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ONE NATION, TWO TEAMS: THE U.S. WOMEN'S NATIONAL TEAM'S FIGHT FOR EQUAL PAY

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ABSTRACT

The United States Soccer Foundation (USSF), embroiled in a long-simmering and well-documented equal pay lawsuit with members of its senior women's national team (the USWNT), won an important victory when U.S. District Court Judge Gary Klausner granted its motion for summary judgment to dismiss the USWNT's claim under the Equal Pay Act (EPA). Judge Klausner found that the USWNT failed to establish a prima facie case of wage discrimination under the EPA because the USWNT players received more total compensation than their male comparators. This article reviews the legal issues in the case and frames them within a broader policy dispute, comparing the two teams' current collective bargaining agreements and providing an overview of the disparate prize money awarded by the Fédération Internationale de Football Association (FIFA).

Introduction

The United States Women's National Team (USWNT) has achieved unprecedented success in women's soccer. Winners of four (out of only eight total) Fédération Internationale de Football Association (FIFA) Women's World Cups and four (out of only six total) Olympic gold medals, the USWNT has consistently performed at the most elite levels of the sport while garnering significant interest from a country whose population is relatively ambivalent towards the world's most popular sport.[1] The United States Men's National Team (USMNT), on the other hand, has never won a World Cup.[2] While the team has enjoyed a strong run of qualification and tournament play, often advancing to the knockout rounds,[3] the USMNT failed to qualify for Russia 2018, the tournament's most recent iteration.[4] The relative on-field success of the USWNT has also benefited the bottom line of the United States Soccer Federation (USSF, the "Federation," or "U.S. Soccer").[5] Notably, the team's 2015 Women's World Cup victory turned an anticipated $420,000 loss in 2016 into an expected profit of $17.7 million.[6] This projected profit was largely based on ticket and merchandise revenue generated during the Women's World Cup Victory Tour.[7] Despite its on-field success and revenue potential, the USWNT has historically been paid less and performed under less favorable working conditions than their male counterparts.[8] USSF, their common employer, is a nonprofit corporation recognized by the Internal Revenue Service (IRS) as exempt from federal taxes under section 501(c)(3) of the Internal Revenue Code.[9] In its annual IRS information returns, USSF describes its mission as "promot[ing] and govern[ing] soccer in the United

1 *See* Leah Asmelash & Brian Ries, *These Stats Show How the USWNT Leads in Soccer – and How Far It Lags in Compensation*, CNN (July 8, 2019), https://www.cnn.com/2019/07/08/sport/uswnt-btn-equal-pay-trnd/index.html.

2 *Id.*

3 *See* Ryan Rosenblatt, *United States World Cup History: What's the Farthest the USMNT Have Progressed?*, SB Nation (July, 1 2014), https://www.sbnation.com/soccer/2014/7/1/5861212/usa-belgium-2014-world-cup-history.

4 Jennifer Calfas, *Why the U.S. Isn't Competing in the 2018 World Cup*, Time (Apr. 30, 2018), https://time.com/5258984/is-the-us-in-the-2018-world-cup/.

5 *See* Jonathan Tannenwald, *Details of U.S. Soccer's Budget for National Teams, NWSL*, Phila. Inquirer (Mar. 7, 2016), https://www.inquirer.com/philly/blogs/thegoalkeeper/Details-of-US-Soccers-budget-for-national-teams-NWSL.html.

6 *Id.*

7 Caitlin Murray, The National Team: The Inside Story of the Women Who Changed Soccer 166 (2019).

8 *See generally id.* at 250.

9 *Nonprofit Explorer: United States Soccer Federation Inc*, ProPublica, https://projects.propublica.org/nonprofits/organizations/135591991 (last visited Aug. 16, 2020).

States in order to make it the preeminent sport recognized for excellence in participation, spectator appeal, international competitions and *gender equality*."[10] Its history of contract negotiations with the USWNT, however, suggests gender equality may not be as integral to the Federation's mission as this IRS filing suggests.

The tension between USSF's apparent commitment to gender equality and its labor relations with the senior women's national team came to a boil in March 2016.[11] Emboldened after winning their third World Cup title in 2015, five USWNT players filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) against USSF, on behalf of themselves individually and all similarly situated USWNT players.[12] The EEOC did not make a determination on the individual charges but instead issued a Notice of Right to Sue to each of the five players in February 2019.[13] The following month, on International Women's Day no less, four of those five players[14] filed a class action lawsuit against USSF on behalf of themselves and all other similarly situated USWNT players. They brought suit in the United States District Court for the Central District of California, alleging violations of the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964 for unequal pay and unequal working conditions based on their sex.[15] While the EEOC charges were still pending,

10 *Form 990 for the Year Ended March 31, 2019*, U.S. SOCCER FED'N 1 (emphasis added), https://cdn.ussoccer.com/-/media/project/ussf/governance/2019/ussf_2018_990_pd-copy (last visited Aug. 16, 2020) [hereinafter *USSF 2019 IRS Form 990*].

11 *See* Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html.

12 *Id.* This step is required in order to exhaust administrative remedies before a party can proceed with filing a federal employment discrimination lawsuit. *See* 29 C.F.R. § 1614.407 (2020).

13 Michael McCann, *Inside USWNT's New Equal Pay Lawsuit vs. U.S. Soccer–and How CBA, EEOC Relate*, SPORTS ILLUSTRATED (Mar. 8, 2019), https://www.si.com/soccer/2019/03/08/uswnt-lawsuit-us-soccer-equal-pay-cba-eeoc-gender-discrimination.

14 Hope Solo was the fifth USWNT player who filed an EEOC charge of discrimination. However, she was not a party to the lawsuit. USSF terminated her contract, forcing her to retire due to off-field incidents following the 2016 Summer Olympics. Andrew Das, *U.S. Soccer Suspends Hope Solo and Terminates Her Contract*, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/25/sports/hope-solo-suspended-for-six-months-by-us-soccer.html. As a result, she has pursued her own legal action against USSF. *See* Michael McCann, *Key Elements in USWNT vs. U.S. Soccer: 2021 CBA Talks, the Hope Solo Case and More*, SPORTS ILLUSTRATED (May 11, 2020), https://www.si.com/soccer/2020/05/11/uswnt-lawsuit-trial-appeal-hope-solo-case-cba-us-soccer.

15 Andrew Das, *U.S. Women's Soccer Team Sues U.S. Soccer for Gender Discrimination*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html.

the USWNT and USSF signed a new collective bargaining agreement (CBA) in 2017.[16] The new CBA provided better travel accommodations and per diems equal to the USMNT, along with guaranteed salaries and other benefits not afforded to the USMNT.[17] The USWNT players, however, felt the CBA had not fully resolved their EEOC complaint and proceeded with the lawsuit.[18] Four months after filing the equal pay lawsuit against its federation, the USWNT won its fourth Women's World Cup.[19] As the final whistle blew, the cacophony of cheers and applause quickly gave way to chants of "equal pay" from the raucous crowd.[20] The chants also greeted the players throughout their post-World Cup celebrations, from the ticker-tape parade in New York City[21] to the Victory Tour friendly—non-competitive—matches played in cities across the U.S.[22]

The USWNT's success on the field, however, did not translate to success in court. On May 1, 2020, the district court granted in part USSF's motion for summary judgment, finding the USWNT failed to establish a prima facie case of wage discrimination.[23] Due to the difficulty comparing the rates of pay under the fundamentally different structures of the men's and women's CBAs, the potential for the USMNT to earn significantly more revenue in FIFA prize money, and the give-and-take bargaining

16 McCann, *supra* note 13.

17 *See* Grant Wahl, *U.S. Women, U.S. Soccer Agree to New CBA, End Labor Dispute*, Sports Illustrated (Apr. 5, 2017), https://www.si.com/soccer/2017/04/05/uswnt-us-soccer-women-cba-labor-talks-agreement-1.

18 *See* ESPN Staff, *USWNT Lawsuit Versus U.S. Soccer Explained: Defining the Pay Gaps, What's at Stake for Both Sides*, ESPN (June 3, 2020), https://www.espn.com/soccer/united-states-usaw/story/4071258/uswnt-lawsuit-versus-us-soccer-explained-defining-the-pay-gapswhats-at-stake-for-both-sides.

19 Steven Goff, *The USWNT Victory Tour Begins, but the Larger Battle Remains over Equal Pay*, Wash. Post (Aug. 3, 2019), https://www.washingtonpost.com/sports/2019/08/03/uswnt-victory-tour-begins-larger-battle-remains-over-equal-pay/.

20 Peter Keating, *Analysis: What Equal Pay in Sports Really Means, as the Fight Goes on for U.S. Women's Soccer*, ESPN (May 14, 2020), https://www.espn.com/espnw/story/_/id/28971949/analysis-equal-pay-sports-really-means-fight-goes-us-women-soccer.

21 *Id.*

22 Josh Schafer, *USWNT Victory Tour as Much About Equal Pay, Growing Women's Soccer as It Is About a Trophy*, Yahoo Sports (Aug. 6, 2019), https://sports.yahoo.com/uswnt-victory-tour-is-as-much-about-equal-pay-growing-womens-soccer-as-it-is-a-trophy-155256822.html.

23 *See* Morgan v. U.S. Soccer Federation, Inc., 445 F. Supp. 3d 635, 656, 663, 665 (C.D. Cal. 2020); Defendant's Motion for Summary Judgment on Plaintiff's Claims at 652, *Morgan*, 445 F. Supp. 3d 635 (No. 2:19-cv-01717), ECF No. 250. Only the part of Plaintiffs' Title VII claim that related to (1) travel conditions and (2) personnel and support services survived. *Morgan*, 445 F. Supp. 3d at 665. *See also infra* note 162 and accompanying text.

history between the parties, the USWNT is unlikely to prevail on appeal.[24] However, public sentiment remains firmly on its side, providing leverage to achieve a favorable settlement with the Federation. USSF itself has indicated such a settlement is likely despite the favorable outcome in court.[25] The *New York Times* noted, in the wake of the summary judgment decision, "[t]he seemingly endless battles with its most popular players have unquestionably damaged—and continue to damage—U.S. Soccer's reputation."[26]

This article examines the equal pay dispute between the two parties and argues why and how USSF should adopt an equal pay standard as a matter of policy. Part I provides an overview of the dispute, framing it as a larger policy argument between the parties, and presents a comparison of the two collective bargaining agreements at issue and the history of FIFA's disparate prize money awards. Part II looks at the EPA itself, including its purposes and limitations in ensuring equal work is rewarded with equal pay. Part III dissects and analyzes the district court's summary judgment decision. Part IV then shifts to a policy discussion and argues the nonprofit missions of USSF and FIFA mandate equal pay for women's soccer players. And finally, Part V considers how the USWNT can leverage its victory in the court of public opinion, despite its loss in a court of law, to settle with USSF and makes specific recommendations to resolve the dispute, informed by the preceding analysis.

24 *See* Michael McCann, *The USWNT's Lengthy Appeal Process and What Comes Next After Legal Setback*, SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/soccer/2020/05/05/uswnt-us-soccer-lawsuit-appeal-chances-settlement-cba.

25 *See* Andrew Das, *Can U.S. Soccer and Its Women's Team Make Peace on Equal Pay?*, N.Y. TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/sports/soccer/uswnt-equal-pay-women-soccer.html.

26 *Id.*

I. An Overview of the Dispute Between the USWNT and U.S. Soccer

The long, fraught history of compensation disputes between the USWNT and U.S. Soccer is well-documented.[27] It is amplified by the current cultural climate, with the Time's Up movement growing out of the Me Too movement to shine a spotlight on wage inequality for women across industries.[28] This cultural moment has given the USWNT a heightened platform—and celebrity friends—to make its case for equal pay to the public.[29] For the most part, the USWNT has used this platform wisely, garnering massive public support and even prompting members of Congress to admonish USSF and threaten to withhold government funding for the U.S.-cohosted 2026 World Cup.[30] This successful securing of public sentiment thus begs the question: is an EPA lawsuit the best vehicle to achieve the larger policy goal of equal pay for women's national team players? To answer that, it is critical to understand each side's legal arguments.

A. *Reviewing the Core Legal Arguments*

The USMNT players are essentially paid on a per-game basis with performance bonuses, while the USWNT negotiated guaranteed salaries and other benefits for its players.[31] This structural difference reflects the economic realities of the two teams, with the bulk of the male players' income derived from their respective club teams[32] and the majority of the female players' pay coming from their national team duties.[33] To the USWNT,

27 *See, e.g.*, Murray, *supra* note 7.

