be delegated to experts, decisions based on value commitments—like the decisions of what rules a community wants to live by—require diverse representation.

Not every type of diversity will be relevant for representation. For example, it is hard to think of a reason why blue-eyed people need specific representation that they could not get from brown-or green-eyed people. Additionally, in some communities, different religions or ages need not be represented, but in others, religion or age may be a key cleavage in a community, and so establishing a system that ensures diverse representation with respect to religion or age will be necessary. In every community in America one thing is for certain: race and ethnicity will be an issue that requires diverse representation.

This Article proceeds as follows: It starts by defining minority representation and outlining the normative and practical case for promoting minority representation, highlights the importance of focusing on local government representation, discusses the legal routes currently available to improve minority representation, goes through two case studies of work I have done at the local level to try to improve minority representation (in Joliet and Blue Island), and concludes with thoughts for the strategies that can be used going forward to advocate and litigate for local government structures that will better protect and promote minority representation.

I. MINORITY REPRESENTATION

If the goal of democracy is majority rule, why is pluralism or an explicit protection of racial justice needed? This question strikes at the basic paradox of...
democracy—can a society be equally committed to majority rule and minority protection? Because it conflicts with government by the majority, the commitment to minority protection must be grounded in some other value. A commitment to minority representation can be grounded in pluralism and/or a commitment to racial justice. Failing to focus on minority representation is not a choice in favor of race neutrality, but instead a de facto vote against racial justice.

For minority representation to exist, all four types of representation outlined above should be present. That is, minority communities must be able to register and vote, to elect candidates of their choice, and to be both descriptively and substantively represented in federal, state, and local government. These types of representation stand in contrast to various kinds of disenfranchisement and political disempowerment minorities have experienced in America’s history.

A. The Voting Rights Act

It wasn’t until the Voting Rights Act (VRA) in 1965 that part of the promise of the Fifteenth Amendment was codified by Congress. Though passed in direct response to the violence in Selma, Alabama, on Bloody Sunday, March 7, 1965, the aims of the VRA were broader than simply allowing Black people to register to vote without fear of losing their lives. Dr. Martin Luther King Jr.’s views on the topic were summarized by Lani Guinier in 1991: “King advocated full political participation by an enlightened electorate to elect blacks to key political positions, to liberalize the political climate in the United States and to influence the allocation of resources.” Guinier also notes that Roy Wilkins, Executive Director of the NAACP and Chairman Lawyers’ Committee for Civil Rights (LCCR), advocated for the VRA before the House Committee on the Judiciary, on the grounds that eliminating voting restrictions would mean that elected officials “will become responsive to the will of all the people.”

Provisions protecting language minority communities (Latinos, Asian Americans, American Indians, and Native Alaskans and Hawaiians) were not

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included in the VRA until 1975. These were added to help non-English-speaking voters to “cast an effective ballot . . .”

The definition of minority political participation used during the 1975 debates included registering, voting, running for office, and holding office as civic participation goals. The 1975 Act’s added protections were written to apply to “language minority groups,” defined as “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”

B. Promoting Minority Representation

i. Registering, Voting, and Having that Vote Count Today

The removal of practices that directly prevented minority voters from registering and voting (for example, literacy tests, and some of the practices prevented through Section 5 preclearance, such as not opening voter registration opportunities when Black citizens appeared at the relevant office to register) supported the most basic type of minority representation: allowing people of color to register, vote, and have that vote count.

There are still laws that disproportionately disenfranchise voters of color, such as felon disenfranchisement laws, photo ID laws, citizenship requirements, and restrictions on early voting that are either currently on the books or are being advanced in legislatures or through ballot initiatives. Advocates for minority representation are using Section 2 of the VRA somewhat effectively where previous litigation under the Fourteenth Amendment has not been successful.

ii. Electing Candidates of the Minority Community’s Choice

The VRA, though originally interpreted by the Supreme Court to protect against only intentional discrimination with respect to the right to vote, was clarified by Congress in 1982 such that today it prohibits systems of election that prevent minority communities from electing candidates of their choice. The classic example of such a system is a town council that elects all of its representatives at large, meaning that every voter chooses someone for each of, say, seven positions. The result

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22 The expansion was both through the coverage formula in Section 4 of the Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (1965), and the addition of Section 203 that required election materials to be printed in multiple languages in areas where there was a significant community with a common language that also spoke English less than well.


24 Id. at 39–58.


27 See supra text accompanying note 9.


29 52 U.S.C.A. § 10301(b).
of at-large systems is that the majority white population, if there is racial polarization in voting, will elect all seven members, and the minority community will never be able to elect a candidate to the local office. In places where it is possible to divide the jurisdiction into single-member districts (SMDs) such that one or more will have a majority of minority citizens, Section 2 of the VRA has been interpreted to require that SMDs (or another remedy) be implemented.\(^{30}\)

iii. Descriptive Representation

The VRA says nothing explicitly about descriptive representation, but the Senate, in passing the amendments to Section 2 in 1982, added in a list of factors that a court must consider as part of the “totality of the circumstances” test. \(^{31}\) Factor seven, in particular, is concerned with descriptive representation: “the extent to which members of the minority group have been elected to public office in the jurisdiction.”

In many cases, the VRA’s protection of communities electing candidates of their choice has resulted in a protection of descriptive representation because people of color have largely been the choice of the minority community and white people have largely been the choice of the white community. For example, at the congressional level in elections from 1966–96 (the thirty years after the VRA was passed) only 35 of the 6,667 elections in white majority districts provided Black winners (that is, 0.005%). \(^{32}\) There are more white winners in majority Black or Latino districts than this low rate, but not a sufficient amount to threaten the ability of representatives of color to be elected at the local, state, and national level.

iv. Substantive Representation

Substantive representation can have both an individual representative component and a whole legislature/policy outcomes component. With respect to individual representatives, the VRA protection of communities of color’s ability to elect candidates of their choice should protect substantive representation (if the community votes in its self-interest and is able to hold the legislator to account). In addition, the Senate factors in the Section 2 amendments to the VRA outline the issues that a court should consider as part of the “totality of the circumstances” test required by the section. One of the Senate factors requires a court to look at whether the relevant minority group bears the effects of discrimination in areas such as education, employment, and health.

Additionally, political scientists have found strong evidence that substantive representation follows directly from descriptive representation. For example, Kerry L. Haynie finds, in analyzing agenda-setting behavior, that “a legislator’s race tends

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to have a stronger effect on substantive representation than does a legislator’s party membership.” 33

With respect to whole legislature/policy outcomes, the story is somewhat different due to the nature of winner-take-all district elections. Whether substantive policy outcomes are promoted by the VRA depends on the size and distribution of the minority communities and the level of racially polarized voting.

The need to divide minority representation into a substantive and descriptive component reveals how differently the political world is experienced by whites and people of color (and hence why it is important to approach the political world with an appreciation of racial difference). Since ninety percent of elected officials are white (and sixty-five percent are white men),34 a white person will almost never need to worry about whether the candidate who will substantively represent him will also descriptively represent him.

C. The Benefits of Minority Representation

Q: Now why would you come from Crittenden County to participate in a fundraiser for a county race that was basically a local race to Philips County?

A: Well, the reason I would come, first of all, there are no blacks elected to a county position in eastern Arkansas and no blacks serving in the House of Representatives in eastern Arkansas and no blacks elected to anything other than school boards in districts that are predominantly black. And I feel like blacks should be elected to public office because they should have a chance to serve.

And I want to help get blacks elected so little black children can see them serving and I want to dispell (sic) the myth that some white kids might have that blacks can’t serve or shouldn’t be serving at the courthouse. And when my little girl goes to the courthouse or when other little girls go to the courthouse, I want them to be able to see black people working up there.

And if we can get some blacks elected at the local level, eventually we can—blacks will have the expertise and we can groom them to the point where they can run for the state legislature and other positions . . . .

Ben McGee, 1988

i. Black Americans

Though the Black community is not homogenous, and Black community groups will differ in their support for various policies and laws, it is possible to find a large

33 KERRY L. HAYNIE, AFRICAN AMERICAN LEGISLATORS IN THE AMERICAN STATES 25, 30 (2001). Haynie justifies assessing agenda-setting behavior as a method of assessing substantive representation by relying on R. Douglas Arnold’s finding that “analyzing legislator’s bill introductions is often superior to a reliance on roll-call votes for attempting to establish a linkage between constituency interests or preferences and the legislative behavior of representatives.” Id. at 25.
body of common ground between black citizens on questions of public policy, ideology, and candidate choice, and therefore to define “Black interests,” for the purpose of studying whether these interests are furthered by an increased presence of black legislators, by greater seniority of black legislators, or other practices aimed at promoting minority representation. Kerry L. Haynie finds that Black citizens “have been the most cohesive and consistent political subgroup in U.S. politics.”

This coherence has made it easier for researchers to draw conclusions as to whether white or Black representatives are better able to represent the views of the Black community. Canon researched thousands of Congressional representatives over a thirty-year period and found that white representatives from districts that are 30–40 percent Black can largely ignore their Black constituents, and many do. Black representatives from districts that are 30–40 percent white cannot ignore their white constituents because they are operating in an institution that is about 86 percent white and a nation that is 82.5 percent white.

He concludes that there is “very little support” for the claim that “whites are just as able to represent black interests as blacks.” Additionally, Haynie, in analyzing state legislatures, found that Black members did not need to be in positions of power (for example, on legislative committees) to exert an influence over substantive outcomes, instead “the mere presence of African Americans in state legislatures . . . was sufficient to yield significant institutional and governmental responsiveness to black interests.” Haynie also examined the introduction of bills by state legislatures and found that “the race of the representative has a powerful and statistically significant effect on the introduction of traditional civil rights legislation.”