28 *See* Liz Clarke, *USWNT and Time's Up Join Forces: 'They're Not Willing to Wait Any Longer*,' Wash. Post (Aug. 2, 2019, 4:53 PM), https://www.washingtonpost.com/sports/2019/08/02/uswnts-equal-pay-advocacy-arm-will-team-up-with-times-up-movement/.

29 *See id.*

30 *See* Des Bieler, *Senate Bill Would Block Federal Funds for 2026 World Cup Until USWNT Gets Equal Pay*, Wash. Post (July 10, 2019, 3:56 PM), https://www.washingtonpost.com/sports/2019/07/10/senate-bill-would-block-federal-funds-world-cup-until-uswnt-gets-equal-pay/.

31 *See* ESPN Staff, *supra* note 18.

32 In this Article, "club teams" or "clubs" refer to teams in domestic soccer leagues such as the NWSL, Major League Soccer, and the Football Association Women's Super League in England. They are distinguished from national teams like the USWNT, which are made up of players from various clubs around the world who are eligible to represent their country in international competitions like the World Cup.

33 *See id.*

its unmatched success on the field warrants pay equal to the USMNT.[34] The team believes it deserves a larger share of the revenue its success has generated for USSF.[35] In collective bargaining negotiations, USSF agreed to provide the USWNT a pay-to-play model similar to the structure of the USMNT CBA but without an equal bonus structure for friendlies[36] or an equal pay rate for the World Cup or other tournaments.[37] Because USSF would not budge on these issues, the USWNT bargained instead to secure guaranteed compensation and other benefits not provided in the USMNT CBA.[38] Its lawsuit alleges the written terms of the CBA establish that USSF has paid female players at a rate less than male players—even taking the fringe benefits into account—and that the players would have received higher pay if they were paid under the terms of the USMNT CBA.[39]

In response, USSF maintained that the USWNT was actually paid more than the USMNT during the five-year class period from 2015 to 2019, both in total compensation and on a per-game basis.[40] During 2016 negotiations, USSF offered the USWNT the same pay-to-play proposal as the USMNT but with lower per-game fees for friendlies and lower bonuses for both friendlies and World Cup play.[41] USSF admitted its offer did not include these terms because it was an intentionally low opening offer, the USWNT has historically generated less revenue than the USMNT from friendlies, and the USMNT has the potential to earn significantly higher prize

34 *See* McCann, *supra* note 13.

35 *Id.*

36 Friendly matches, or friendlies, refer to non-competitive, exhibition soccer games between two national teams. They are often scheduled leading up to a tournament to help fine-tune the squad or during intervals when there are no major tournaments to allow coaches to experiment with line ups.

37 *See* Meg Linehan, *$67m in Damages: The Most Interesting Details of the Latest USWNT Equal Pay Filings*, ATHLETIC (Feb. 21, 2020), https://theathletic.com/1625872/2020/02/21/67m-in-damages-the-most-interesting-details-of-the-latest-uswnt-equal-pay-filings/.

38 *See id.*

39 *See* Alana Glass, *Jeffrey Kessler on the USWNT and Their Fight for Equal Pay*, FORBES (Oct. 1, 2019), https://www.forbes.com/sites/alanaglass/2019/10/01/jeffrey-kessler-uswnt-and-their-fight-for-equal-pay/#2a8a161d78b5 ("As described in the court filing, if the men and women each played 20 friendly matches and won all of their games, the female players would earn a maximum of $99,000 or $4,950 per game. Meanwhile, the male players would earn an average of $263,320 or $13,166 per game. The compensation for a USWNT player would amount to just 38% of a similarly situated USMNT player." *Id.*)

40 Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiffs' Claims at 6, Morgan v. United States Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717), ECF No. 171.

41 *Id.* at 17–18.

money from the FIFA World Cup.[42] The two sides ended up with what USSF described as a hybrid contract that includes guaranteed salaries for some players, flat fee appearances for others, and performance bonuses for both types of players.[43] Most importantly, USSF argued the 2017 CBA had paid the USWNT over $25 million in the ensuing three years, 2.5 times as much as the $11 million the USMNT's CBA had paid during that same period.[44] The 2017 USWNT CBA provides several contract terms not present in the current USMNT CBA, including a six-figure salary guaranteed regardless of play; salary continuation during periods of injury; paid health insurance benefits; paid childcare assistance; paid pregnancy and parental leave; severance benefits; retirement benefits; bonuses tied to increased television ratings, sponsorship revenue, and ticket sales; over $1 million per year for players' National Women's Soccer League (NWSL)[45] salaries; a $230,000 signing bonus paid directly to the twenty-three players on the roster ($10,000 each) when the CBA was executed; and an annual $350,000 payment to the players' union in exchange for rights to the players' images and likenesses.[46] USSF argued that even taking out the NWSL salaries, money allocated to the union, and other benefits, the USWNT received roughly $6 million more than the USMNT over the past five years.[47]

USSF also argued that if any pay differential between the national teams existed, it was based on two factors unrelated to sex: (1) a good-faith belief the USMNT had generated and would continue to generate more revenue and profit for the Federation primarily due to the huge difference in potential FIFA prize money; and (2) terms and trade-offs negotiated by two different unions during the course of collective bargaining.[48] The basic structure of each team's collective bargaining agreement and FIFA's history

42 *Id.* at 18.

43 *Id*.

44 *Id*. at 19.

45 The NWSL is the women's professional soccer league in the U.S. There are currently nine clubs in the league, with plans to add two to three expansion clubs in the next two years. Despite the popularity of the USWNT, women's soccer leagues have historically struggled in the U.S., prompting USSF to offer to subsidize some of the salaries and operations to ensure the financial health of this league at the outset. *See* Jamie Goldberg, *National Women's Soccer League Enters New Era with U.S. Soccer's Role in League Set to Change*, Oregonian (Sept. 4, 2019), https://www.oregonlive.com/portland-thorns/2019/09/national-womens-soccer-league-enters-new-era-with-us-soccers-role-in-league-set-to-change.html. The relationship between USSF and the NWSL is explained in more detail below. *See infra* Section I.B.iii.

46 Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiffs' Claims, *supra* note 40, at 1–2.

47 *Id.* at 2.

48 *Id.* at 14–15.

of prize money disparity are explored in the following sections.

B. *Separate but Equal? A Comparison of the Collective Bargaining Agreements*

Included among the thousands of pages of supporting documentation attached to the parties' motions for summary judgment was the full 2017 USWNT CBA.[49] The USMNT also issued a statement in support of the USWNT's position that provides additional context regarding the differences in both the terms and the negotiating history of the men's and women's CBAs. The USMNT's union argues USSF's comparison of the 2011 USMNT CBA in negotiating the 2017 USWNT CBA is part of a false narrative the Federation has been using "as a weapon against current and former members of the [USWNT]."[50] The 2011 USMNT CBA expired at the end of 2018, but the players' union and USSF have not agreed to a new CBA.[51] As a result, the USMNT continues to play under this expired agreement.[52] The USMNT contends its 2011 CBA was negotiated towards the end of the global economic crisis of the late 2010s, and as such, USSF claimed its economic future was uncertain and therefore could not agree to the compensation increases owed to the USMNT as a result of significantly increased revenue.[53] Under the 2011 USMNT CBA, player compensation increased by only 25% over the eight-year term of the agreement, about 2.5% per year, but USSF's revenues tripled during that time.[54] By 2017, the USMNT says USSF's revenues had again tripled along with its net assets, which amounted to $168 million.[55]

Both the USMNT and USWNT players' unions expected the USWNT's 2017 CBA negotiations to result in dramatic increases in USWNT compensation on par with USSF's substantial increases in revenue since the two teams last negotiated their respective collective bargaining agreements.[56] "Instead, the women's 2017–2021 CBA did not bring the women equality in working conditions and the women did not benefit from the dramatic

49 The full five-year agreement has not previously been made publicly available. *See* Linehan, *supra* note 37.

50 U.S. Soccer Players, *Statement About the USWNT 2017-2021 CBA,* U.S. NAT'L SOCCER TEAM PLAYERS ASS'N (Feb. 12, 2020), https://ussoccerplayers.com/2020/02/statement-about-the-uswnt-2017-2021-cba.html [hereinafter *USMNT Statement*].

51 *See id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

increase in revenue associated with the USWNT."[57] The USMNT further argues that the deal USWNT ended up with was worse financially than the USMNT's 2011 CBA, negotiated six years prior and in its final year before expiration.[58] By insisting on this mark of comparison, the USMNT's union contends, USSF showed it had no intention of fairly compensating the female players.[59] A comparative analysis of the 2017 USWNT CBA and the expired-yet-still-in-effect 2011 USMNT remains necessary to arrive at an acceptable settlement, as all of the legal arguments put forth by both sides are based on that comparison, and the USMNT has not yet agreed to a new CBA with USSF.

i. Guaranteed Salary vs. Pay-to-Play

One of the key distinctive features of the USWNT CBA is its guaranteed salary structure. Under the 2017 USWNT CBA, players under contract—as designated by USSF—earn a guaranteed annual base salary of $100,000.[60] Contracted players will continue to earn this guaranteed salary for up to a year if they are unable to play due to injury.[61] The number of contracted players is set to decrease over the lifetime of the agreement, dropping from seventeen players in 2020 to sixteen in 2021.[62] The non-contract players only receive compensation when called up to the team.[63] Specifically, they receive $4,250 each time they are called into USWNT training camp.[64] That figure drops to $3,750 if the player has participated in a national team camp fewer than eight times—whether or not the player actually played a game.[65] The non-contract players are also eligible for the same performance bonuses as the contract players,[66] as detailed in the following section. If USSF elects to terminate a player who has been contracted for at least twelve months in the past year, as it recently did with Morgan Brian, the player receives severance for at least one month and up

57 *Id.*
58 *Id.*
59 *Id.*
60 U.S. Soccer Fed'n & U.S. Women's Nat'l Team Players Ass'n, Collective Bargaining Agreement 2017-2021 art. 11(A)(5) (July 6, 2017) (on file with parties) [hereinafter 2017 USWNT CBA].
61 *Id.* at art. 6(D)(1).
62 *Id.* at art. 8(A)(1).
63 *See id.* at art. 11(A)(2).
64 *Id.* at art. 11(A)(3).
65 *Id.*; *Id.* at Exhibit A.
66 *See id.* at art. 11(A)(4).

to four months.[67]

Like the non-contract USWNT players, the male players generally must be on the USMNT roster to be eligible for compensation from USSF, albeit at significantly higher rates.[68] However, the USMNT CBA also provides reduced training camp compensation amounts for friendly matches for players who were invited to training camp but did not make the roster for the match or matches associated with that camp.[69] USSF pays the USMNT players through appearance fees and bonuses, as detailed in the next section.

ii. Bonuses

USSF's unwillingness to provide the USWNT bonuses equal to the USMNT is one of the key points of contention in the equal pay lawsuit. USSF admits it offered lower bonuses for wins and ties in friendly matches, as well as lower bonuses for qualifying for the World Cup and making the World Cup roster.[70] This compensation decision was based on USSF's assessment that USWNT friendly matches typically brought in less revenue than USMNT friendlies and FIFA's enormous gap in World Cup prize money.[71] Under both CBAs, the teams receive per-game and one-time bonuses based on factors such as the type of game (friendlies, qualifiers, or tournaments), the level of the opponent in FIFA's rankings, and the outcome. The USMNT receives $5,000 for losses in friendlies and qualifiers and $6,875 for losses in World Cup games.[72] The USWNT, conversely, receives no bonus for losses and a total tournament rather than a per-game World Cup bonus.[73] Additionally, the bonus amounts in each category are significantly lower in the USWNT CBA than in the USMNT CBA.[74]

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67 *See id.* at art. 8(A)(2). In its opposition to the USWNT's motion for summary judgment, USSF noted Brian's contract was terminated in December 2019, but she continued to receive her annual salary as severance through the end of March 2020. *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 6, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717), ECF No. 186.

68 *See* U.S. Soccer Fed'n & U.S. Nat'l Soccer Team Players Ass'n, Collective Bargaining Agreement 2011-2018 Exhibit A (Nov. 23, 2011) (on file with parties) [hereinafter 2011 USMNT CBA].

69 *See id* at Ex. A, § X.

70 Defendant's Notice of Motion and Motion for Summary Judgment on Plaintiffs' Claims, *supra* note 40, at 17–19.

71 *Id.* at 18–19.

72 2011 USMNT CBA, *supra* note 68, at Exhibit A, § XVI.

73 *See* 2017 USWNT CBA, *supra* note 60, at Exhibit A.

74 *Compare id. with* 2011 USMNT CBA, *supra* note 68, at Exhibit A, § XVI.

iii. NWSL Salaries

The NWSL is the third iteration of professional women's soccer in the U.S.[75] Since its inception, the NWSL has been subsidized by USSF, along with the Canadian national soccer federation, through the payment of the salaries of each respective federation's national team players.[76] The 2017 USWNT CBA sets the NWSL salaries on a tiered basis, with at least eleven Tier 1 players (designated by the Federation) receiving a slightly higher salary than their Tier 2 counterparts ($72,500 and $67,500, respectively, in 2019).[77] USSF has had direct management of the league, spending $18 million on the NWSL,[78] but such oversight has recently transitioned to newly-appointed Commissioner Lisa Baird.[79]

Neither USSF nor the USWNT has offered any explanation as to why the players' NWSL club salaries are negotiated within the same agreement as their national team compensation. However, it is worth noting that the same party (USSF) controls both the players' national team and club team livelihoods. The 2017 USWNT CBA notably prohibits the players from strikes and lockouts during the term of the agreement, a five-year period that runs from January 1, 2017, to December 31, 2021.[80] Perhaps, as the USMNT union postulated, the resulting unequal bargaining position left the members of the USWNT no reasonable alternative but to accept the compensation terms offered by USSF.[81]

C. *Eye on the Prize (Money): Should U.S. Soccer Be Responsible for FIFA's Shortcomings?*

USSF would not agree to provide the USWNT equal compensation related to World Cup play because, in its view, the men's and women's competitions are entirely different, with different qualifying processes, levels

75 *See* Leander Schaerlaeckens, *How the NWSL Made American Women's Pro Soccer History*, Yahoo Sports (Apr. 16, 2016), https://sports.yahoo.com/blogs/soccer-fc-yahoo/nwsl-makes-history-with-fourth-season-054334254.html.

76 *See id.*

77 2017 USWNT CBA, *supra* note 60, at art. 9(C)(1)(a), Ex. A.

78 Jamie Goldberg, *National Women's Soccer League Enters New Era with U.S. Soccer's Role in League Set to Change*, Oregonian (Sept. 4, 2019), https://www.oregonlive.com/portland-thorns/2019/09/national-womens-soccer-league-enters-new-era-with-us-soccers-role-in-league-set-to-change.html.

79 *See* Grant Wahl, *NWSL Hires Lisa Baird as New Commissioner*, Sports Illustrated (Feb. 27, 2020), https://www.si.com/soccer/2020/02/27/nwsl-commissioner-lisa-baird.

80 2017 USWNT CBA, *supra* note 60, at art. 2, art. 26.

81 *See* USMNT Statement, *supra* note 50.

of opponents, and, most important to USSF's overall legal argument, prize money.[82] USSF argues the USWNT players are asking the court to "force U.S. Soccer into paying them as though they negotiated a different contract, won competitions they did not play in, defeated opponents they never faced, and generated over $60 million more in FIFA prize money for U.S. Soccer than they actually did."[83] A review of FIFA's history of providing significantly different prize money for the men's and women's most prestigious tournament is thus necessary to contextualize any forthcoming equal pay settlement between USSF and the USWNT.

FIFA is the governing body of world soccer.[84] It is comprised of 211 member national associations divided into six regional confederations.[85] The U.S. Soccer Federation is a member of the Confederation of North, Central America, and Caribbean Association Football, widely known by its acronym CONCACAF.[86] FIFA is a nonprofit organization with a three-pillar mission: (1) "to develop the game [of soccer] everywhere and for all[;]" (2) "to touch the world through a wide range of competitions[;]" and (3) "to build a better future through [soccer]."[87] FIFA acknowledges it accomplishes these goals through the revenue generated from the men's World Cup, played every four years.[88] A report issued by FIFA in February 2020 notes over $6 billion in revenue from the 2015–2018 cycle and pledges to invest $4 billion in "development and education," $1 billion in women's soccer, and $500 million in the development of soccer infrastructure by 2022.[89]

According to FIFA data, over 3.5 billion people watched the most recent World Cup held in Russia in 2018.[90] Each of the sixty-four matches

82 Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment at 3–4, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 171.

83 *Id.* at 25.

84 *See FIFA – Soccer's World Governing Body*, U.S. SOCCER, https://www.ussoccer.com/history/organizational-structure/fifa (last visited Jan. 22, 2021).

85 *FIFA Member Associations*, FIFA, https://www.fifa.com/associations/ (last visited Jan. 22, 2021).

86 *See Host of the World's Game*, U.S. SOCCER, https://www.ussoccer.com/history/organizational-structure/concacaf (last visited Jan. 23, 2021).

87 *Federation Internationale de Football Association*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/980132529 (last visited Jan. 23, 2021); *The 'Three Pillars' of FIFA's Mission*, FIFA (Jan. 19, 2017), https://www.fifa.com/who-we-are/videos/the-three-pillars-of-fifa-s-mission-2863856.

88 *The 'Three Pillars' of FIFA's Mission*, *supra* note 87.

89 FIFA, MAKING FOOTBALL TRULY GLOBAL: THE VISION 2020-2023, at 4 (2020), https://resources.fifa.com/image/upload/making-football-truly-global-the-vision-2020-2023.pdf?cloudid=z25oyskjgrxrudiu7iym [hereinafter FIFA Vision 2020-2023].

90 Press Release, FIFA, More than Half the World Watched Record-Breaking 2018 World Cup (Dec. 21, 2018), https://www.fifa.com/worldcup/news/more-than-half-

averaged a live audience of 191 million, and the final attracted an audience of 1.12 billion people around the world.[91] FIFA data also shows the most recent Women's World Cup held in France in 2019 was watched by over a billion people, making it the most-watched tournament in its relatively short twenty-eight-year history.[92] The final was also the most-watched match in Women's World Cup history, with a total audience of over 263 million.[93] Each match averaged an audience of over 17 million viewers, more than double the per-match average audience from the 2015 Women's World Cup.[94] In contrast, 99.9 million people tuned into Super Bowl LIV in 2020.[95]

With both the World Cup and the Women's World Cup steadily growing in overall and per-game worldwide viewership, the prize money has also increased.[96] The table below shows a comparison of the total and per-team prize money available in the 2018 World Cup[97] and the 2019 Women's World Cup.[98]

the-world-watched-record-breaking-2018-world-cup.

91 *Id.*

92 *28 Years of Women's World Cup History*, FIFA (Apr. 18, 2019), https://www.fifa.com/womensworldcup/news/28-years-of-women-s-world-cup-history; Publicis Sport & Entertainment, FIFA Women's World Cup France 2019: Global Broadcast and Audience Report 2–3 (2019), https://img.fifa.com/image/upload/rvgxekduqpeo1ptbgcng.pdf.

93 Publicis Sport & Entertainment, *supra* note 92, at 2–3.

94 *Id.* at 2.

95 Stephen Battaglio, *Super Bowl 2020 Scores 99.9 Million TV Viewers with Chiefs Comeback*, L.A. Times (Feb. 3, 2020), https://www.latimes.com/entertainment-arts/business/story/2020-02-03/super-bowl-2020-scores-99-9-million-tv-viewers-with-chiefs-comeback.

96 *See* Richard Asfour, *Gender Pay Inequality in World Cup Prize Pools and International Football*, Everything Money: Your Guide to Money Behind 2019 Women's World Cup, https://sites.duke.edu/2019womensworldcupfinances/how-countries-pay-their-players/ (last visited Jan. 23, 2021).

97 FIFA, Off the Pitch: Trophies, Awards and More. . .: Statistical Kit 4 (2018).

98 FIFA, Statistical Kit: FIFA Women's World Cup France 2019 60 (2019).

	2018 WORLD CUP	2019 WOMEN'S WORLD CUP
WINNER	$38 million	$4 million
RUNNERUP	$28 million	$2.6 million
THIRD PLACE	$24 million	$2 million
FOURTH PLACE	$22 million	$1.6 million
QUARTERFINALS ELIMINATION	$16 million	$1.45 million
KNOCKOUT STAGE ELIMINATION	$12 million	$1 million
GROUP STAGE ELIMINATION	$8 million	$750,000
TOTAL POT	**$400 million**	**$30 million**

On the women's side, these figures are double what was available in the previous Women's World Cup.[99] Despite this increase, the women's prize money remains substantially lower than the men's prizes.[100] The total prize money for the 2019 Women's World Cup was just 7.5% of the men's total, resulting in a difference in payment of $370 million.[101] The USWNT received just above 10% of what the French men's national team received for winning the entire tournament in 2018 and *half* of what male teams receive for not even making it out of the World Cup's opening group stage. These numbers do not align with the differentials in viewership for the two tournaments. According to the FIFA viewership data described above, the total viewership of the 2019 Women's World Cup was about 34% of the 2018 World Cup total audience, and the 2019 final-match audience was just

99 Nick Friend, *FIFA to Double Women's World Cup Prize Money*, SPORTS PRO MEDIA (Oct. 29, 2018), https://www.sportspromedia.com/news/fifa-womens-world-cup-prize-money.

100 *Id.*

101 Niall McCarthy, *The Gender Pay Gap at the FIFA World Cup Is $370 Million [Infographic]*, FORBES (June 11, 2019), https://www.forbes.com/sites/niallmccarthy/2019/06/11/the-gender-pay-gap-at-the-fifa-world-cup-is-370-million-infographic/#6126dbd12751. According to the Australian players union, which represents both the men's and women's national soccer teams, the gap is adjusted to $336 million when factoring in the lower number of teams in the women's tournament. *See* Grant Wahl, *Australia Players Union Writes to FIFA over 'Discrimination' in WWC Prize Money*, SPORTS ILLUSTRATED (June 3, 2019), https://www.si.com/soccer/2019/06/03/australia-players-union-fifa-womens-world-cup-prize-money-discrimination.

under 22% of the audience tuning into the men's final.

In response to FIFA's announcement that it would double the prize money for the 2019 Women's World Cup, international players union Fédération Internationale des Associations de Footballeurs Professionnels, commonly known as FIFPRO, criticized the measure.[102] While the prize money for the women grew, the men's prize money also increased such that the difference between the two tournaments' financial rewards grew even greater.[103] The gap between the prize for winning the women's versus the men's tournament went from $33 million[104] in the previous World Cup cycle to $34 million.[105] A statement issued by the union noted: "This regressive trend appears to contravene FIFA's statutory commitment to gender equality."[106] Unions representing players in Australia, Norway, Sweden, and New Zealand have written to FIFA to protest the comparatively small gains, urging the governing body to move towards pay equality.[107] The Professional Footballers Australia union contends even if the total women's prize money continues to increase by 100% every four years, as it has done over the last two cycles, it will take until 2039 to achieve pay equality with the men's prize money, assuming it continues to grow at the same 12% rate.[108] FIFA President Gianni Infantino has conceded that critics of the prize money structure are "perfectly justified" and "have a 'fair point'" but characterized the increase in the women's prize total as one of many steps.[109]

USSF maintains it has "for years" lobbied FIFA for increased Women's World Cup prize money and "continues to do so[.]"[110] However,

102 Friend, *supra* note 99.

103 *Id.*

104 *See* Cork Gaines, *There Is an Enormous Disparity in How Much Prize Money FIFA Pays in the Men's and Women's World Cups*, Bus. Insider, (June 26, 2015), https://www.businessinsider.com/fifa-womens-world-cup-prizes-2015-6.

105 *Id.*

106 Christian Radnedge, *Soccer: FIFA Approves Prize Money Increase for 2019 Women's World Cup*, Reuters, (Oct. 26, 2018), https://www.reuters.com/article/us-soccer-fifa-women/soccer-fifa-approves-prize-money-increase-for-2019-womens-world-cup-idUSKCN1N01RV.

107 *Id.*

108 '*Is It Too Much to Ask?' Matildas Take Fight to FIFA over Fair Women's World Cup Pay*, Guardian (June 3, 2019), https://www.theguardian.com/football/2019/jun/04/is-it-too-much-to-ask-matildas-take-fight-to-fifa-over-fair-womens-world-cup-pay.

109 *See* Rob Harris, *FIFA Has $2.7 Billion in Cash, but Won't Fix Women's World Cup Prize Money Gap*, Phila. Inquirer (Mar. 7, 2019), https://www.inquirer.com/soccer/fifa-world-cup-prize-money-women-jill-ellis-20190307.html. Infantino further indicated the difference in prize money boils down to differences in revenue generated by the men and women. However, much of FIFA's revenue from these events is derived from sponsorships, which are not sold separately for the two tournaments. *See id.*

110 *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs'

it also must be noted the Federation stands to gain substantial revenue by securing increased prize money for the women. As former Federation president Sunil Gulati noted, USSF refused to provide equal World Cup bonuses not just because of the significant differences in prize money but because it was more likely to have to *actually pay* the USWNT for a successful tournament performance.[111]

Motion for Partial Summary Judgment, *supra* note 67, at 23.