A corollary of the Canon and Haynie findings is that “districts with a majority black population had no significant impact on whether legislators representing such districts introduced black interest legislation.” That means that majority-Black districts without a Black elected official are not likely to see Black-interest legislation introduced on their behalf, even though the minority community voted that representative into office. Thus, the candidate of choice of a minority community will best represent them substantively if—and only if—that candidate also descriptively represents them. There are of course exceptions to this statistical finding: there have been and are a small number of majority Black communities that elect white candidates to represent them, and those candidates provide substantive representation for their communities. Those exceptions do not undercut the link between descriptive and substantive representation, but rather should give us hope

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36 Haynie, supra note 33, at 19.
37 Canon, supra note 32, at 13.
38 Id. at 12.
39 Haynie, supra note 33, at 90.
40 Id. at 30.
41 Id.
that in a future time it will be possible for all white candidates to represent all of their constituents, not just the white ones.

ii. Latinos

The Latino community is not as politically cohesive as the Black community, largely because of group differences by country of origin, e.g., Mexico, Puerto Rico, and Cuba. This makes it difficult to assess whether on the whole, the Latino community is able to get “what it wants” because there is no “it.”

However, it is possible to assess whether Latinos are more likely to get the outcomes they desire than white Americans. It has been shown that, in Congress, Latinos, like Black Americans, are less likely to have policies implemented that they care about when their representatives are white, with the exception of districts that are over fifty percent Latino and represented by white members. In the latter case, Latinos are as likely to have their policies represented by their congressional members as the whites in that district. Thus, having a Latino representative generally leads to substantive representation for Latinos.

For Latinos (as well as Blacks), the substantive representation that results from descriptive representation also goes beyond just being more generally liberal. An analysis of voting patterns in several Congresses shows that “rather than simply greater intensity on a liberal-conservative spectrum, which generally emphasizes economic/class cleavages, minority representatives see a second, racial dimension of policies as highly salient.” This finding also tends to discredit those who say that substantive representation for minorities can be achieved by simply increasing the number of liberal representatives in office. White representatives—even liberal ones—do not have the “sense of racially ‘linked fate’” or “personal experience with discrimination” to draw upon, which shows up in how they vote.

iii. Asian Americans

Though the Asian American community does not share a common history, language, or country of origin, political scientists conclude that an “Asian American identity does exist and frequently works as a collective group.” Unlike Black

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42 See JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT 51 (2008).
43 See id. at 197.
44 See id.
46 See id. at 158, 160. Preuhs and Hero used a measure of how liberal a representative was (the DW NOMINATE score) along with scores on race issues from the NAACP (for Blacks) and NHLA (National Hispanic Leadership Council) to analyze voting patterns. They found that for white liberals, the DW NOMINATE score was highly explanatory of voting patterns whereas for Black and Latino representatives, the scores from NAACP and NHLA indicating how sensitive a candidate is to minority issues were far more predictive of representatives votes on certain issues. Id.
Americans and Latinos, Asian Americans, though exhibiting a reasonable level of political cohesion, largely do not exhibit party loyalty.\textsuperscript{48}

An example of Asian political cohesion is the fight to keep an Asian neighborhood together during a redistricting process in New York in the 1990s. Latinos challenged the Twelfth Congressional District in New York, and a group of Asian Americans intervened to argue that the redrawn district should not split up their community.\textsuperscript{49} The community was defined by common neighborhoods, language, level of education, employment in similar industries, use of public transport, and immigration status.\textsuperscript{50} The Court found this argument compelling, and the first constitutionally permissible Asian-influence district was formed. The district remains a multi-racial opportunity district (with 40% Latino and 20% Asian American population).\textsuperscript{51}

When there are common interests amongst Asian American groups,\textsuperscript{52} it is possible to study whether Asian American legislators effectively represent those interests, and it has been found that they do, indeed, further such interests.\textsuperscript{53}

\textit{iv. Minority Representatives as Role Models}

Guinier explains role model theory as Black representatives "who convey the message 'We Have Overcome' and inspire those not yet overcoming. Thus, in general, Black role models are powerful symbolic reference points for those worried about the continued legacy of past discrimination."\textsuperscript{54}

The most prominent example of a candidate of color inspiring others is, of course, President Obama. The ability of a Black man to be elected to the highest office in the land conveys the message to Black children everywhere that they too can do great things even though they may experience racism along the way. Similarly, Senator Daniel Inouye served as a role model to a generation of Japanese Americans,\textsuperscript{55} as did Mayor Villaraigosa, Senator Rubio, and Congressman Castro for Latinos.

\textsuperscript{48} See Glenn D. Magpantay, \textit{Asian American Voting Rights and Representation: A Perspective from the Northeast}, 28 FORDHAM URB. L. J. 739, 764 n.163 (2001) ("Political cohesion around candidates can be discerned, but party loyalty is largely absent.").

\textsuperscript{49} \textit{Id.} at 766–67.

\textsuperscript{50} \textit{See id.} at 766–67.

\textsuperscript{51} New York's 12th Congressional District in the 1990s is now the 7th District, and is still represented by Nydia Velasquez. The District is 43% Latino and 19% Asian according to the 2013 American Community Survey estimates. \textit{See U.S. CENSUS BUREAU, 2013 American Community Survey} (2013), http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.

\textsuperscript{52} See Magpantay, \textit{supra} note 48, at 768 (explaining that communities of interest can be identified within the Asian American community).

\textsuperscript{53} See Chaturvedi, \textit{supra} note 47, at 20 ("Asian American legislators represent Asian Americans well.").

\textsuperscript{54} GUINIER, \textit{supra} note 35, at 57.

v. Improved Civic Participation by People of Color

In 1965, Black voter registration rates were as low as 6.7% in some states. This was the intended outcome of the white power structure in place. Following the adoption of the VRA, voter registration rates increased. Voter turnout also largely followed a similar trajectory. Guinier theorized in 1994 that this is because there is a key role that “group identity plays in mobilizing political participation and influencing legislative policy.” She noted also that: “blacks can be encouraged to participate in the political process, the possibility of electing a ‘first’ Black tends to increase election day turnout. Indeed, the courts and commentators have recognized that the inability to elect Black candidates depresses black political participation.”

Studies of each of the minority groups under consideration bear out this hypothesis. For Blacks, this effect was dramatically illustrated in the 2008 election where black turnout eclipsed that of white turnout for the first time, likely because Black voters wanted to elect the first black President. Additionally, political scientists have found a link between the election of black mayors and greater Black political participation.

For Latinos, a study of Southern California over five years shows that Latino voter turnout increases when Latino voters have a chance to elect their candidate of choice out of a majority-minority district. That boost to turnout increases with each additional overlapping district where electing a Latino is possible: the highest turnout came from Latino voters who lived in overlapping majority-minority districts for State Assembly, State Senate, and U.S. House of Representatives.

For Asian Americans, Taofang Huang finds that Asian Americans are more likely to vote when an Asian American is a candidate, particularly when the candidate’s ties to a specific Asian country are a prominent part of his or her presentation during a campaign.

It seems likely that, beyond mayoral races, increased minority representation at the local level will drive minority civic participation. For example, each additional Latino majority-minority district increases turnout by the Latino community. Thus, descriptive representation should increase substantive representation on both ends; the elected official is more likely to take the interests of the minority community
seriously and the community will become more engaged, mobilized, and better able to hold that representative accountable.

vi. Confidence in Government

Jane Mansbridge explains the connection between increased descriptive representation, legitimacy, and confidence in government:

Seeing proportional numbers of members of their group exercising the responsibility of ruling with full status in the legislature can enhance de facto legitimacy by making citizens, and particularly members of historically underrepresented groups, feel as if they themselves were present in the deliberations.64

Haynie and Guinier accept this argument, but they clarify that they believe descriptive representatives will only contribute a basic level of trust in political institutions if the minority members actually speak for the communities from which they come.65

The benefit of an increased confidence in government will not necessarily only be felt by members of the relevant minority community but may also increase the confidence of elected officials that they have made decisions based on the views of the entire community, rather than just the white majority. There is also a possibility that this confidence could flow over to white voters themselves if they believe that all community members are having their voices heard on local decision-making bodies.

vii. Changing Attitudes to Minority Legislators and Minority Community Members

There is some evidence that Black political leadership can help to break down the “myth that some white kids might have that Blacks [and other minority candidates] can’t serve or shouldn’t be serving.”66 For example, Zoltan Hajnal shows that “the transition from white to Black leadership frequently leads to notable shifts in white attitudes and behavior.”67 Hajnal argues that this shift in behavior occurs where information about the Black political leadership is credible and widely disseminated such that the white community perceive their black leader to have real

64 Haynie, supra note 33, at 114 (citing Jane Mansbridge, Should Blacks Represent Blacks and Women Represent Women? A Contingent Yes, 61 J. Pol. 628, 650 (1999)).
65 Haynie, supra note 33, at 114.
66 Id. at 63.
67 Hajnal, supra note 60, at 7. Unfortunately, Hajnal finds exceptions to his rule, and Chicago is one of the notable exceptions: “Although Black representation in most cases leads to decreased racial tension and greater acceptance of Black incumbents, there are a select number of cities where racial tension remains high, voting continues to be highly racially polarized, and few new white voters begin to support Black leaders despite years under Black leadership . . . . Chicago represents perhaps the most famous case of ongoing white resistance.” Id. at 123 (though Hajnal can explain the unique circumstances that set Chicago out from other cities).
control over outcomes and policies, and white community members are therefore more likely to reduce their negative attitudes to Black leadership.