111 *See* Linehan, *supra* note 37; discussion *infra* Section III.B.

II. The Promise and Limitations of the Equal Pay Act of 1963

A. *An Introduction to the EPA and Its Goal to Ensure Equal Work Is Rewarded with Equal Wages*

The Equal Pay Act of 1963 (EPA) added the principle of "equal pay for equal work regardless of sex" to section 6 of the Fair Labor Standards Act.[112] In establishing the burden-shifting framework of EPA claims, the Supreme Court provided an overview of the legislative history of the Act in *Corning Glass Works v. Brennan*.[113] The purpose of the Act, the Court noted, was to remedy the "serious and endemic" problem of employment discrimination "based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[114] The Eighth Circuit has described the EPA as a "broad charter of women's rights in the economic field" which seeks to "overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it."[115] The *Corning Glass Works* Court further described the EPA as "broadly remedial," noting "it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."[116]

The EPA prohibits employers from compensating employees differently, on the basis of sex, for equal work in jobs that require "equal skill, effort, and responsibility . . . performed under similar working conditions[.]"[117] There are four exemptions—three specific and one catchall—that allow disparate wages for employees of different sexes. These exemptions apply where such payments are made pursuant to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than

112 Corning Glass Works v. Brennan, 417 U.S. 188, 190–91 (1974) (finding a violation of the EPA where male nightshift workers were paid higher wages than female dayshift workers).

113 *Id.* at 195–97.

114 *Id.* at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

115 Shultz v. American Can Co.-Dixie Products, 424 F.2d 356, 360 (8th Cir. 1970) (quoting Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970) (holding an employer violated the EPA by paying female machine operators who worked exclusively on the day shift twenty cents an hour less than male night-shift operators who performed nearly identical work)).

116 *Corning Glass Works*, 417 U.S. at 208.

117 29 U.S.C. § 206(d)(1).

sex."[118] The plaintiff bears the burden of proof to establish a prima facie case of wage discrimination.[119] Specifically, plaintiffs at this stage must show they: (1) were paid less than coworkers of the opposite sex; (2) performed substantially equal work; and (3) carried out the work under similar working conditions.[120] One scholar has noted that "the prima facie standard under the EPA is defined in broad terms and requires an intricate factual examination of the compared jobs to determine whether the performance of the work requires substantially 'equal skill, effort, and responsibility.'"[121] Once a prima facie case has been established, the burden shifts to the defendant to show the differential is justified by one of the four affirmative defenses enumerated in the Act.[122] Each of the prima facie elements and the catchall exception are explained in the following subsections.

i. Lesser Rate of Pay

Under the EPA, wage rate "refers to the standard or measure by which an employee's wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis."[123] Wages include all payments made as remuneration for employment and all forms of compensation, regardless of the time of payment or how the payment is characterized.[124] Fringe benefits—such as insurance, retirement benefits, and bonus structures—are also considered wages.[125]

Courts have generally held that total remuneration is not the proper basis for comparing wages.[126] The Sixth Circuit has noted that the EPA

118 *Id.*

119 *See Corning Glass Works*, 417 U.S. at 195.

120 29 U.S.C. § 206(d)(1); *see also* 29 C.F.R. § 1620.13(a) (2020).

121 Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815, 831 (2013) [hereinafter Thompson Eisenberg, *Stopped at the Starting Gate*].

122 *Corning Glass Works*, 417 U.S. at 196.

123 29 C.F.R. § 1620.12(a) (2020).

124 29 C.F.R. § 1620.10 (2020).

125 29 C.F.R. § 1620.10 (2020); 29 C.F.R. § 1620.11(a) (2020).

126 *See, e.g.*, Bence v. Detroit Health Corp., 712 F.2d 1024, 1027 (6th Cir. 1983) (rejecting an employer's total remuneration argument because females were paid at a lower commission rate than males for selling the same health club memberships at a higher frequency), *cert. denied*, 465 U.S. 1025 (1984); Ebbert v. Nassau Cnty., No. 05-CV-5445(FB)(AKT), 2009 WL 935812, at *3 (E.D.N.Y. Mar. 31, 2009) ("As a matter of common sense, total remuneration cannot be the proper point of comparison. If it were, an employer who pays a woman $10 per hour and a man $20 per hour would not violate the EPA or the NYEPA as long as the woman negated the obvious disparity

"commands an equal *rate* of pay for equal work . . . [and the c]omparison of pay rates entails measuring the amount of pay against a common denominator, typically a given time period or quantity or quality of output."[127] As a result, courts must identify the proper factor to measure pay rates.[128] "This must be a practical inquiry which looks to the nature of the services for which an employer in fact compensates an employee."[129] In some circumstances, however, total remuneration may be an appropriate measure, provided that a plaintiff's total compensation is not more than her comparator's solely by virtue of working more.[130] For example, one district court found a plaintiff had not established a valid EPA claim despite receiving a smaller weekly salary than her male coworkers because, when her insurance benefits were factored in, she received greater total compensation than her comparators.[131]

ii. Substantially Equal Work

Federal regulations define equal work under the EPA as work that is equal in terms of its required skill, effort, and responsibility.[132] The work does not have to be identical, but it must be "substantially equal."[133] While there is no precise definition of substantially equal work, the regulations provide guidance for determining equal skill, effort, and responsibility and require that these terms are interpreted in consideration of the broad remedial purpose of the EPA.[134] Skill is measured by the experience, ability, education, and training necessary in the performance of a job.[135] Effort refers to the amount of physical or mental exertion a job requires.[136] Responsibility is the degree of accountability required to perform a job.[137]

by working twice as many hours. Neither Congress nor the New York Legislature could have intended such an absurd result.").

127 *Bence*, 712 F.2d at 1027.
128 *Id.*
129 *Id.*
130 *See id.* at 1027–28.
131 Bertotti v. Philbeck, Inc., 827 F. Supp. 1005, 1010 (S.D. Ga. 1993).
132 29 C.F.R. § 1620.13(a) (2020).
133 *Id.*
134 29 C.F.R. § 1620.14(a) (2020).
135 29 C.F.R. § 1620.15(a) (2020).
136 29 C.F.R. § 1620.16(a) (2020).
137 29 C.F.R. § 1620.17(a) (2020).

iii. Similar Working Conditions

The EPA regulations note that generally, where jobs are found to require equal skill, effort, and responsibility, they are also likely to produce similar working conditions.[138] Similarity is a flexible standard, requiring a practical judgment "in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels."[139] Working conditions also encompass the surroundings and hazards of a job, taking into account their intensity, frequency, and the severity of injury they may cause.[140] For example, a New York district court found female dispatcher/corrections officers did not work under similar conditions as higher-paid male corrections officers because the male officers worked directly with inmates in cell blocks and the female officers worked primarily in a secure control room.[141]

iv. Factor Other than Sex

As described above, once a plaintiff establishes the three elements of a prima facie wage discrimination case, the burden shifts to the employer to prove the pay disparity resulted from one of the EPA's four exceptions. As the Fourth Circuit noted, "this statutory language requires that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[142]

By far, the most commonly asserted defense is the catchall defense claiming pay differentials are based on a factor other than sex.[143] A study of 500 district court EPA cases decided between 2000 and 2011 found that employers typically offer a laundry list of reasons to justify their pay disparities.[144] The most commonly asserted factors "other than sex" were the length of service (informal seniority); qualifications in terms of experience, education, or performance; market forces or business judgment; and prior

138 29 C.F.R. § 1620.18(b) (2020).

139 29 C.F.R. § 1620.18(a) (2020).

140 *Id.*; *see also* Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974).

141 Pfieffer v. Lewis Cnty., 308 F. Supp. 2d 88, 101–02 (N.D.N.Y. 2004).

142 E.E.O.C. v. Md. Ins. Admin., 879 F.3d 114, 121 (4th Cir. 2018) (emphasis in original) (internal citations omitted) (finding a prima facie case of wage discrimination where three female employees of an independent state agency earned less than at least one male comparator performing substantially equal work under similar working conditions).

143 *See* Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 836.

144 *Id.* at 815–16.

or negotiated salaries.[145] The regulations do not specify what constitutes a reason other than sex, but they do note that the comparative average cost of employing one sex as a group does not qualify as a pay differential based on a factor other than sex.[146] The regulations also state that collective bargaining agreements are not a defense.[147] However, in practice, courts defer to the bargaining process itself and tend not to address the regulation prohibiting the use of collective bargaining agreements as an EPA claim defense.[148] As described below, the district court in *Morgan v. U.S. Soccer Federation* focused largely on the bargaining history of the two parties before ultimately finding the USWNT was not paid less than the USMNT over the class period when looking at total compensation rather than the rate of pay. Although the USWNT argued the collective bargaining agreement could not be used as a defense by USSF and cited the regulation, the district court did not address this point in its decision.

B. *Surviving Summary Judgment: A Hurdle Most EPA Claims Cannot Clear*

Due to the fact-intensive nature of EPA claims, courts have recognized that summary judgment is often inappropriate to resolve such claims.[149] In practice, however, federal district courts dismiss most equal pay claims at the summary judgment stage.[150] A study of 500 federal district court decisions considering an employer's summary judgment motion on an equal pay claim revealed that courts granted 68% of these motions from 2000 to 2011.[151] Thus, about a third of the claims survived the summary judgment hurdle.[152] At the appellate level, courts affirmed 92% of district court summary judgment grants in favor of employers from 2000 to 2009.[153]

145 *Id.* at 837.

146 29 C.F.R. § 1620.22 (2020).

147 29 C.F.R. § 1620.23 (2020) ("Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect.").

148 *See, e.g.*, Perkins v. Rock-Tenn Servs., Inc., 700 F. App'x 452, 457 (6th Cir. 2017) ("There is no question that the decisions made as a result of negotiations between union and employer are made for legitimate business purposes; thus, a wage differential resulting from status as a union member constitutes an acceptable 'factor other than sex' for purposes of the Equal Pay Act.").

149 Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 816 (citing Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985)).

150 *Id.*

151 *Id.* at 817.

152 *Id.*

153 Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 34 (2010) [hereinafter Thompson Eisenberg, *Shattering the Glass Ceiling*].

The study of district court decisions noted that summary judgment for employers was granted on the vast majority of EPA cases, largely regardless of the judge's political ideology or sex or the geographic location of the court.[154] The author of the study identified the strict interpretation of the prima facie equal work standard, and the liberal application of the "any factor other than sex" defense as the key barriers to trial for EPA claims.[155] The author noted:

> [While the] prima facie standard under the EPA is defined in broad terms and requires an intricate factual examination of the compared jobs to determine whether the performance of the work requires substantially equal "skill, effort, and responsibility[,]" . . . some courts have required strict identity among compared jobs or imposed their own vision of "equal work" without applying the EPA's regulatory definitions.[156]

Of the 500 decisions studied, 49% found the plaintiff failed to establish the prima facie equal work element.[157]

Most of these decisions offered very little, if any, analysis of the equal work standard.[158] Out of the relatively small number of claims found to satisfy the prima facie standard (185 out of 500), the court denied summary judgment for employers in 144, or 79%, of such cases.[159] "This is an important finding because most legislative proposals to amend the EPA focus on narrowing the statute's defenses, not modernizing the prima facie standard."[160] However, because a significant majority of equal pay claims are lost at the prima facie level, courts typically never even reach the merits of the asserted defenses.[161] Ultimately, the study argues that juries, rather than district court judges, should be making factual judgments about whether jobs are substantially equal.[162] The next section explores how the district court in *Morgan v. U.S. Soccer Federation* resolved the summary judgment motions filed by both parties in line with the majority of cases reviewed in the study.

154 Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 831.
155 *Id.* at 839.
156 *Id.* at 831, 33.
157 *Id.* at 833.
158 *Id.*
159 *Id.* at 835.
160 *Id.*
161 *Id.*
162 *See id.* at 834.

III. The District Court's Summary Judgment Ruling and the Complexity of Comparing Compensation Structures Under Two Vastly Different CBAs

A. *How the District Court Disposed of the USWNT's EPA Claim*

Like the majority of cases examined in the study described above—and despite the prediction from many legal analysts that the case was likely to proceed to trial due to disputed facts offered by both parties and their experts—the district court granted USSF's motion for summary judgment as to the USWNT's EPA claim.[163] The court outlined the burden-shifting framework of EPA claims and the necessary elements to establish a prima facie case before shifting the burden to the defense to show any wage differential is justified by a factor other than sex.[164] Under this framework, the plaintiffs had to show that "(1) they performed substantially equal work as [US]MNT players, (2) under similar working conditions, and (3) [US]MNT players were paid more."[165] Rather than analyze the three-prong test in order, the

163 *See, e.g.*, Derek Helling, *Summary Judgment Would Give Either Side Tremendous Pull in USWNT Labor Dispute*, Advocacy for Fairness in Sports (Feb. 29, 2020), https://advocacyforfairnessinsports.org/current-litigation/current-miscellaneous-cases/summary-judgment-would-give-either-side-tremendous-pull-in-uswnt-labor-dispute/; Michael McCann, *Coronavirus, New U.S. Soccer Leadership and Their Impact on USWNT's Lawsuit*, Sports Illustrated (Mar. 25, 2020), https://www.si.com/soccer/2020/03/25/us-soccer-uswnt-lawsuit-coronavirus-summary-judgment-trial-date. With respect to the USWNT's Title VII claims, the court granted USSF's motion for summary judgment in part and denied it in part. Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 665 (C.D. Cal. 2020). The USWNT argued USSF violated Title VII by paying female players less than similarly situated male players and subjecting them to unequal working conditions in three areas—field surfaces, travel conditions (charter flights and hotels), and support services (medical and training support). *Id.* at 656–65. The court already held the USWNT was not paid less than the USMNT in its analysis of the EPA claims and thereby granted summary judgment to USSF on this point under Title VII as well. *Id.* at 657. The court also granted summary judgment in favor of USSF regarding the USWNT's claim USSF subjected the women's team to less favorable (and more dangerous) field surfaces more frequently than the men's team, finding the USWNT presented insufficient evidence that USSF's proffered reasons for the discrepancy (competitive advantage and scheduling necessities) were merely pretext for discrimination *Id.* at 663. Conversely, the court found the USWNT did raise a genuine issue as to USSF's pretext regarding the claim that USSF provided charter flights more frequently to the USMNT than to the USWNT. *Id.* at 665. As a result, this claim, along with the claims regarding travel conditions and support services, which were not addressed by USSF in its motion for summary judgment, will proceed to trial. *See id.* at 665.

164 *Morgan*, 445 F. Supp. 3d at 652.

165 *Id.*

district court focused solely on the third element—whether USSF paid the male players more than the female players—in finding the USWNT failed to establish a prima facie EPA claim.[166]

As noted in Part I, Section A, the USWNT argued that the written terms of its CBA established that its players were paid at a rate less than the USMNT players based on (1) a lower bonus structure than what is available under the men's CBA and (2) their expert's report that the female players would have received more under the men's CBA than they did under their own CBA, even taking into account the fringe benefits not afforded to the male players.[167] USSF argued it actually paid the USWNT *more* than the USMNT during the class period both in total compensation ($24 million compared to $18 million) and on a per-game basis ($220,747 per game and $212,639 per game, respectively).[168] The USWNT contended total compensation was the inappropriate method of comparing the two teams' wages, based on arguments the district court had already decided in an earlier phase of the case.[169]

At the class certification stage, the district court rejected USSF's argument that the plaintiffs lacked standing because the four class representatives individually made more money than the highest-paid USMNT player during the class period.[170] In rejecting this argument, Judge Gary Klausner noted it "presuppos[ed] that there [could] be no discrimination under either Title VII or the EPA where a female employee's total [annual] compensation exceeded that of similarly-situated males, *regardless* of whether the female receiv[ed] a lower rate of pay than her male comparators."[171] To hold otherwise, he explained, could lead to an "absurd result" where a woman paid at half the rate of a male coworker receives equal compensation solely by virtue of working twice as many hours.[172] Despite the USWNT's characterization of USSF's total compensation argument as an attempt to relitigate the court's certification order, the court noted it could not conclude *at the class certification stage* that discrimination had not occurred based solely on the fact that some USWNT received greater total compensation than USMNT players without further evidence that the

166 *See id.* at 652–56.

167 Plaintiffs' Motion for Partial Summary Judgment at 6–7, Morgan v. U.S. Soccer Fed'n, 445 F. Supp. 3d 365 (C.D. Cal. 2020) (No. 2:19-CV-01717-RGK-AGR), ECF No. 170.

168 *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 653 (C.D. Cal. 2020).

169 *See* Plaintiffs' Motion for Partial Summary Judgment, *supra* note 167, at 7–8.

170 *See* Class Certification Ord. at 5, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 365 (C.D. Cal. 2020) (No. 2:19-CV-01717-RGK-AGR), ECF No. 98.

171 *Id.*

172 *Id.* at 5–6 (citing Ebbert v. Nassau Cnty., No. 05-CV-5445(FB)(AKT), 2009 WL 935812, at *3 (E.D.N.Y. Mar. 31, 2009)).

female players were not paid more by virtue of working more.[173] Instead, the district court found the plaintiffs had the burden of showing what evidence they had developed on this point at the summary judgment stage and did not satisfy this burden.[174] The court pointed to the "undisputed" evidence that, during the class period, the USWNT played 111 games and made $24.5 million in total compensation, averaging $220,747 per game, whereas the USMNT played 87 games and made $18.5 million in total compensation with an average of $212,639 per game.[175] "Based on this evidence, it appears that the [US]WNT did not make more money than the [US]MNT solely because they played more games. Rather, the [US]WNT both played more games and made more money than the [US]MNT per game. Under these circumstances, it is not 'absurd' to consider the total compensation received by the players."[176]

In wrapping up its analysis of the EPA claim, the district court addressed the plaintiffs' two primary arguments as to how the USWNT CBA established a lower pay rate than the USMNT CBA. With respect to the lower bonus structure in the USWNT CBA, the court emphasized that focusing on the bonuses in isolation ignored the other compensatory benefits the players received under the terms of the CBA in contravention of the EPA, which requires all forms of compensation, including fringe benefits, to be considered wages.[177] As to the argument that the USWNT would have been paid more under the USMNT CBA, the district court pointed to the history of negotiations between the parties in finding untenable the comparison of what each team would have made under the other's CBA because it "ignores the reality that [each team] bargained for different agreements which reflect different preferences, and that the [US]WNT explicitly rejected the terms they now seek to retroactively impose on themselves."[178] Judge Klausner found this evidence, taken together, was insufficient to create a genuine issue of material fact for trial, thereby declining to address the remaining elements of the prima facie claim and granting summary judgment to USSF

173 *See* Morgan v. U.S. Soccer Fed'n, Inc., 445 F.Supp.3d 635, 653–54 (C.D. Cal. 2020).

174 *Id.* at 654.

175 *Id.*

176 *Id.*

177 *Id.* (citing 29 C.F.R. § 1620.12(a) (2019); 29 C.F.R. § 1620.11(a) (2019); Diamond v. T Rowe Price Assocs., Inc., 852 F. Supp. 372, 395 (D. Md. 1994) (granting summary judgment to employer on plaintiff's EPA claim where plaintiff did not receive stock options and larger annual bonuses but did receive more total compensation than her comparators)).

178 *Id.* at 655 (noting in labor negotiations the USWNT union rejected the pay-to-play structure of the USMNT CBA and was willing to forgo higher bonuses to secure other guaranteed compensation and benefits not provided in the men's CBA).

on the USWNT's EPA claim.

B. *Analysis of the Court's EPA Holding*

Ultimately, USSF has the stronger legal position. While the facts and public sentiment may be on the side of the USWNT, the law favors the Federation. However, there are flaws in the district court's EPA analysis that may lead to a successful appeal to get the EPA claim before a jury.

The district court found that in terms of total and per-game compensation, the USWNT had been paid more than the USMNT during the five-year class period. In so finding, the court dismissed the plaintiffs' arguments that lower bonuses made their *rate* of pay lower and that they would have received more compensation under the terms of the USMNT CBA because the players' union bargained for their guaranteed contract terms. However, the court failed to acknowledge that the five-year class period included two World Cups for the women in 2015 and 2019, both of which they won, and only one World Cup for the men in 2018, for which they failed to even qualify. The prize money available to the *winner* of the Women's World Cup is less than the prize money FIFA pays to men's national teams for *qualifying* for the World Cup.[179] The Federation admitted it had these historical revenue differentials in mind when it negotiated USWNT performance bonuses related to the 2015 and 2019 Women's World Cups.[180] It conceded that paying the USWNT equal bonuses for Word Cup play would "break" the Federation financially without receiving "concomitant prize money."[181] As a result, USSF rejected the USWNT union's demand for equal bonuses during the 2016 contract negotiations.[182] In a declaration regarding his involvement in CBA negotiations attached to USSF's summary judgment filing, former Federation president Sunil Gulati stated:

> One thing I do know is that I never would have authorized offering or accepting, and never would have recommended to the Board agreeing to, the same bonuses for Women's World Cup play that were contained in the [US]MNT's agreement for their World Cup play for very simple reasons. I believed the [US]WNT was much more likely to qualify for and succeed in their tournament than the [US]MNT was, and I believed that the [US]MNT's

179 *See supra* Section I.C.

180 *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *supra* note 67, at 20–21.

181 *Id.* at 18.

182 *See* Defendant's Motion for Summary Judgment at 21, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 171.

> participation and success in their tournament would result in the receipt of substantially more prize money from FIFA than the [US]WNT's participation and success in their tournament.[183]

These facts are undisputed, and yet the district court failed to address them in concluding the USWNT received more compensation than the USMNT. The women's team may not have had to work more to earn greater total and per-game compensation than their male counterparts, but they certainly had to be more successful.[184]

The court also provided no analysis of the USWNT's expert's assessment of wages. After reviewing the bargaining history between the parties since 2012, the court simply dismissed the USWNT's expert opinion that the players would have received more money under the USMNT, even taking into account the fringe benefits not provided to the men, because "the [US]WNT explicitly rejected the terms they now seek to retroactively impose on themselves."[185] However, the undisputed facts show the USWNT did not reject the terms of the USMNT CBA. Instead, they rejected the same pay-to-play structure that offered lower bonuses and appearance fees than what is provided to the men.[186] When it became clear that USSF was not going to agree to the same level of compensation for the USWNT under a pay-to-play model, the union shifted its priorities to try to secure other guaranteed compensation and benefits for the players. While courts are hesitant to interfere with the bargaining process in labor negotiations, it is an inaccurate characterization of the facts to say the USWNT explicitly rejected the terms of the USMNT CBA. Where, as here, the two labor agreements being compared are so fundamentally different, the hypothetical scenario outlined by the USWNT expert is useful.[187] If both teams played and won twenty friendly matches under their respective CBAs, the USMNT players would earn $263,320 ($13,166 per game), and the USWNT players would receive a maximum of $99,000 ($4,950 per game), 38% of the male

183 *See* Linehan, *supra* note 37.

184 *See* Das, *supra* note 25 ("By failing to qualify for the only men's World Cup played during the class window, the men became ineligible for millions of dollars in performance bonuses of their own. Those payments would have swelled their paydays from U.S. Soccer far beyond what the women could ever earn.").

185 Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 655 (C.D. Cal. 2020).

186 *See id.* at 655.

187 Legal scholar Steven Bank has criticized the USWNT's argument that they would have received higher compensation under the USMNT CBA, characterizing it as "cherry picking the most favorable argument" and noting "comparing CBAs on upside only (when the WNT wins) ignores downside (when the WNT loses)." Steven Bank (@ProfBank), Twitter (May 2, 2020, 12:25 PM), https://twitter.com/ProfBank/status/1256636027369746433.

players' earnings.[188]

Even if the court had considered these facts and determined the USWNT established a prima facie EPA claim—assuming the other two elements are met—the players still may not have survived the summary judgment hurdle. As the study reviewed in Section B of Part II notes, courts tend to liberally apply the "any factor other than sex" defense in considering summary judgment motions on EPA claims. Here, USSF points to both revenue and collective bargaining as two non-sex-based factors for any pay disparity between its men's and women's senior national teams.[189] While the court did not explicitly evaluate these defenses in finding the plaintiffs failed to establish the necessary prima facie element of lesser pay, it indicated support for USSF's position by citing the parties' bargaining history to reject the USWNT's approach to comparing the compensation of the two teams, noting the players were willing to forgo higher bonuses for other benefits.[190] As a result, it seems likely that the court would have granted summary judgment for the Federation even if it had found the USWNT established a prima facie case of wage discrimination under the EPA.