At the congressional level, some studies on white voting behavior following Black leadership support Hajnal’s findings, but some find the opposite result, with whites being eight to ten percent less likely to support Black incumbents than white incumbents. Despite this finding, the number of Black congressional representatives that represent majority white districts has increased from zero in 1960 to six in 2000, representing sixteen percent of all Black representatives. Though change in the level of racially polarized voting is slow, it seems change has indeed followed from increased examples of Black leadership (in both majority white and majority Black communities).

The number of Latino and Asian American representatives has only started to grow in the past three decades, but the data so far suggest that white voters respond to Latino and Asian American leadership positively. Hajnal finds “there does appear to be a pattern of changing white behavior in response to experience with Latino elected officials. The evidence is clearer for whites who experience Latino leadership than it is for whites who live under Asian American incumbents but in both cases there are signs that white Americans are learning.”

The effect of minority political leadership on white racial attitudes is therefore one of caution and hope. Though minority representation “cannot solve all or even most of America’s racial ills . . . if it can begin to reduce racial divisions in the political arena, then it is a goal well worth pursuing.”

viii. Minority Representation and the Representation of Women

Focusing on minority representation gives us a chance to explore “the interaction and coalition formation that may occur between women and minority groups with corresponding interests” and to find ways to advance representation for both of these underrepresented groups of people.

A finding that reveals corresponding interests is that the improvement in minority representation over the past few years has largely been driven by women of color. This is particularly true for black elected officials. For example, in 2001, the increase in Black elected officials in office was entirely due to the increase in Black women in office. Since 1998, the number of Black men has actually decreased, and overall (from 1970–2005) black female elected officials

68 Id. at 145.
69 Id.
70 Id. at 146.
71 ZOLTAN HAJNAL, AMERICA’S UNVEVEN DEMOCRACY 153 (2010).
72 Id. at 161.
73 Michael D. Minta, Gender, Race, Ethnicity, and Political Representation in the United States, 8 POL. & GENDER 541, 544 (2012).
increased twenty-fold while black male elected officials increased only fourfold.74

The fights for gender and racial/ethnic equality should be seen as connected because achieving minority representation is not just about narrowly satisfying the interests of some racial groups. Rather, it is grounded in a view of democracy that says that all of those who are historically or currently disempowered still deserve respect and recognition. This connection has been important in the advances of racial and gender justice: the civil rights movement of the 1960s was dominated by discussions of race, but coalition building allowed protections for gender to be included in the Civil Rights Act of 1964.75

II. MINORITY REPRESENTATION IN LOCAL GOVERNMENT

Now that we have set the boundaries for our discussion of what constitutes minority representation and why we may desire to increase it, let us turn our attention to local government representation in particular. The starkest recent example of the importance of local government in the fight for racial equality comes from Ferguson, Missouri.

Many will remember Ferguson only for the shooting and killing of an unarmed, Black teenager, Michael Brown, by a white police officer in 2014.76 A large part of the blame for this terrible event was rightly attributed to the racially discriminatory culture within the Ferguson Police Department.77 But there are deeper issues. Ferguson, along with St. Louis, is highly segregated not only in housing patterns, but also in the distribution of local power.78 Although Ferguson’s population is majority Black, it is run by a white mayor and a white police chief, with a police department known for brutality against Black79 youth and racist conduct by police officers.

While Ferguson is over sixty-seven percent Black, its city council included only one Black member out of six seats.80 In addition, seventy-seven percent of students

74 Carol Hardy-Fanta et al., Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States 6 (Sep. 1, 2005) (unpublished manuscript) (on file with the American Political Science Association).
75 See Minta, supra note 73, at 544–45.
78 See The Death of Michael Brown, supra note 76.
79 This report uses “Black” rather than African American to ensure that people without slave ancestry but who still hail from Africa are included in the analysis. The Census Bureau uses both terms in its work. This report capitalizes “Black” because the terms Latino and Asian are also usually capitalized.
in the Ferguson-Florissant School District are Black, yet only one school board member out of seven total was Black. City councils, school boards, and other local government systems can influence city agencies and the allocation of resources in many important ways. For example, if Ferguson’s city council looked like Ferguson itself, it could choose to ensure that the police force is racially diverse, better trained to understand racial justice issues, and held accountable for racially disparate treatment and racially discriminatory conduct.

The situation on the ground in Ferguson serves to highlight a truth about local governments across our country: they control many aspects of our daily lives, not just criminal law but also many other policy areas that are crucial for the civil rights agenda. Local government decisions can affect whether a community is integrated, whether public employees include people of color, whether police target people based on race, whether schools disproportionately suspend and expel Black students, whether food deserts exist, whether minority-owned businesses can thrive, whether people of color’s right to vote is disproportionately burdened.

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84 City policies about standards for hiring can affect diversity in public employees. See, e.g., Lewis v. City of Chicago, 643 F.3d 201 (7th Cir. 2011).

85 See, for example, New York’s “Stop and Frisk” laws that were found to have disproportionately impacted the Black community in New York. See generally Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).


87 Governor Pat Quinn appropriated $10 million to go to cities, towns, and villages across Illinois to address the problem of food deserts. City council members had to apply to receive that money, and some used the media in that lobbying effort. Landon Cassaman, Rockford “Food Desert” Seeks State Funding, WIFR.COM (Aug. 3, 2012, 9:32 PM), http://wifr.com/home/headlines/Rockford-Food-Desert-Seeks-State-Funding-164970226.html.

88 For example, Chicago has a Minority and Women-Owned Business (e.g., M/WBE) Certification Program that provides contracting opportunities to M/WBE certified companies. BUSINESSES & PROFESSIONALS, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/ofinterest/bus/mwdbie.html (last visited March 12, 2015).

89 For example, the Department of Justice was asked to investigate the placement of voting machines in Franklin County. The DOJ found that more registered voters were allocated to a single machine in predominantly Black precincts, and less registered voters per machine in predominantly white precincts (the amount of actual voters for each machine did not show a discriminatory impact). Dan Tokaji, DOJ: No Discrimination in Ohio Election, MORTIZ COLLEGE OF LAW: ELECTION LAW @ MORTIZ BLOG (July 5, 2005), http://mortizlaw.osu.edu/blogs/tokaji/2005/07/doj-no-discrimination-in-ohio-election.html. In addition, decisions on the allocation of voting machines and election judges can affect
whether first-time offenders are prosecuted for felonies under the criminal justice system,\textsuperscript{90} and where for-profit detention centers will be located,\textsuperscript{91} to name a few examples.

Local governments are often overlooked and understudied compared with federal or state governments when it comes to civil rights protections. Local governments contribute to whether we make our society a place where people can thrive economically, politically, and socially, regardless of their race or ethnicity, or whether people of color will face an uphill battle just to live, work, and be educated. Local governments are at the forefront of civil rights issues, and so it is at that level that we should be trying to ensure that minority communities are fairly represented.

Unlike Congress and state legislatures, which can contain many hundreds of legislators, local school boards and city councils are usually comprised of five to fifteen members. Adding even a single minority voice to the deliberations of a small body can help the rest of the members better understand issues from the perspective of the minority community, and that member can raise issues or introduce motions for a vote, without needing to have the support in a legislative committee. Thus, the introduction of one or more people of color to a local council has the potential to make a larger difference at the local level than at the state or congressional level.

\textbf{A. Descriptive Representation at the Local Level May Increase Descriptive Representation at the National Level}

Even if one’s ultimate goal is to improve state or federal minority representation, local minority representation is still fundamentally important to that end. Local government representation by minority candidates can “build the bench” of candidates for higher office. Minority representatives at the federal level are more likely than their White peers to ascend through the political ranks by first serving as local elected officials.

An analysis of the background of the House members in the 114th Congress found that while twenty-two percent of White representatives started their political careers as elected representatives in local government, representatives of color were

\begin{itemize}
\item \textsuperscript{90} The Cook County State’s Attorney is an elected position in local government. In March 2011, the Cook County State’s Attorney implemented a Deferred Prosecution Program to attempt to divert first time offenders from the justice system. \textit{Deferred Prosecution Program, TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES}, http://www2.tasc.org/program/deferred-prosecution-program (last visited Mar. 13, 2015).
\item \textsuperscript{91} The Corrections Corporation of America sought to build a for-profit immigration prison in Joliet in 2013. In order for that to go ahead, the Joliet City Council had to approve a special use permit. Ashlee Rezin, \textit{Pressure Against Joliet’s Proposed For-Profit Immigrant Detention Center Escalates}, PROGRESS ILL. (May 16, 2013, 7:11 PM), http://www.progressillinois.com/quick-hits/content/2013/05/16/pressure-against-joliet-s-proposed-profit-immigrant-detention-center-es.
\end{itemize}
much more likely to have started in local government: 29% percent of Asian American representatives, 38% of Black representatives (over 1.5 times as many as white representatives), and 44% of Latino representatives (double the number of white representatives) started their political careers as local government representatives.92

This disparity holds specifically for people of color: there is little difference by gender (twenty-five percent of male and female representatives started in local elected office) and party (twenty-one percent of white Republicans and twenty-four percent of white Democrats started in local elected office).

Therefore, improving local minority representation could create a cadre of trained representatives of color that are ready to go on to state and national office to represent the interests of their communities. In addition, the reluctance of white voters to vote for Black candidates breaks down (even if only to some extent) after experiencing Black leadership.93 Thus, the opportunities for local Black candidates to get elected to higher office, even if the higher offices are not majority-minority communities, improves.

B. Descriptive Representation Improves Substantive Representation at the Local Level

Descriptive representation for people of color at the local level has the potential to significantly improve the lives of communities of color.