The fact-intensive nature of the court's analysis and findings, however, suggests the case should have proceeded to trial to allow the jury to serve its role as trier-of-fact. A reasonable jury could look at the history of labor negotiations and determine that USSF's control of both the national team and league salaries put the USWNT in an unequal bargaining position. Or, a reasonable jury could agree with the court's assessment that the USWNT's rejection of the pay-to-play structure and higher bonuses to secure guaranteed benefits makes the team's approach to compensation comparison untenable. The point, as noted by the study of district court EPA summary judgment decisions, is that district court judges should not be making these "factual judgment calls."[191] However, whether on appeal or before a hypothetical jury, the USWNT appears unlikely to prevail on its EPA claims for three reasons: (1) the compensation structures of the USWNT and USMNT are so fundamentally different they are nearly impossible to compare to determine whether USSF has, in fact, paid the women at a lesser rate than the men; (2) differences in revenue generation, including FIFA prize money, is likely an acceptable non-sex-based factor in USSF's compensation decisions; and (3) the players negotiated, through give and

188 *See* Glass, *supra* note 39.

189 *See* Defendant's Motion for Summary Judgment, *supra* note 182, at 14–15.

190 *See Morgan*, 445 F. Supp. 3d at 655 ("This method of comparison not only fails to account for the choices made during collective bargaining, it also ignores the economic value of the 'insurance' that [US]WNT players receive under their CBA.")

191 *See* Thompson Eisenberg, *Stopped at the Starting Gate*, *supra* note 121, at 834.

take, the terms of their agreement through the collective bargaining process, which courts tend to prefer not to interfere with. For each of these reasons, in addition to the general propensity of district courts to grant summary judgment in favor of employers in EPA cases, an EPA lawsuit was likely not the most effective weapon the USWNT could have chosen to fight its battle for equal pay.

IV. A POLICY PERSPECTIVE: APPLYING A NONPROFIT LENS

As a matter of policy, USSF and FIFA should set a standard of equal pay for male and female players. Unlike for-profit entities, neither FIFA nor USSF exists to maximize revenues. Both organizations are nonprofits and have specific charitable purposes their activities must support in order to retain the tax benefits afforded to them by their domestic jurisdictions.[192] Among the charitable purposes identified by both FIFA and the Federation is the growth and development of the women's game.

A. *FIFA's Mission*

FIFA has identified the following mission to support and advance the game of women's soccer:

> FIFA promotes the development of women's football and pledges to support women's football financially and to give players, coaches, referees and officials the opportunity to become actively involved in football. FIFA is helping to popularise the game by increasing public awareness and conducting information campaigns as well as overcoming social and cultural obstacles for women with the ultimate aim of improving women's standing in society.[193]

Included with this mission statement is a list of objectives to achieve the goals stated therein.[194] Specifically, FIFA states it will work to: ensure that every girl and woman who wants to play soccer has the opportunity to do so; help member associations to overcome the main challenges of developing women's soccer; promote opportunities for women, both on and off the pitch; involve more former female players; have more quality top-level female coaches; help build sustainable professional national and regional women's soccer competitions at various levels; constantly improve the quality, organization, and expansion of women's soccer competitions; and encourage the promotion and marketing of women's soccer at all levels to grow participation, build a bigger audience, and target potential partners.[195]

192 *See generally* Benoit Merkt, *Charitable Organisations in Switzerland: Overview*, WESTLAW (Mar. 1, 2020), https://content.next.westlaw.com/8-633-1801?transitionType=Default&contextData=(sc.Default)&__lrTS=20170607012756718&firstPage=true; Alyssa Dirusso, *American Nonprofit Law in Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39 (2011).

193 *Women's Football Mission*, FIFA, https://www.fifa.com/womens-football/mission/ (last visited Aug. 16, 2020) [hereinafter FIFA Women's Soccer Mission].

194 *Id.*

195 *Id.*

In addition to these broader goals, FIFA has identified the acceleration of women's soccer as one of its eleven goals to accomplish its vision for 2020–2023.[196] "Bolstering the women's game, as well as the participation of women in football governance at all levels, is at the top of the game's agenda around the world."[197] To support these efforts, FIFA plans to reform competitions, including introducing additional regular global women's competitions; modernize programs aimed at developing women's soccer in a way that is tailored to the specificities of the women's game; and create programs and policies that put women in a position to succeed on the pitch and assume global soccer leadership positions.[198] Significantly, FIFA also sets out to enhance the commercial value of women's soccer through the evolution of FIFA's commercial program, "taking into consideration the specific needs of the women's game, whose distinct brand identity should be created and underpinned by an innovative digital strategy."[199] FIFA expects the prioritization of these initiatives to further boost the commercial value of women's soccer.[200]

B. *USSF's Mission*

In its legal filings, USSF touts its own role in "championing women's soccer within the United States and on the world stage" as a factor that has contributed to the USWNT's unprecedented success.[201] USSF's bylaws set forth the specific purposes of the nonprofit Federation, including "to promote, govern, coordinate, and administer the growth and development of soccer in all its recognized forms in the United States for all persons of all ages and abilities, including national teams and international games and tournaments."[202] As noted in the introduction, USSF has described its mission to the IRS as promoting and governing soccer in the U.S. to achieve recognition for excellence in, among other things, gender equality.[203]

Undeniably, USSF's support of women's soccer and the USWNT has put the team in a position to achieve unparalleled success in the

196 *See* FIFA Vision 2020-2023, *supra* note 89, at 22.
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 Defendant's Motion for Summary Judgment, *supra* note 182, at 1.
202 U.S. Soccer Fed'n, Inc., Bylaws of the United States Soccer Fed'n, Inc. art. 102(1) (last updated May 1, 2020), https://cdn.ussoccer.com/-/media/project/ussf/governance/2020/bylaws/202021-bylaw-book_final.ashx?la=en-us&rev=42540dd47a7f4c3eba252b8ae8bda610&hash=C6D2CE954680C6C563BEABDCFED9A7B0.
203 USSF 2019 IRS Form 990, *supra* note 10.

women's game. In its motion for summary judgment, USSF noted that star USWNT player Megan Rapinoe had even acknowledged the Federation was deserving of "a tremendous amount of credit" for "back[ing] the team in a very strong way" and "push[ing] the game" in the U.S. and abroad.[204] Despite the evident support of women's soccer by both FIFA and USSF, the significant pay disparity between male and female players remains. As the women's game has grown in the U.S. and around the world, so have the rallying cries for equal pay.

C. *Adopting an Equal Pay Policy Furthers These Nonprofit Missions*

As described above, both FIFA and USSF have nonprofit missions to advance women's soccer regardless of how much revenue they receive by doing so. In fact, FIFA has described itself, along with its confederations and national member associations like USSF, as the guardians of the women's game.[205] A key way to truly serve as a guardian of women's soccer is to provide the women with equal pay. This starts with FIFA, which should not only make the prize money for its men's and women's World Cups equal but also require its member associations to pay their national women's teams equal to their men's teams. Doing so will help accelerate the development of women's soccer around the world (one of FIFA's stated goals for the 2020–2023 period), resulting in a better, more competitive sports entertainment product to increase commercialization (also a stated goal) and continuing the trajectory of women's soccer gaining popularity around the world in recent years. The increase in commercial attention would then arguably lead to a reduction in the gap in revenue generated by the men's and women's teams.[206]

By not making the prize money equal, FIFA has essentially enabled its member associations to not pay their women's national team players equally, which stunts the overall development of the women's game. The lack of parity beyond the top ten or so ranked teams in women's soccer is on display during every CONCACAF World Cup and Olympic qualifying

204 Defendant's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, *supra* note 81, at 1.

205 FIFA Women's Soccer Mission, *supra* note 193.

206 For example, a 2017 research study found that individuals who previously viewed at least one professional women's soccer match were much more likely to watch a women's soccer event in the future. Lindsey Darvin & Michael Sagas, *Objectification in Sport Media: Influences on a Future Women's Sporting Event*, 10 INT'L J. SPORT COMM. 178, 191 (2017). "[T]hese results suggest that previously viewing at least one women's professional soccer event drastically affected an individual's event expectancies and future viewership intentions." *Id.*

tournament.[207] Most recently, the USWNT cruised through the tournament to qualify for the 2020 (now 2021) Tokyo Summer Olympics.[208] The disparity in the level of play was most stark during the USWNT's opening match against an inexperienced and ultimately defenseless Thailand in the 2019 Women's World Cup, which resulted in a 13-0 victory for the Americans.[209] Notably, the Thai women's national team, which was playing in its first Women's World Cup, is supported by a wealthy patron, the chief executive of one of the country's largest insurance companies, who also serves as its general manager.[210] The family insurance company sponsors Thailand's women's league and employs women's national team players.[211] The USWNT was roundly criticized for continuing to press for goals despite the match being well out of hand for the Thai team.[212] In response, USWNT player Alex Morgan stated her hope that the tournament would expand to thirty-two teams and that the dramatic loss would "encourage[] FIFA to put a bit of pressure on those respective federations to put more efforts into their women's sides."[213]

While the USWNT has received considerable support from its federation in comparison to many women's national teams around the world, its own success in relation to the rest of the field of teams is what has put it in the position to demand equal pay. The relative lack of on-field success of the USMNT only amplifies the unique message of the USWNT players. As discussed in Section A of Part I above, one of USSF's core arguments in justifying any wage differential between the two teams is its inability to provide the equal fees and bonuses requested by the USWNT because

207 *See* Meg Linehan, *USWNT Qualify for Olympics, Easily as Ever (and That's a Problem)*, Athletic (Feb. 9, 2020), https://theathletic.com/1595197/2020/02/09/uswnt-qualify-for-olympics-easily-as-ever-and-thats-a-problem/. Of the qualifying tournament, goalkeeper Ashlyn Harris stated "I always respect my opponents[.] . . . I just want the best for women. I want them to have the same opportunities that I had, and I know that's difficult. I know they probably don't have the voice I do. If I can urge these federations in CONCACAF to continue to invest in these women's teams to give them a better chance to succeed, I think that's the goal. I'm rooting for them. I want everyone to have the access that I do. I also know that's not realistic, and that sucks." *Id.*

208 *Id.*

209 *See* Dan Wetzel, *No Place for Orange Slices: Why USWNT Was Right to Run Up Score Against Thailand*, Yahoo! Sports (June 11, 2019), https://sports.yahoo.com/why-uswnt-was-right-to-run-up-score-against-thailand-020720143.html.

210 Aimee Lewis, *US Defends Itself After Humiliating Thailand at Women's World Cup*, CNN (June 12, 2019, 6:56 AM), https://www.cnn.com/2019/06/11/football/uswnt-womens-world-cup-thailand-record-spt-intl/index.html.

211 *Id.*

212 *See id.*

213 *Id.*

the women's team has historically generated less revenue for friendlies and is eligible for far less FIFA prize money than the USMNT. However, the Federation's resistance to the USWNT's equal pay overtures and its disastrous "inherent inferiority" legal arguments, described in Section A of Part V, below, have ultimately made the USWNT *more* commercially viable. A report in the *Wall Street Journal* noted the rise in marketing deals centered on equality for women as evidence that "the U.S. women's equal pay-fight has spurred more marketing deals with the federation."[214] The USWNT home jersey, in which the players secured the team's fourth World Cup title, became the bestselling soccer jersey for men or women ever sold on the retailer's website in one season.[215] Nike struggled to meet the demand for the jersey following the World Cup.[216]

Perhaps most significantly, an act of protest by the USWNT led to sales of a t-shirt that set a single-day record for the company that produced it, despite going on sale just one hour and forty-three minutes before the end of the day.[217] After legal filings became public in which USSF contended USWNT players did not perform equal work to USMNT players because they "inherently had less skill, ability and responsibility than men's players[,]" the USWNT players appeared for their next game (just two days later) wearing their pregame warm-up shirts inside out, hiding everything but the outline of the U.S. Soccer crest and, more significantly, the four stars representing the team's four World Cup wins.[218] T-shirts bearing the "4 Stars Only" empty crest went on sale that same night through a company called BreakingT, which has a licensing agreement with the USWNT players' union.[219] *Sports Illustrated* reporter Grant Wahl noted this "viral business opportunity" was "the perfect symbolism, a way to show the abject emptiness of the U.S. Soccer Federation while still honoring the players who

214 Rachel Bachman, *U.S. Women's Soccer Games Outearned Men's Games*, WALL ST. J. (June 17, 2019), https://www.wsj.com/articles/u-s-womens-soccer-games-out-earned-mens-games-11560765600.