At the county level, a minority commissioner can influence whether services and administrative positions will be distributed equitably. For example, in Chilton County, Alabama, during the late 1980s, the county decided which roads got paved and re-paved (as many county boards do). Their system was ad-hoc and resulted in the all-white board of commissioners prioritizing white neighborhoods. Once Bobby Agee, the county’s first Black commissioner, was elected in 1988, he was able to implement a systematic and objective way to determine which roads got paved.94 As a result, Black communities had their roads paved (and the overall process was more responsive to community needs). The county board also has the power to suggest and appoint administrative personnel. After Bobby Agee was elected, Black representatives were appointed by the county board to administrative board positions.95

At the municipal level, descriptive representation for Black Americans has led to an improvement in police and social welfare policies for the Black community. Having a Black mayor is consistently associated with an increase in the number of Black officers on the police force.96 A Black mayor also makes it more likely that there

92 All research for this small study was conducted by the author.
93 See Hajnal, supra note 60, at 160–63. (“[B]lack mayoral leadership [can] . . . change white voting behavior, [and] also [l] alter white racial attitudes.”).
95 Id.
96 See Daniel J. Hopkins & Katherine T. McCabe, After It’s Too Late: Estimating the Policy Impacts of Black Mayoralties in U.S. Cities, 40 AM. POL. RES. 665, 665–700 (2012); see also Jihong Zhao, Ni He & Nicholas
are police department policies that aim to improve the relationship between police and the over-policed Black communities, such as citizen accountability boards.\textsuperscript{97} Black descriptive representation also leads to better responsiveness of social service agencies to the needs of the Black community, particularly when the program managers and the representatives engage in community networking and learning.\textsuperscript{98}

And, at the school board level, school boards that include Latino representatives are more likely to hire Latino school administrators, such as principals and superintendents, who, in turn, hire more Latino teachers. Qualitative\textsuperscript{99} and quantitative\textsuperscript{100} studies, including randomized experiments,\textsuperscript{101} find that the academic achievement of Latinos, as well as non-Latinos, increases when a school has Latino teachers. In addition, a majority of Latinos would prefer for their children to have more Latino teachers.\textsuperscript{102}

### III. Improving Local Minority Representation

If we accept that improving minority representation at the local level is a valid goal, then how are we to achieve this improvement? Perhaps everything appears to be able to be changed by litigation or legislative change if one is a lawyer (much like a hammer sees everything as a nail), but I believe that there are great strides to be made through these two methods. The third, complementary, and in many ways a \textit{sine qua non} of legal change, method is to engage in community organizing. That is beyond the scope of my expertise though, so I will leave it to others to comment on the best ways to integrate community organizing into a fully-fledged litigation and legislative advocacy campaign.

#### A. Litigating over minority vote dilution

The difficulty with using litigation to develop solutions to a complex problem like minority representation is that an impact case will set a precedent based on a unique factual scenario and with a single or limited set of remedies. In the case of minority representation, \textit{Thornburg v. Gingles} was a watershed for minority representation because it set the floor—a base level of representation of people of color in the halls of power—below which the country would not return.\textsuperscript{103}

\begin{thebibliography}{99}
\bibitem{101} Id. at 1230–31.
\bibitem{102} Id. at 1230.
\bibitem{103} Id. at 1224.
\end{thebibliography}
Unfortunately, Gingles has also come to represent a ceiling. That ceiling prevents the adoption of an election system that would allow for fairer representation for people of color.

The concept of vote dilution was recognized as a constitutional harm in the “one person, one vote” (OPOV) Supreme Court cases of the 1960s. The Court found that an individual’s vote could be diluted if she was in an election district that had a huge disparity in population to another district for election to the same legislature. For example, in Baker v. Carr, districts for the state legislature in the urban centers of Tennessee had ten times the number of people as districts in rural areas. This meant that a voter in an urban district had one-tenth the voting power of a voter in a rural area. The court labeled the requirement of rough population equality a OPOV requirement:

“All who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be . . . . The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”

The OPOV requirement recognizes that an individual’s vote can be diluted by the size of election districts. Minority vote dilution operates in a similar, but more complex way than individual vote dilution, and it describes a group rather than an individual harm. As Pamela S. Karlan explains, “[u]nlke the white suburban plaintiffs in Reynolds whose voting strength was diluted because of where they lived, the political power of Black citizens is diluted because of who they are.”

Thus, in 1971, in Whitcomb v. Chavis, a group of Black voters in Indiana argued that vote dilution could also occur based on race, rather than geography. The plaintiffs argued that by electing multiple legislators in the Marion County area using at-large elections, the Black community was left with “almost no political force

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106 The OPOV started as a rough population equality measure, but later was changed to require a population deviation of no more than one person for each congressional district (and at the state legislative and local level, the population requirement only allowed that the largest and smallest districts deviated by no more than 10%). See Karcher v. Daggett, 462 U.S. 725, 730–41 (1983) (regarding congressional districts); Larios v. Cox, 305 F. Supp. 2d. 1335, 1337 (2004), aff’d, 124 S. Ct. 2806 (2004) (citing Brown v. Thomson, 462 U.S. 835, 842–43 (1983) (regarding state legislative districts)).
108 The concept of minority vote dilution was first hinted at in Fortson v. Dorsey, 379 U.S. 433 (1965), but not relied upon by the appellees, and so it was only briefly addressed by Justice Brennan writing for the Court. Id. at 439 (“It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”).
or control over legislators because the effect of their vote [was] cancelled out by other contrary interest groups.” 111 The problem with winner-take-all, at-large elections (those where fifty-one percent of the community can elect one hundred percent of the representatives) is that “a slim majority of voters has the power to deny representation to all others.” 112 The Court declined to find that there was in fact a constitutional violation caused by the use of at-large districts in Indiana, but it left open the question of whether, in the right factual scenario, the rights of minority voters might be diluted.

Shortly thereafter, plaintiffs from Texas, in *White v. Regester*, convinced the Supreme Court that there was invidious discrimination in the drawing of the Texas legislative redistricting plan in violation of the Equal Protection Clause of the Fourteenth Amendment. 113 The plaintiffs showed that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” 114 The court analyzed a number of practices that prevent political participation by Black voters in Dallas County and Latino voters in Bexar County. These included party slating, poll taxes, cultural barriers, and the use of multi-member districts (MMDs) with at-large, winner-take-all plurality voting.

Another set of plaintiffs tried to build on the theory of minority vote dilution as caused by at-large voting in MMDs from *Regester* to argue that such dilution was occurring in the city of Mobile, Alabama. In *Mobile v. Bolden*, the plaintiffs alleged that the Fourteenth and Fifteenth Amendments, and Section 2 of the VRA, were violated by the City Commission’s election system that elected the three-person Commission at-large, thereby denying the Black population (that constituted 35.4% of the total population) the ability to elect a single candidate. 115 The Court held that there was no difference between the Fifteenth Amendment and Section 2 of the VRA, and found that both the Fourteenth and Fifteenth Amendments were not violated because a showing of purposeful discrimination was required for each, and such a purpose was not shown. 116

The holding in *Bolden* appeared to make it all but impossible for plaintiffs to overturn redistricting plans or election systems that diluted the minority vote. As Chandler Davidson describes, in the context of an attempted minority vote dilution case in the town of Taylor, Texas (where, despite high Latino turnouts in elections

111 Id. at 129.
114 Id. at 766.
and Latino candidates running regularly for office between 1967 and 1974, no candidate that was the choice of the minority community was elected):

The decision presented serious problems to the plaintiffs in Taylor, whose at-large system had been established in 1914. The files of the local newspaper only went back to the 1930s, and official city documents relating to the charter revision shed no light on the motives for the change. After much soul searching, the plaintiffs withdrew the suit, at the cost of three years of trial preparation, dashing the minorities lingering hopes that the U.S. Constitution might provide them relief.117

The difficulties Bolden created were foremost on the minds of legislators when they amended Section 2 of the VRA in 1982. Congress added paragraph (b) to Section 2 that explained that Section 2(a) could be violated if a “totality of circumstances” test was met, rather than the more stringent purposeful discrimination test of the Fourteenth and Fifteenth Amendments. The totality of the circumstances test means that plaintiffs can present evidence that an election system in effect dilutes the minority vote, along with examples of other types of racial discrimination that occur in the jurisdiction, rather than having to show that the particular election system was adopted with a racially discriminatory purpose.

The amended Section 2 was used effectively in litigation immediately after 1982, with the seminal case of Thornburg v. Gingles in 1986 establishing a three-part test that plaintiffs could meet in order to prove a Section 2 violation even if they could not prove that an election system was instituted for the purpose of discriminating with respect to voting on the basis of race. The Gingles test requires the racial, ethnic, or language minority group to prove that it is:

1. sufficiently large and geographically compact to constitute a majority in a single-member district;
2. politically cohesive; and
3. in the absence of special circumstances, that bloc voting by the white majority usually defeats the minority’s preferred candidate.118

The Court will also look at factors identified by the Senate in the 1982 amendment of Section 2. These factors clarify the “totality of circumstances” requirement in Section 2.119 Modern legal strategies to overcome minority vote dilution must still operate within the Gingles framework. However, this does not mean that the remedy imposed in Gingles (majority-minority SMDs with winner-take-all plurality voting) must be applied wherever a Section 2 violation occurs. In addition, Section 2 litigation is not the only strategy that can be used to remove

118 Thornburg, 478 U.S. at 49–51.
119 The list of Senate factors and a brief discussion of how they are used in litigation is available here: Section 2 of the Voting Rights Act, U.S. DEP’T OF JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last updated Aug. 8, 2015).
minority vote dilution. The remainder of this section compares the *Gingles* remedy to other election systems used in the United States to prevent minority vote dilution.

**B. Remediing Minority Vote Dilution: The Problem of Majority-Minority SMDs**

The benefits of the *Gingles* remedy are most clear where the fact scenario is similar to that in *Gingles*. That is, where an “at-large scheme consistently, systematically dilutes the voting strength of a geographically isolated racial or ethnic minority.”\(^\text{120}\) There are multiple reasons why this particular scenario is becoming less common, and therefore why systems other than majority-minority SMDs are more likely to protect the voting rights of racial and ethnic minorities. These reasons are discussed below.

i. Decreasing Residential Segregation

America is becoming less residentially segregated.\(^\text{121}\)

The movement of people of color into relatively white suburban areas causes those suburbs to become more diverse (in that they include people of multiple races and ethnicities) but not necessarily residentially integrated.

Many of the areas that have new populations of color still have almost entirely white representation at the school board or local government level. In many cases this is because at-large districts are used to elect the local board. For example, the Hanover Park, Illinois, town council is all white, yet forty-four percent of the population is Black, Latino, or Asian American.

The consequence of reduced segregation is that majority-minority SMDs cannot be drawn to protect the voting rights of people of color. The *Gingles* remedy only protects geographically compact minority communities. As long as people of color do not make up a majority of new neighborhoods and racially polarized voting persists,\(^\text{122}\) there will be no minority representation on local representative bodies.

ii. Irregular Town Boundaries

Unlike county boundaries, which are mostly square in Illinois, and school board boundaries, which are also fairly smooth, town boundaries are often uneven, winding in and out of communities, along some roads and not others, and very often including unincorporated areas within the town boundary. In order to keep SMDs as contiguous as possible (it may not be possible if the town itself is non-contiguous),


\(^{122}\) Racially polarized voting occurs when one racial or ethnic minority group prefers one candidate or set of candidates and a different racial or ethnic minority group prefers different candidates. For example in Alabama in 2012, white voters voted for President Obama at a rate of about eight percent, while Black voters voted for the President at a rate of around ninety-eight percent. This represents a huge polarity in voting preferences by race.
district boundaries can only be drawn in certain ways, which can prevent the drawing of majority-minority districts.

iii. Lack of Minority Voting Cohesion

There are a number of cities or school boards that have a combined minority population over fifty percent and yet, in at-large elections, all of the elected officials are white. It may be that minority voter turnout is lower than that of white voters. However, it could also be that the minority communities do not vote together to elect candidates of choice, so if the plurality of voters are white and vote cohesively, they will be able to elect all of the candidates for the local board.

iv. Low Turnout or Lack of Candidates

There are some city councils and school boards that are majority-minority or even plurality Black or Latino, and yet they continue to elect an all-white council or board. An explanation for this is lower voter turnout by the minority community. The Joint Center for Political and Economic Studies notes that minority turnout in local elections is worse than white turnout (this does not always hold for federal general elections).123 As long as this situation continues, even with cumulative or ranked choice voting, it will be hard to improve minority representation.

v. The Problem of Prison-Based Gerrymandering

Prison-based gerrymandering occurs because prisoners are counted at their prison addresses by the U.S. Census Bureau, but they cannot actually vote. Thus, if a district is drawn to include a nearby prison, it will consist of far fewer actual eligible voters than a neighboring district (though they have the same total population). The most egregious example in the country is in the city of Anamosa, Iowa, where each City Council ward has around 1,370 people, but one ward has 1,321 prisoners and 58 non-prisoners. This means that 58 people have the voting power of 1,370 for the city council.124

In Illinois, the biggest distortion of prison gerrymandering occurs because sixty percent of the prison population comes from Cook County, yet ninety-nine percent of the population is housed and counted in districts outside of Cook County.125 This leads to less comparative urban representation and greater rural representation.

vi. Growing Minority Populations

125 Id.
The Census only occurs every ten years and it is usually accompanied by redistricting (except where at-large elections with winner-take-all voting is used), but throughout the decade people move, citizens turn eighteen, and residents are naturalized. If fair representation systems are used, then the election system can ensure that as soon as a minority community is large enough to elect a candidate of their choice, they can do so. If at-large systems are used, then the jurisdiction does not need to change to SMDs or move district boundaries until it is sued under Section 2 of the VRA or until the next census is released.

vii. Problems with Majority-Minority Districts for the Black Population

Many researchers have found that district-based elections increase Black representation when they replace winner-take-all at-large systems. Despite this, there are three main criticisms leveled at majority-minority districts for the Black community. First, as a matter of substantive representation, packing Black voters, who are predominantly Democratic, into single districts can create districts in the surrounding areas that are more Republican, resulting in the election of more Republicans to the legislature, which may be less likely to support the interests of the Black community. Cameron, Epstein, and O’Halloran found in 1996 that the 1990 round of congressional redistricting’s focus on using majority-minority districts to ensure that communities of color could elect candidates of choice diluted the minority influence in surrounding areas and led to “an overall decrease in support for minority sponsored legislation.”

Cameron, Epstein, and O’Halloran believe that if SMDS are used, there is a tradeoff between increasing the number of minority officeholders and enacting legislation that furthers the interests of the minority community. Their finding held true in the South, where they determined the optimal minority population in any district to be forty-seven percent (rather than over fifty percent as has been imposed


128 Cameron et al., supra note 127, at 794.
by the Courts in Section 2 cases). Outside of the South, they found that “substantive minority representation is best served by distributing Black voters equally among all districts.”

A second criticism of majority-minority districts, articulated, by Professor Abigail Thernstrom, is that a preoccupation with creating majority Black districts entrenches the racial segregation of minority voters. Thernstrom argues that “minority representation might actually be increased not by raising the number of black officeholders [elected from Black districts] but by increasing the number of officeholders, black or white, who have to appeal to blacks to win.”

A version of this argument has been made by Professor Lani Guinier, who argues that “single-member districts may aggravate the isolation of the black representative” and possibly even lead to Black representatives being viewed as tokens that let the white majority feel that their role in the winning coalition has greater value.

In addition to opposing the tokenism of minority representation, Guinier highlights that the purpose of the VRA was—and the purpose of civil rights activists should be—minority empowerment, not just minority legislative presence. She has argued that the current interpretation of the VRA (to protect majority-minority districts seemingly at the expense of all other protections) has “inescapably closed the door’ on the real goal of the civil rights movement, which was to alter the material condition of the lives of America’s subjugated minorities.” Whether the door is closed is debatable, but the research in The Color of Representation shows that remedies other than SMDs will need to be used with more frequency if we are to improve the substantive representation of communities of color.

A third criticism is leveled by the national organization FairVote, which has long argued that one of the main problems with majority-minority districts is that they “require the continuation of some degree of housing segregation that concentrates minority populations within easily drawn boundaries.” They elaborate:

129 Bartlett v. Strickland, 556 U.S. 1, 17 (2009) (“We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2.”).
130 Cameron et al., supra note 127, at 809.
132 Guinier, supra note 35, at 81.
133 Id. at 64.
134 Id. at 55.
135 Id. at 54.
[A SMD system] has been effective for racial minorities and has remedied thousands of minority vote dilution lawsuits and dramatically increased racial minority representation where it has been applied. However, the effectiveness of majority-minority districts as voting rights remedy is dependent upon the geographic concentration of racial minorities. Geographic dispersion can limit majority-minority districts to fewer seats than a given racial minority’s share of population. Even where districts provide an effective remedy in the short-term, they may not adequately represent the jurisdiction’s diversity after its demography changes. Finally, many racial minority voters will be unable to elect preferred candidates when not living in majority-minority districts.137

viii. Problems with Majority-Minority Districts for the Latino Population

SMDs do not increase descriptive representation for Latinos as much as they do for blacks and may actually decrease Latino descriptive representation.

Latinos are not as segregated from whites or from other minority groups as are Blacks.138 This means that there are fewer places where it is even possible to draw a Latino majority-minority district. This is one of the major reasons why Latinos are more underrepresented than Blacks. Since the 1980s, Latinos have moved from more-segregated to less-segregated areas, becoming more integrated with both white and Black Americans.139

In addition, any attempt to enfranchise minority communities must take into account varying levels of citizenship and political incorporation.140 Even in communities where there are a significant number of Latinos who are American citizens, they may be still new enough to the country that they lack the social networks and community knowledge to run a successful campaign141 (and the community may be more resistant, especially in local races where candidates often run on a platform of how long they and their families have been in the community). In a city with low levels of citizenship and political incorporation, there may be one viable candidate and just enough Latino citizens across the city to elect that person, with a fair representation electoral system rather than SMDs with winner-take-all plurality voting system providing the only likelihood of that happening.

The scenario of the city with a high number of Latino noncitizens represents a particularly important case for minority representation. In a single-member-district system, each candidate may not have enough Latino citizens to ever be concerned with the interests of Latinos because they do not influence his or her chances for reelection. A system that allowed at least one Latino representative to be elected would then give that population some chance of having a voice.