215 Meg Kelly, *Are U.S. Women's Soccer Players Really Earning Less than Men?*, WASH. POST (July 8, 2019), https://www.washingtonpost.com/politics/2019/07/08/are-us-womens-soccer-players-really-earning-less-than-men/.

216 Caitlin Murray, *Why Nike Didn't Have Enough USWNT World Cup Jerseys to Meet Demand — and What It Cost the Players and Fans*, YAHOO! SPORTS (Oct. 10, 2019), https://sports.yahoo.com/why-nike-didnt-have-enough-uswnt-world-cup-jerseys-to-meet-demand-and-what-it-cost-the-players-and-fans-171933947.html.

217 Grant Wahl, *USWNT Invisible Crest Protest Becomes Hit T-Shirt–and Example of Players' Revenue Potential*, SPORTS ILLUSTRATED (Mar. 16, 2020), https://www.si.com/soccer/2020/03/16/uswnt-protest-us-soccer-tshirt-crest-four-stars.

218 *Id.*

219 *Id.*

have led the U.S. to its greatest soccer triumphs."[220]

It should be noted, however, that an argument for equal pay among national teams is not an argument that salaries for men and women employed by the same clubs should be equal. Those clubs do not have nonprofit purposes to consider and can make compensation decisions purely driven by revenue generation and potential. Former Ballon d'Or[221] winner Ada Hegerberg, arguably the best player in the sport, is the highest-paid women's soccer player in the world, earning an annual salary of around $562,000 (with bonuses) from her club, Olympique Lyonnais.[222] That figure is significantly higher than the highest salaries awarded to players in the other prominent women's soccer leagues around the world, including, notably, the U.S.[223] It is also roughly 326 times less than what male superstar Lionel Messi is paid by his club, FC Barcelona.[224] However, it is notable that the clubs that pay the highest women's salaries are affiliated with successful men's soccer clubs. These salary figures are dwarfed by the top men's club salaries, but they show how an infusion of revenue generated by men's soccer can help make women's soccer more commercially successful. They also show how important national team compensation is to women players who do not receive the benefit of high club salaries.

Ultimately, the nonprofit missions of both FIFA and its member federations will be better served by making equal pay the standard in women's national team compensation. That investment should, in turn, increase revenue generated by women's soccer at both the national team and club level.

220 *Id.*

221 The Ballon d'Or is one of the most prestigious individual awards in international soccer, typically awarded to the player considered to be the best in the world that year. *See* Sarah Mervosh & Andrew Das, *Ada Hegerberg Won the Ballon d'Or. Then She Was Asked if She Knew How to Twerk*, N.Y. Times (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/sports/soccer/ada-hegerberg-ballon-dor.html.

222 Grant Wahl, *The Intricacies and Ever-Changing Landscape of the Global Market for Women's Players*, Sports Illustrated (July 6, 2019), https://www.si.com/soccer/2019/07/06/global-market-womens-soccer-players-uswnt-europe-nwsl. Hegerberg is Norwegian and famously has refused to play for her national team since August 2017 over equal pay concerns. Kellen Becoats, *Nike Signs Soccer Star Ada Hegerberg Away from Puma with 'Game Changer' Step Toward Equal Pay*, Forbes (June 8, 2020, 11:11 AM), https://www.forbes.com/sites/kellenbecoats/2020/06/08/nike-signs-ada-hegerberg-lyon-equal-pay/#13bd4b843f84. The Norwegian federation's equal pay journey is discussed in Sections V.A and V.B, *infra*.

223 Wahl, *supra* note 217.

224 *Lionel Messi*, FC Barcelona, https://www.fcbarcelona.com/en/football/first-team/players/4974/lionel-messi (last visited Jan. 23, 2021); Conor Pope, *Here Are the Highest Paid Women's Footballers in the World – and How They Compare to the Highest Paid Men*, FourFourTwo (Apr. 2, 2019), https://www.fourfourtwo.com/us/news/highest-paid-women-footballers-ada-hegerberg-lyon.

V. MOVING FORWARD: RECOMMENDATIONS TO RESOLVE THE DISPUTE

USSF won an important and significant victory in court—one that research suggests has a 92% chance of being upheld by the appellate court.[225] However, the Federation has bungled the public perception of this case to such an extent that it has given the USWNT bargaining power in what seems to be an inevitable outcome, resolving the dispute through settlement.[226] It is through this court of public opinion that the USWNT may finally be able to achieve its equal pay policy goal. To fully understand the leverage afforded by this public support despite losing in court, it is necessary to examine the sequence of events that led to a change in both USSF's leadership and legal representation.

In early March 2020, when both parties filed oppositions to the other party's motion for summary judgment, USSF's filing garnered intense scrutiny.[227] Up to that point, USSF's arguments, both in court and publicly, had largely centered on revenue disparities between the two teams, flagging the huge difference in FIFA prize money as the primary culprit of any pay wage gap. However, the Federation controversially asserted that the jobs of male and female soccer players are not equal because women are inherently physically inferior.[228] The filing explicitly stated, "[t]he overall soccer-playing *ability* required to compete at the senior men's national team level is materially influenced by the level of certain physical attributes, such as speed and strength, required for the job."[229]

As media reports dissected these ostensibly sexist arguments, USSF sponsors like Coca-Cola, Budweiser, Visa, and Deloitte began speaking out against the Federation.[230] Volkswagen issued a statement declaring it was "disgusted" by U.S. Soccer's "unacceptable" positions, noting "[w]e stand with the USWNT and the ideals they represent for the world, [and] [w]e demand that U.S. Soccer rise up to these values."[231] The next day, USSF President, Carlos Cordeiro, issued a statement apologizing for the legal

225 *See* Thompson Eisenberg, *Shattering the Glass Ceiling*, *supra* note 153, at 34.

226 *See* Das, *supra* note 25.

227 *See* Graham Hays, *U.S. Soccer Chief Apologizes for 'Offense and Pain' as USWNT Protests*, ESPN (Mar. 11, 2020), https://www.espn.com/soccer/united-states-usaw/story/4072953/us-soccer-chief-apologizes-for-offense-and-pain-as-uswnt-protest.

228 *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment, *supra* note 67, at 11.

229 *Id.*

230 *See* Kevin Draper & Andrew Das, *'Blatant Misogyny': U.S. Women Protest, and U.S. Soccer President Resigns*, N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/sports/soccer/uswnt-equal-pay.html.

231 *See id.*

strategy and taking responsibility for not having reviewed the filing before its submission.[232] Cordiero's statement was ironically issued during the waning moments of the USWNT's final game in the She Believes Cup,[233] an annual four-team, round-robin tournament hosted by U.S. Soccer to provide the USWNT a regular opportunity to play against elite competition.[234] Megan Rapinoe, arguably the most famous women's soccer star in the world, responded to Cordeiro's statement live at the conclusion of ESPN's broadcast of the game, issuing an impromptu, impassioned statement of her own:

> To every girl out there, to every boy out there, who watches this team, who wants to be on this team or just wants to live their dream out, you are not lesser just because you are a girl. You are not better just because you are a boy. We are all created equal and should have the equal opportunity to go out and pursue our dreams.[235]

The following evening, three days after the controversial filing, Cordeiro resigned.[236] Cindy Parlow Cone, USSF Vice President and former USWNT player, then became the Federation's first female president, and the Federation hired new legal counsel.[237]

Collectively, these events tremendously weakened USSF's already precarious position in the court of public opinion.[238] The Federation's victory in court is not enough to repair its damaged reputation. With new leadership and a new legal team in place, USSF seems primed to settle this case.[239] However, the industry-wide shutdown of live crowds at sports events due to the COVID-19 pandemic has severely impacted USSF's revenue, prompting layoffs and other cost-saving measures that may hinder its ability to offer a settlement that will satisfy the USWNT.[240] Despite this unforeseen complication, the longer this case drags out, the stronger the public support for the USWNT appears to be growing.[241] As the two sides presumably work behind the scenes to reach an acceptable settlement before the surviving

232 Hays, *supra* note 227.
233 *See id.*
234 *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment, *supra* note 67, at 15.
235 *See* Hays, *supra* note 227.
236 Draper & Das, *supra* note 230.
237 *Id.*
238 *See* ESPN Staff, *supra* note 18.
239 *Id.*; *See also* Das, *supra* note 25.
240 *See* Michael McCann, *U.S. Soccer's Financial Standing a Wild Card with Regard to USWNT Lawsuit*, Sports Illustrated (Apr. 21, 2020), https://www.si.com/soccer/2020/04/21/us-soccer-finances-loan-uswnt-equal-pay-lawsuit.
241 *See* Das, *supra* note 25.

Title VII claim on unequal working conditions goes to trial, this article recommends specific measures the parties can take to resolve the equal pay dispute and enter into a new collective bargaining agreement.

A. *FIFA Prize Money*

Although Part IV argued FIFA should award equal prize money for its men's and women's World Cup tournaments, the reality facing the USWNT and USSF at the bargaining table is that the prize money from the men's World Cup offers USSF substantially more potential revenue. The parties must find an acceptable solution to this issue whether or not the USWNT retains its guaranteed salary structure or opts for pay-for-play compensation like the USMNT in its next CBA. One possibility is putting the prize money awarded to both teams into a pot and allocating an equal percent of that pot to each team.[242] However, the USWNT may not be willing to agree to this plan considering it won the last World Cup while the USMNT failed to qualify. A second option would be to award the teams an equal percentage of the prize money they individually earn. The Norwegian Football Association (FA) recently negotiated a new CBA with its senior men's and women's national teams using this prize money model.[243] Each team will receive 25% of the prize money the FA receives for that team's successful performances.[244] However, given the vast difference in prize money available, this structure is more equitable than equal and thereby likely not acceptable to the USWNT.[245] A perhaps more appealing compromise would be to give the USWNT a greater percentage of the prize money awarded to USSF as a result of its World Cup success, and the USMNT would receive a smaller percentage of any prize money it earns through World Cup play. USSF would then pay a lump sum to the USWNT players union to cover

242 *See* Grant Wahl, *Op-Ed: If the Goal Is Equity, the U.S. Women and Men Should Team Up to Bargain with U.S. Soccer*, L.A. TIMES (July 17, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-07-17/equal-pay-soccer-womens-national-soccer-team-world-cup.

243 *See* Grant Wahl, *What FIFA and the Rest of the World Can Learn from Norway's Equitable Pay Agreement*, SPORTS ILLUSTRATED (Oct. 8, 2017), https://www.si.com/soccer/2017/10/08/fifa-women-soccer-equal-pay-norway-gianni-infantino.

244 *Id.* It should be noted, the Norwegian CBA may have been negotiated with an eye toward equal pay in large part to entice Ada Hegerberg to resume playing for the national team ahead of the 2019 Women's World Cup, but she was not satisfied with this equitable solution and opted not to play in the World Cup. *See* Bonnie D. Ford, *Why You Won't See Ada Hegerberg, the World's Best Player, at the Women's World Cup*, ESPN (June 5, 2019), https://www.espn.com/soccer/fifa-womens-world-cup/story/3867349/why-you-wont-see-ada-hegerbergthe-worlds-best-playerat-the-womens-world-cup.

245 *See* Wahl, *supra* note 242.

any difference in the prize money paid to the men after the previous year's World Cup after factoring in any other compensation already awarded to the women that year. Settling on an exact formula is beyond the scope of this article, but these are the types of arrangements both sides will need to consider in order to come to an agreeable resolution.