137 Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims, supra note 112.
139 See Stephanopoulos, supra note 3.
140 Id. at 88–89.
141 Id. at 90.
ix. Problems with Majority-Minority Districts for the Asian American Population

SMDs with winner-take-all plurality voting are even more problematic for the Asian American population, because their population is comparatively low throughout the country, making it hard to draw majority Asian American districts in most places.\footnote{142} New York City elections provide the clearest example of how SMDs have failed the Asian American population. The use of ranked choice voting in New York City school board elections from 1970 to 1999 led to descriptive representation of Asian Americans, “many with almost exclusive support from Asian American voters.”\footnote{143} This result provided a “stark contrast” with the experiences of Asian American candidates in elections for other legislative bodies representing New York (that do not use ranked choice voting): in the late 1990s, “[e]ven with 800,000 Asian Americans, though there [w]ere fifteen Asian American elected officials in the school boards, no Asian ha[d] been elected to the city council, state legislature, or Congress.”\footnote{144}

C. Remediying Minority Vote Dilution: Fair Representation Systems

Given the myriad of potential problems with using SMDs to improve minority representation, I recommend the use of “fair representation systems” to overcome these boundaries. Fair representation systems used in the United States include cumulative and ranked choice voting (where used with MMDs). Overall, fair representation systems ensure that “a majority cannot control the outcome of every seat up for election. Instead, they ensure that the majority wins the most seats, but guarantee[s] access to representation for those in the minority.”\footnote{145}

Cumulative voting was used to elect the Illinois House of Representatives for more than a century (1870–1980)\footnote{146} and was initially enacted to ensure that the minority party would have representation in a politically polarized state.\footnote{147} Cumulative voting is currently used in local elections in Alabama, California, Illinois,

\footnote{142} California’s 49th state legislative district is the first majority Asian American state legislative district outside of Hawaii. See Daniela Gerson, California’s First Asian Majority Legislative District, ALHAMBRA SOURCE (Aug. 17, 2011), http://www.alhambrasource.org/stories/californias-first-asian-majority-legislative-district.

\footnote{143} Magpantay, \textit{supra} note 48, at 739, 773. This history led to the Department of Justice, in 1999, denying preclearance to a state law seeking to replace ranked choice voting for the school boards. Ultimately, school boards were shifted to not being elected at all, which is why ranked choice voting is not used in the city today.

\footnote{144} \textit{Id}.

\footnote{145} \textit{Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims, \textit{supra} note 112.}


New York, South Dakota, and Texas, and ranked choice voting was previously used at the local level in Ohio and New York and is currently used in California, Maine, Minnesota, and Massachusetts. Overall, more than 100 jurisdictions in the United States currently use fair representation voting to elect their representatives.

Fair representation systems not only improve many measures of minority representation, but they also lead to improved democratic outcomes generally.

i. Improved Minority Representation

First and foremost, for my purposes, the benefit of fair representation systems is that they allow people of color to elect candidates of their choice, where winner-take-all, at-large systems would, and SMD systems may, prevent them from doing so. As FairVote found, “in a study of 96 elections in 62 jurisdictions with cumulative voting or the single vote, black candidates were elected 96 percent of the time and Latino candidates 70 percent of the time when a black or Latino candidate ran.”

In New York:

African Americans, [Latinos], and Asian Americans made up 37 to 47 percent of [the] City’s population during the three decades in which it used [ranked choice] voting for its school board elections. The minority groups won 35 percent to 57 percent of these positions, compared to only 5 percent to 25 percent of seats on the city council, which were elected using single-member districts.

During a period when the South elected zero Black representatives to Congress and State legislatures, Illinois's cumulative voting system meant that at all times from 1894 to 1980 there was at least one Black legislator in the Illinois House (and in most years there were many more than that) despite the Black population in the state averaging roughly fourteen percent throughout that period.

149 Id. at 835.
149 Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims, supra note 112. In addition, many corporations in the US (about ten percent of the S&P 500) use cumulative voting to elect their boards, including AON, Toys ‘R’ Us, Walgreen’s, and Hewlett-Packard. See also Cumulative Voting—A Commonly Used Proportional Representation Method, FAIRVOTE, http://archive.fairvote.org/?page=226.
151 Effectiveness of Fair Representation Voting Systems for Racial Minority Voters, supra note 147. See also David Brockington et al., Minority Representation Under Cumulative and Limited Voting, 60 J. OF POL. 1108, 1115 (1998); Steven Hill & Rob Richie, New Means for Political Empowerment in the Asian Pacific American Community, 11 HARV. J. ASIAN AM. POL’Y REV. 335, 340 (2001) (citing election of Bobby Agee in Chilton County, AL despite being outspent twenty to one by the highest spending candidate).
152 Stephanopoulos, supra note 148, at 849 (citations omitted).
Where fair representation systems have been implemented to remedy a Section 2 violation, the system has resulted in communities of color being able to elect their candidates of choice and has improved descriptive representation. This has been shown for the Black, Latino, and Native American communities.\textsuperscript{154} Ranked choice voting (RCV) provides additional value for racial and ethnic minorities. Because it creates incentives for candidates to reach out to more voters, it tends to result in less racially polarized campaign tactics and more inclusion for racial minority voters. Even in single-winner, winner-take-all elections, ranked choice voting appears to have an impact. For example, the imposition of ranked choice voting in San Francisco and Oakland led to the first Asian American mayor being elected in San Francisco and to the first Asian American—and first female—mayor being elected in Oakland.\textsuperscript{155} In San Francisco, of eighteen offices elected by RCV, sixteen are held by people of color—up from nine when RCV was first used in 2004.\textsuperscript{156}

The ability of communities of color to elect candidates of their choice in fair representation systems is not limited to groups that are residentially segregated, which, as Nicholas Stephanopoulos has argued, is more equitable because “[s]patially dispersed groups are just as deserving of representation” as segregated ones.\textsuperscript{157} This ability also means that all members of a community of color in a jurisdiction can have a say in who is elected to represent that community of color, rather than just those people of color that happen to live in the majority-minority district.

\begin{itemize}
  \item \textbf{ii. Cross-Racial Coalition Building}
\end{itemize}

As well as improving descriptive representation and allowing communities of color to elect candidates of their choice, fair representation systems have also been shown to foster the construction of cross-racial coalitions among both voters and legislators.\textsuperscript{158} This is particularly true for RCV, given that voters have every incentive to vote strategically

\begin{footnotesize}
\begin{enumerate}


\item[157] Stephanopoulos, \textit{supra} note 148, at 847, n.3.

\item[158] FairVote’s Amicus Curiae Brief, \textit{supra} note 154, at 16 (citing Steven J. Mulroy, Alternative Ways Out: A Remedial Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies, 77 N.C. L.
\end{enumerate}
\end{footnotesize}
to rank candidates outside their own racial group (in addition to selecting their preferred candidate in the number one position). Even when voters in a racial minority are below the threshold of exclusion necessary to elect their most preferred candidate, their second choice vote will be sought after by multiple candidates, possibly from a variety of racial, ethnic, and political backgrounds.

iii. Increased Representation for All Political Minorities

Fair representation systems show huge benefits to racial minorities, but they may also “open up the political process for politically cohesive minorities, not just racial minorities.”

In addition to the minority political party being able to gain representation, other demographic minorities can also have a better chance at being elected. For example, alternative election systems can lead to greater diversity by gender, age, religion, sexuality, or country of origin, depending on the communities of interest in the jurisdiction.

iv. Reduced Partisan Polarization

Cumulative voting in Illinois historically increased “the variance of the policy views held by both Democratic and Republican members of the state house.” This holds not just historically for Illinois but has also been suggested as a way to reduce polarization across the board in modern America: “[i]f one’s greatest concern in a . . . legislature is partisan gridlock, multi-member districts could potentially ease the partisan feuding by making each party more ideologically diverse.”

v. Improved civic engagement

Fair representation systems can lead to improved civic engagement by communities of color. For example, a study of cumulative voting “found that their elections feature higher turnout, more active campaigning by candidates, greater mobilization by outside groups, and more contested races than either single-member districts or at-large regimes” and “voters worldwide in preferential systems [for example, ranked choice voting] exhibit greater satisfaction with democracy and are more likely to believe their elections are conducted fairly.”

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159 Guinier, supra note 35, at 71.
160 Stephanopoulos, supra note 148, at 855.
162 Stephanopoulos, supra note 148, at 851–52.
vi. Removal of Race Conscious Districting

While many racial justice advocates do not accept that redistricting should avoid being race conscious, there are skeptics in the community and on the Supreme Court of an over-zealous focus on race in redistricting and in remedying past discrimination generally. For these critics, fair representation systems may be more acceptable than SMD systems because they “do not compel any consideration of race in their design or operation. They promise levels of minority representation comparable to those produced by Section 2, but without any of the ‘dividing’ and ‘segregating’ that are sometimes linked to the provision.”

IV. Applying the Theory: Three Case Studies

Armed with the knowledge that I could help my community by improving minority representation, in particular through the use of fair representation systems, I set out to find communities to work with on these important issues.

The overwhelming lesson from these efforts was that creating change at the local level is tough but possible. Some of the constraints include that there are limited resources to support local organizing efforts; the central authorities are powerful and able to control, or even manipulate, the ballot initiative process, and litigation is costly and time consuming. In this section, I present three stories from communities that I have worked with on minority representation issues. None can be considered a complete success, but all show that there is some hope for positive change if attorneys and community members work hard together toward common goals.

A. Joliet...The Dice Were Loaded from the Start

Joliet is the fourth largest city in Illinois, with a population of almost one hundred and fifty thousand people. The heart of Joliet is about an hour’s train ride southwest of downtown Chicago. Joliet has seen a large increase in its minority population from 1990 to 2010. As of the 2010 Census, Joliet was approximately fifty-three percent white, twenty-eight percent Latino, sixteen percent Black, and two percent Asian American. It had eight council members, of which two were Black,
and six were non-Hispanic white. The city council was chosen from five single-member districts (of which two were majority-minority) and three council members were elected at-large. I have been privileged to work with the Concerned Citizens of Joliet (CCJ) and Jorge Sanchez of the Mexican American Legal Defense and Educational Fund. Jorge and I have attended multiple local meetings, discussions, education sessions, church events, and fairs to discuss redistricting with the local community. By 2014, Joliet was ready for change.

The CCJ is a multi-generational, multi-ethnic, multi-religious organization that focuses on helping all the people of Joliet—not just the wealthy elites. CCJ worked effectively as a diverse coalition to prevent a for-profit immigration detention prison from being erected in Joliet. High from their victory on this important issue, the group set out to tackle a new issue. The CCJ decided that they could not sufficiently hold their city council accountable for its policy positions and suspected that the redistricting system was to blame.

CCJ sensed that the redistricting system was unfair, with almost all of the city council members living in the tiny (and comparatively wealthy) “Cathedral District”, leaving the south, east, and west sides all without a council member close to them. This resulted, they believed, in an unequal distribution of resources (trash and snow are quickly cleaned up in the center of town, but left for days on the outskirts; the center of town has its parks upgraded while the edge of town has chain link fences and broken playground equipment); and there was a lack of awareness of the concerns of the outlying areas, in particular those that pertain to the Black and Latino communities.

The CCJ developed a campaign “Joliet for 8 districts,” seeking to place an initiative on the ballot asking the city to vote to have eight single-member districts. In 2016, the CCJ submitted their signatures for this proposition for the third time, and for a third time were blocked from the ballot. There have been a series of roadblocks to their community action, well beyond the usual struggles of a meagerly funded volunteer group seeking to create change.

One initial challenge I faced as a practitioner was that the CCJ had already decided that they wanted eight SMDs. I had wanted to articulate the benefits of ranked choice voting and MMDs (at least for the three already at-large seats), but the community found that option to be foreign to its experiences, and the community had already decided that having council members be geographically spread across the town was of prime importance to them. This experience led me to refine the ways I present ranked choice voting discussions to community groups and helped me to understand that there is more to representation than just descriptive and substantive issues—spatial patterns (of communities and candidates) are intertwined with our beliefs about effective representation.

Asian+White. Other races and ethnicities make up the remainder of the population, but are not reported in every case. American Community Survey 2010–14).
i. The Ballot Initiative Strategy

To place an initiative on the ballot in Illinois, a home rule county, a group must gather the number of signatures equal to eight percent of the vote in that jurisdiction for governor in the most recent election. In 2014, when the CCJ first gathered signatures, the local authorities were not able to determine how many signatures they actually required because the gubernatorial vote is collected at the precinct and county level, and the city crosses two counties and splits some twenty precincts.

A local citizen—with connections to the incumbent council members—challenged the signatures gathered by the CCJ in 2014, resulting in the challenger, the CCJ (and Jorge and I with them), and the authorities holding a week of hearings and signature review sessions to determine whether the CCJ had met the statutory signature requirement. The most farcical, and quite possibly unconstitutional, aspect of the whole week was that the local review board (staffed, by Illinois statute, by the mayor, a current city council member, and the city attorney) was informed that we would not be told how many signatures needed to be gathered until the number of signatures had been counted. Somewhat unsurprisingly, it turned out, a week later, that the number of signatures needed was just a few hundred more than those that had been validated. In addition to this, another questionable legal decision was made by the city council member on the local review board: he refused to recuse himself despite the fact he was elected from one of the three at-large positions and therefore subject to be removed if the ballot initiative went ahead and was approved.

Aside from the review board process, the room where signatures were validated quickly degenerated into a power play, as the county staff members claimed that people who had moved away from the address where they signed the petition could not be counted as a valid signature. The Illinois statutes are unclear on this point, so it was left to the local review board to decide how to interpret the law, resulting—again unsurprisingly—with those signatures being considered invalid.

One of the volunteer signature gatherers with the CCJ had toured a local short-term housing facility, Evergreen Terrace, to gather hundreds of signatures. Another CCJ member was a pastor to this community, and the residents there represent exactly the people that CCJ was trying to enfranchise (poor, predominantly minority, often sick and/or struggling with homelessness). Many of these residents of Evergreen Terrace had moved since signing the petition (the signature gathering had been going for around nine months by the time the signatures were reviewed). The review board decision meant that hundreds of signatures from these eligible voters were invalidated.

At the lowest ebb in the signature review week, I sat with one of the Latino leaders of the CCJ as she listened to the staff laugh at the “hard to pronounce names” of her neighbors, get confused as to whether someone was a duplicate signatory

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169 Ill. Const. art. VII § 6(a) (All towns over 25,000 are automatically home rule counties.).
170 10 ILCS § 10–9(3).
because the Latino “names were so similar,” and joke about how they had not bothered to learn Spanish in school.

After this unfair and, frankly, humiliating process, the CCJ pulled themselves back together to try to put the issue on the next ballot, in the local elections for 2015, but with the bulk of signature gathering occurring during the freezing winter months, they were unable to reach the target number of signatures.

In August 2016, the CCJ again submitted nearly four thousand signatures. They still did not know exactly how many signatures were needed because one of the two counties that Joliet sits in refused to respond to multiple letters requesting the target number. The estimate in the previous hearing was around 2,800.

The current mayor of Joliet was previously a council member and he had signed the 2014 petition to place the question on the ballot—he believed the people should get to vote on the question. Somewhat unsurprisingly, the petition was challenged (this time by the county clerk herself), and despite excellent pro bono representation from a large Chicago firm, the CCJ again lost their bid to place the question on the ballot.

In response to the outcry over the third petition being rejected, the Mayor appointed a Latina to the City Council. The person has no connection to CCJ or the communities they represent, and so it remains to be seen whether this will be a step forward or backward for minority representation in Joliet.

ii. Litigation

The demographics have changed in Joliet since 2010. In particular, many of the Latino community has turned 18 or gained citizenship, such that even in 2015, there was a large enough Latino and Black citizen voting age population that if they continued to vote together to elect candidates of their choice, three majority-minority districts could be drawn. There is no doubt that with updated census data, this figure will rise.

It is likely that the CCJ will have a viable Section 2 case if the Latina that was appointed to the Council is not elected to her position (and in particular if she is not elected with evidence of racially polarized voting), but with VRA litigation being so complex, expensive, and time intensive, it is unlikely that the VRA will provide a change for the CCJ members before the next census is taken. The CCJ will need to get the resources for political science experts, discovery, and court fees to show that if the city were divided into eight districts, three would be majority-minority (without race predominating in the drawing of the districts).

It is quite possible that by the time the next full census results are released in 2021, Joliet will be majority-minority—perhaps even using the Citizen Voting Age Population (CVAP). This could result in a bizarre reversal of incentives by the majority white council members. For white voters to be represented at close to proportional level in a majority-minority town, the city council would favor removing the at-large seats. If it came to this, at least the CCJ would have their preference for council members who live closer to their constituents realized, even if it takes nefarious reasoning to get there.
B. An Accidental Win in Blue Island

Blue Island is a small city immediately south of the border of Chicago. It has a population of just over twenty-three thousand, of which twenty-one percent are white, forty-seven percent are Latino, and thirty percent are Black. When CVAP is used, the white population grows to twenty-nine percent, the Black population grows to thirty-eight percent, while the Latino population drops to just thirty percent. Blue Island, like Chicago to its north, is still fairly segregated, particularly for the Black community.

i. Pushing for Public Hearings

In 2015, when we met with the Citizens in Action Serving All (CASA) group in Blue Island, there were seven two-member districts constituting their council. Of the fourteen members, two were Latino and two Black. There was no majority Latino district and only two majority Black districts.

We spent a few weekends sitting down with local community members, showing them the mapping capabilities of Maptitude for Redistricting and discussing where they would prefer the district lines to be drawn. We had to consciously remind the excited rooms that it was not likely that we would be able to get the Council to adopt the plan we wanted, but that knowing what the districts are and could be would be helpful in itself.

As we suspected, we were able to draw a plan using the most recent CVAP data, with three majority Black districts and one majority Latino district. We then needed a way to convince the council (or a court) to adopt a new plan. Blue Island does not have home rule, so it was not possible to use a ballot initiative to create change. Strangely, Blue Island had not redrawn its city council districts since 1996, and as two census counts had come and gone, the districts were in violation of the one person, one vote (OPOV) requirement of the federal Constitution. We were able to use this as leverage to ask the council to hold public hearings to redraw the seven districts, and the CASA group advocated for the plan with four majority-minority districts.

After two months of Council hearings and public hearings of the Council’s Redistricting Subcommittee to discuss possible district plans, the City Council surprised no one by voting to adopt its own district plan. The major difference between the CASA plan and the city council plan was that the latter protected incumbents, while the former was drawn without regard for current council members. CASA opposed the protection of incumbents at the public hearings, but the council opted to protect its self-interest in its vote.

\[171\] Voting Age Population by Citizenship and Race (CVAP), supra note 168. All numbers are reported for non-Hispanic white, Latino, non-Hispanic Black plus non-Hispanic Black+White. Other races and ethnicities make up the remainder of the population, but are not reported here. American Community Survey 2010–2014 https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

\[172\] My colleague Annabelle Harless and I worked with CASA together throughout the work in Blue Island.

By good fortune (and the not-unexpected increase in the proportion of Blue Island that is Black or Latino), the new CVAP data (the 2011–15 estimates) was released by the Census Bureau a few days before the council’s final vote. CASA was able to tell the council before their vote that even though they disliked that the plan protected incumbents, they were pleased that it too had three majority Black and one majority Latino district. The next election in Blue Island will now include four of seven districts with a majority of people of color. Hopefully the communities of color can respond to this good news by electing their preferred candidates across the city.

ii. Online Public Redistricting

Another notable aspect of our work in Blue Island was that we decided to use a free trial of a service called iRedistrict,\textsuperscript{174} to make map drawing available to the community online. iRedistrict’s main power as a piece of software is its ability to draw random simulations of districts. We were using it for a slightly different purpose: to allow the public to make changes to the old redistricting plan, or the CASA plan, or to create their own new plan, and to see the demographic effects of such changes in real time.

In addition to using iRedistrict, we placed Keyhole Markup Language (KMZ) files and descriptions of data onto the Google Maps Engine, and thereby made the statistics (and boundaries) of current, and various proposed plans, available to anyone with a network connection (we also displayed these tools at the Redistricting Committee Public Hearings).

The community was reluctant to embrace iRedistrict, likely because the editing aspect of the software had sufficient bugs as to make the map drawing process quite frustrating for the casual user. In total, we only had seven users sign up to use the online map drawing software.

To our surprise though, the Google Maps Engine districts and statistics were viewed over one thousand times and used by local media in their reporting of the case. Each public hearing had around thirty, and at times more than fifty, people in attendance (largely thanks to letter box pamphlets distributed by Mark and Kathy Kuehner of CASA). I believe we showed that there is an interest, even in a small community considering very local issues, in using online tools to better understand local government, and it is likely that this interest can be harnessed and enlarged through online organizing tools.

Overall, Blue Island was a success to the extent that CASA and the community will now have districts that are constitutional and will have the possibility of electing candidates of choice of the minority community to a majority of the council seats. Blue Island also showed the utility of online redistricting tools in community organizing.

\textsuperscript{174} See iRedistrict\textsuperscript{®}: Smart Redistricting Software for Territory Mapping with Powerful Optimization, ZILLION INFO, http://zillioninfo.com/product/iRedistrict (last visited Nov. 18, 2016) (iRedistrict\textsuperscript{®} is an award-winning redistricting software with powerful optimization algorithms, intuitive user controls, easy editing interface, and customizable reporting. It received two National Science Foundation (NSF) SBIR Awards in 2013 and 2014.).
around this issue. We were not able to prevent council members from focusing on their own self-interest in their vote for new districts, but very few jurisdictions are ever able to achieve such a feat.

C. Crete-Monee School Board Ten Years On

In our research into local redistricting in Illinois, we tried to find success stories—places where minority representation had increased and the community was in a better place because of it. We reviewed all the prior Section 2 cases from Illinois and thought that the Crete-Monee School District case looked particularly promising.

Crete-Monee School District had been sued in the late 1980s\textsuperscript{175} over a possible Section 2 violation. By the mid-1990s, the case eventually resulted in a consent decree, and as a result the board started electing Black representatives to the school board.\textsuperscript{176} As of March 2017, the school board has three Black and four white members, and the president is an African American.\textsuperscript{177}

We set up a meeting with Dr. Hall, the president of the school board, to find out all the ways that the diverse board was helping the community. Dr. Hall agreed that the diverse board was better able to ensure racial equity in the school policies and procedures, and the district report card suggests the district is at or just below average on most statewide metrics,\textsuperscript{178} but Dr. Hall lamented that the diverse board had not resulted in better racial relations in the community. In 2015, the district successfully defended against a challenge to part of the consent decree, and not-at-all subtle racial overtones were used in local school board election campaigns (one campaign sought to “change the face” of the school board).

V. THE ROAD AHEAD

As long as there are communities willing to push for change to local redistricting practices, we practitioners must make ourselves aware of the best possible strategies and tactics we can use to help communities seek better outcomes.

A. Federal Litigation

Federal Section 2 litigation can be pursued to remedy the most egregious cases of minority vote dilution, where the minority population in question is geographically concentrated.

\textsuperscript{175} Palmer v. Bd. of Educ., 46 F.3d 682, 683 (7th Cir. 1995).
B. Section 2 Remedies

A jurisdiction found to violate Section 2 is able to choose how it will remedy the violation and, with the approval of the court, can then implement the new system. In many cases, jurisdictions choose to adopt SMDs, but not in every case. Recently, a defendant in Port Chester, New York, was able to implement cumulative voting to remedy a Section 2 violation, over the objection of the plaintiff. Many jurisdictions in Alabama that were forced to change from at-large elections after the long running Dillard litigation chose to adopt cumulative or single voting in the 1980s and 1990s.

Thus far, no jurisdiction has chosen to adopt ranked choice voting in response to a Section 2 violation. However, it was requested (and approved by the court) as a remedy to a potential Military and Overseas Voter Empowerment Act (MOVE Act) violation in Alabama in 2013, and it was used for overseas voters in a similar way in four additional states in 2014 (Arkansas, Louisiana, Mississippi, and South Carolina).

Pam Karlan has argued since 1989 that Section 2 remedies can be innovative and non-traditional. She explains:

> Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . Congress squarely stated that a court faced with a violation of Section 2 must ‘exercise its traditional equitable powers so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.’ A court faced with a violation ‘cannot authorize a remedy . . . that will not with certitude completely remedy the Section 2 violation.’

Courts have rejected remedies that have been proposed by defendants and explained how options provided by the plaintiff will remedy the section violation better, but ultimately the defendant is able to determine the remedy for a Section 2 violation. The remedies in Alabama included not only cumulative voting but also an increase in the number of commissioners from four to seven and the institution of a system whereby the commission chairmanship would rotate between commissioners.

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182 United States v. Alabama, 778 F.3d 926 (11th Cir. 2015).
185 Id. at 219.
186 See Dillard v. Crenshaw Cty., 831 F.2d 246, 250–253 (11th Cir. 1987).
allowing a Black commissioner to occasionally be chairman, if one had been elected.\textsuperscript{187} These provisions were implemented upon the recommendation of a “special master,” a magistrate with the federal court. The Supreme Court’s finding in \textit{Holder v. Hall} has now limited the ability of a court to impose a remedy requiring an increase in the number of districts in an election jurisdiction in response to a Section 2 violation,\textsuperscript{188} but there has been no limitation on the type of election system that can be used to remedy a Section 2 violation.

The most promising avenue to use to argue for fair representation systems comes from the myriad of cases that have dealt with the question of imposing a remedy to a statewide redistricting violation. In these cases, defendants have argued that particular proposed remedial plans do not fully remedy the constitutional or statutory error. The remedial phase of redistricting cases is within the court’s equitable jurisdiction, and since 1972 the Supreme Court has recognized that the “scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”\textsuperscript{189} Though broad, “[t]he remedial powers of an equity court . . . are not unlimited.”\textsuperscript{190} It is the court’s duty to navigate between seeking a remedy to an unconstitutional redistricting plan and minimizing the disturbance of legitimate state policies.\textsuperscript{191}

There are cases where courts have explicitly overruled the imposition of remedies by the legislature, and these cases should be used to push for fair representation remedies. In one case, the reason the Court chose to draw its own plan was because the Court found that “[i]n its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left us no basis for believing that, given yet another chance, it would produce a constitutional plan.”\textsuperscript{192} In that case, the Court explained that it could not “turn a blind eye on the record of the Legislature.”\textsuperscript{193}

In addition to the difficulties at the remedies phase, additional difficulties of federal Section 2 litigation include:\textsuperscript{194}

- “[v]oting rights suits are actually among the most time- and labor-intensive of all actions brought before the federal courts;”\textsuperscript{195}
- attorneys’ fees do not necessarily follow from a victory and the cost of litigating a Section 2 case is extremely high; and

\begin{itemize}
  \item \textsuperscript{187} Dillard v. Chilton Cty. Comm’n, 495 F.3d 1324, 1327 (11th Cir. 2007).
  \item \textsuperscript{188} Holder v. Hall, 512 U.S. 874 (1994).
  \item \textsuperscript{190} \textit{Id.} (citing Whitcomb v. Chavis, 403 U.S. 124, 199 (1971)).
  \item \textsuperscript{191} \textit{Id.} at 202.
  \item \textsuperscript{192} Hays v. State of La., 936 F. Supp. 360, 372 (W.D. La. 1996).
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{195} Stephanopoulos, supra note 148, at 850.
• the defendant is allowed to choose how to remedy a violation and so can implement a new election system that meets a bare minimum requirement of representation of the minority population.

C. State Voting Rights Acts

Given the potential difficulties associated with federal Section 2 litigation, implementing a state voting rights act (and then suing in state courts) may be a better alternative in some states.

California has instituted a remedy to alleviate some of the problems of Section 2 litigation by enacting a California Voting Rights Act (CVRA) that makes it cheaper and easier to prove that a local government’s election system impermissibly dilutes the votes of the minority community. The CVRA does not require fair representation remedies, but such systems could be imposed as a remedy in future state acts.196

An additional benefit of developing a state level jurisprudence on minority vote dilution is that it can fill the gaps left in the current Section 2 jurisprudence. For example, the Gingles criteria for Section 2 liability are based on the assumption that SMDs are the appropriate benchmark for minority vote dilution when, in fact, the SMD requirement effectively overlooks the dilution of non-compact minority populations. As a result, a place where a crossover district can be drawn (districts where a racial minority votes as a bloc with a small amount of support from the white majority, resulting in the candidate of choice of the racial minority being elected) will not establish liability under Section 2 and so cannot be required by federal law.

State Voting Rights Acts can be tailored to local needs, but in all cases if they include provisions that explicitly allow for fair representation systems to be imposed in response to a violation, and if they make the proving of a violation less burdensome than the federal VRA, then they will be a useful tool in the fight for improved minority representation in local government.

CONCLUSION

Striving for fair representation systems in local government is an important way to promote minority representation, and thereby fulfill the promise of our democracy. I encourage all practitioners to use the ideas and arguments in this paper to improve local government across the country.

196 For example, Santa Clarita chose to adopt cumulative voting as a settlement to a CVRA lawsuit. Drew Spencer, “California City of 180,000 to Provide Cumulative Voting Rights” FairVote Press Release (March 12, 2014), http://www.fairvote.org/newsletters-media/e-newsletters/california-city-of-180000-to-provide-cumulative-voting-rights-/ (last visited March 15, 2015). Note, though, that jurisdictions found liable under Section 2 VRA can also choose to adopt cumulative voting, but they cannot be required to do so.