B. *Joint Bargaining*

While the Norwegian model is better described as equitable than equal due to the disparity in potential prize money, it represented a significant shift in the bargaining process for both national teams.[246] As part of the deal, the men's team agreed to give up $69,000 a year in marketing payments that would instead go to the women, along with an increase in the fixed payments paid to the women's team.[247] In so doing, the Norwegian FA nearly doubled its fixed payments to the women's team, bringing the annual total to $751,000 per year, which is exactly the same as what the male players will receive ($69,000 less than their compensation under the previous CBA).[248] Notably, the same union represents both the men's and women's national teams.[249]

The scathing statement issued by the USMNT union about the USWNT's 2017 CBA notes that the USWNT union typically negotiated their CBA after the men and describes how the two unions have worked together since 1999 with the goal of securing gains in pay and working conditions comparable to the men for the women.[250] However, the women negotiated their 2017 CBA towards the end of the USMNT's 2011 CBA, making it easier for USSF to compare the USWNT's proposed compensation to figures agreed to by the USMNT union in 2010.[251] Thus, having two separate unions not only dilutes the bargaining power of both teams it makes revenue and compensation comparisons nearly impossible, presenting a significant hindrance to the efforts to achieve equal pay. The USWNT and USMNT should form one players' association, like the Norwegian union, in order to have access to the same USSF financial figures at the same moment in time and bargain with USSF together. Doing so will give both teams a stronger, more informed bargaining position and make it more difficult for USSF to use the USMNT's compensation against the USWNT

246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.*
250 USMNT Statement, *supra* note 50.
251 *See id.*

in negotiations. Perhaps it will also result in a more similar compensation structure so that the two teams could better analyze their relative equality. In a recent *L.A. Times* op-ed, soccer journalist Grant Wahl advocated for this joint-bargaining structure, noting that "[t]he two . . . teams would have more leverage together, especially with the threat of a double-barreled work stoppage heading into 2022, when the men's World Cup is scheduled."[252] Wahl also noted that bargaining together would not require the teams to secure the exact same compensation terms, but instead would give them the opportunity to "creatively determin[e] what they view as 'equal pay,' while maintaining strict equity on apples-to-apples comparisons, such as travel support."[253]

C. *Separate Sponsorships*

In its court filings, USSF admitted that its joint marketing of broadcast and sponsorship rights for the USWNT, USMNT, and other USSF properties makes it "impossible" to break down how those key revenues are allocated between the two teams.[254] However, in the summer of 2019, Visa announced a five-year partnership with USSF in which over half of the funds are contractually required to support women's soccer.[255] Thus far, Visa's unusual stance on formalizing how its sponsorship dollars are allocated is an anomaly among USSF partners, though other sponsors have made public statements in support of the USWNT's fight for equal pay.[256] Notably, Secret, a partner of USSF since March 2019, took out a full-page ad in the *New York Times* a week after the 2019 Women's World Cup to announce it would donate $529,000 to the USWNT player's association ($23,000 for each of the 23 players) to "help close the . . . gender pay gap."[257]

USSF should allow separate sponsors for each senior national team. There can still be larger joint sponsors that support both teams as well as other USSF properties, but allowing individual team sponsors will

252 Wahl, *supra* note 242.

253 *Id.*

254 *See* Plaintiff's Notice of Motion and Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support at 14, Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR), ECF No. 170.

255 Kevin Draper, *Pushed by Consumers, Some Sponsors Join Soccer's Fight over Equal Pay*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/sports/soccer/womens-soccer-nike-sponsors.html.

256 *Id.*

257 *See id.*; Secret Deodorant (@secretdeodorant), TWITTER (July 14, 2019, 5:25 AM), https://twitter.com/SecretDeodorant/status/1150335540354584576?s=20.

provide U.S. Soccer with a more accurate reflection of the revenue each team is generating when making compensation decisions. The USWNT has demonstrated its commercial viability independent of the USMNT, particularly in the aftermath of the 2019 Women's World Cup, and it should be rewarded for that success.

D. *NWSL Salaries*

At a minimum, the NWSL salaries should be removed from the USWNT CBA, separately negotiated, and memorialized in a separate contract. USSF is clearly counting the NWSL salaries as a benefit paid out to the USWNT players under their CBA. Actually, it is separate work from, and in addition to, the players' national team duties, and it should therefore be paid separately. For those same reasons, it should not be counted in any comparative compensation calculations for purposes of determining whether USSF has paid the USWNT a lesser rate of pay than the USMNT.

Recent increases in outside investment in the league suggest U.S. Soccer may step back from its role in subsidizing national team player salaries.[258] In January 2020, the ownership group of French soccer club Olympique Lyonnais, which operates successful men's and women's club teams, acquired an 89.5% operating stake of the NWSL team based in the Seattle area.[259] More recently, in July 2020, the NWSL announced an expansion team in Los Angeles beginning in 2022.[260] The team, tentatively referred to as Angel City, is owned by more than thirty people, the vast majority of whom are women.[261] Notable owners include actresses Natalie Portman, Jennifer Garner, Eva Longoria, Jessica Chastain, and Uzo Aduba; Mia Hamm, Abby Wambach, Julie Foudy, Lauren Holiday, and other former national team players; and Serena Williams, her tech entrepreneur husband Alexis Ohanian, and their two-year-old daughter Olympia.[262] In an interview with the *New York Times*, club president Julie Uhrman noted part of the owners' mission in investing in the team was "embracing the fight for pay equity for women [athletes] by bolstering media coverage of the

258 *See, e.g.*, Meg Linehan, *Angel City's Alexis Ohanian and Julie Uhrman on a Shared Vision for NWSL in LA*, Athletic (July 21, 2020), https://theathletic.com/1941373/2020/07/21/ohanian-uhrman-angel-city-nwsl-la/.

259 *See NWSL's Reign FC Acquired by French Powerhouse OL Groupe*, Associated Press (Dec. 19, 2019), https://apnews.com/b93abe08c972d931d3c58e5dd51a1b8b.

260 Avi Creditor, *NWSL Reveals 2022 Los Angeles Expansion Team with Loaded Ownership Group*, Sports Illustrated (July 21, 2020), https://www.si.com/soccer/2020/07/21/nwsl-los-angeles-expansion-angel-city-ownership-group.

261 *See id.*

262 *Id.*

league, securing new sponsorships and, ultimately, creating stronger revenue streams through increased viewership."[263] With such high-profile ownership, Angel City FC earned an estimated $31 million media value across media platforms without spending anything on marketing.[264] If this early interest is an indication of future success, it will bolster the value of the entire league and help the players achieve the kind of financial security male national players enjoy through their respective club contracts.

263 Gillian R. Brassil, *New Women's Soccer Team, Founded by Women, Will Press Equal Pay Cause*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/sports/soccer/angel-city-fc-nwsl.html.

264 *See* Alexis Ohanian, *Angel City: Initializing a Women's Football Club in Los Angeles*, MEDIUM (July 29, 2020), https://medium.com/initialized-capital/angel-city-initializing-a-womens-football-club-in-los-angeles-bd226d17748.

Conclusion

It is no secret that men's soccer is vastly more popular and generates significantly more revenue than women's soccer in most, if not all, parts of the world. The USWNT, however, has proven that there can be an exception to this ostensible rule. Through its unprecedented success, particularly in comparison to the USMNT, it has built a tremendous following and platform and used that platform to advocate for equal pay. Despite this public support, there appears to be little hope the USWNT will prevail in its lawsuit against the Federation. However, as one writer noted, while the primary purpose of the lawsuit was equal pay, its secondary purpose was visibility: "[v]isibility for [the players] and for other chronically underpaid women's teams[;] [v]isibility for the lack of opportunities girls and women have in sports compared to boys and men[;] [v]isibility for what U.S. Soccer says it stands for: to 'promote and govern soccer in the U.S. in order to make it the pre-eminent sport recognized for excellence in participation, spectator appeal, international competitions, and gender equality.'"[265] This visibility has given the USWNT leverage to settle the case with USSF and in future CBA negotiations.

As a matter of policy, however, USSF, FIFA, and other national federations should adopt an equal pay standard.[266] Equal pay is an essential component in developing and growing the game of women's soccer around the world. It is an investment in women—in their skill and competitive spirit—that has the potential to yield substantial returns for FIFA and its national member associations in the form of increased ticket sales, TV ratings, and sponsorships. Not only does it make economic sense, but it also furthers the well-documented nonprofit missions of FIFA, USSF, and the other national federations. The growth and development of women's soccer are essential to these organizations' charitable purposes precisely because the game provides an opportunity to positively impact women's freedom and equality, which are still restricted in many parts of the world. As one writer noted, human rights are not "separate from women's soccer[;]" they are "a

265 Seth Vertelney, *Lose the Battle, Win the War? Why USWNT's Equal Pay Defeat Isn't a Total Catastrophe*, Goal (May 5, 2020), https://www.goal.com/en-us/news/uswnt-equal-pay-defeat-not-total-catastrophe/1jersb5mtfyw1fl9ndusayral.

266 In fact, England and Brazil, two elite federations, recently announced they have been paying their women's and men's players equally in terms of match fees, bonuses, and prizes. *See* Andrew Downie et al., *England's Men's and Women's Teams Receive Equal Pay, Says FA*, Reuters (Sept. 3, 2020), https://www.reuters.com/article/us-soccer-brazil-pay/brazil-announces-equal-pay-for-mens-and-womens-national-teams-idUSKBN25U101.

defining aspect."[267] No matter the final outcome of the USWNT's lawsuit against USSF, these arguments for investing in women's soccer remain firm.

Unfortunately, while both FIFA and USSF were in a strong financial position to make moves toward equal pay before the COVID-19 pandemic, the industry-wide shutdown of all sports across the world has cost both of these entities a significant amount in projected 2020 revenue and beyond.[268] One analysis estimated the sudden shutdown of the sports industry would wipe out at least $12 billion in expected revenue.[269] That's in the U.S. alone, and that's the economic reality both USSF and the USWNT will be facing as they negotiate a settlement to resolve their equal pay dispute. There were no easy answers pre-COVID, given the fundamentally different structures of the USMNT and USWNT compensation packages. Resolution now becomes more difficult as the full extent of the pandemic's impact on the world economy remains unknown. What is known, however, and what should remain at the forefront of USSF's and FIFA's minds when making decisions about compensation for women's national teams, is the impact equal pay will have on the growth and development of the women's game in the United States and across the globe.

267 Allison Cary, *Falling in Love with France*, BACKLINE SOCCER (Apr. 29, 2020), https://www.backlinesoccer.com/post/falling-in-love-with-france.

268 *See* McCann, *supra* note 240; Arvind Sriram, *FIFA to Release $150 Million to Member Associations Due to COVID-19 Pandemic*, REUTERS (Apr. 24, 2020), https://www.reuters.com/article/us-health-coronavirus-soccer-fifa/fifa-to-release-150-million-to-member-associations-due-to-covid-19-pandemic-idUSKCN22623U. However, FIFA has announced its plan to invest $1 billion in women's soccer from 2019 to 2022 will continue despite the financial impact of the coronavirus pandemic. Suzanne Wrack, *FIFA Says Planned £800m Investment in Women's Football Will Not Be Cut*, GUARDIAN (Apr. 20, 2020), https://www.theguardian.com/football/2020/apr/20/fifa-says-1bn-investment-in-womens-football-will-not-be-cut.

269 ESPN Staff, *Sudden Vanishing of Sports Due to Coronavirus Will Cost at Least $12 Billion, Analysis Says*, ESPN (May 1, 2020), https://www.espn.com/espn/otl/story/_/id/29110487/sudden-vanishing-sports-due-coronavirus-cost-least-12-billion-analysis-says.

LAWYERING IN THE AGE OF LYNCHING

*By Brigitte Meyer**

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CONTENT WARNING

The following article engages critically with issues of racism and racial terror and includes descriptions of violent and traumatic events. This content has the potential to be difficult and/or acutely affect our readers. Throughout this article, racial slurs used in historical primary sources were redacted or replaced. The Law Review and the author acknowledge that the usage of racial slurs by a non-Black author, regardless of the academic nature of the work, is inappropriate.

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INTRODUCTION

Lawyers concerned with justice must confront the social environment in which their legal decisions are made. This was never clearer than in the case of those tasked with defending Black men accused of capital crimes in the lynching-era South. There, formal law stood in tension with what some have termed underlaw: the belief that the benefits of law and the social contract belong only to some, namely white "persons," and that those benefits depend on the subordination of others, particularly Black "subpersons." Under this concept, Black racial subjugation stands not in opposition to America's law, social contract, or ideals but as their necessary foundation. As formal law began to step away from explicit racial subordination by the early twentieth century, the requirements of law and the demands of underlaw diverged. Fearful that law would no longer ensure Black racial subjugation, whites often resorted to public acts of torture and murder as a means of reinforcing the "subpersonhood" and subjugation of Black persons. Even where formal legal proceedings took place, underlaw often infected the process.

When Black men stood accused of crimes against whites, attorneys and other legal actors stepped into the tension between law and underlaw. This article explores that tension and the responses of legal actors through the story of John Henry Sloan, a Black man accused of murdering a white youth in Colquitt County, Georgia, in 1935. Part I defines underlaw and its historical relationship to lynching. Part II recounts the story of John Henry Sloan and explores the effects of underlaw on his community, the legal proceedings leading to his eventual execution, and the legal actors involved. Part III discusses the difficulty of fully assessing the effects of underlaw when extrajudicial violence gives way to proceedings having the appearance of legitimacy under law. Part IV examines the backlash against the Black Lives Matter movement as a contemporary manifestation of underlaw.

I. Law and Underlaw: Overview

Some scholars argue that law, as it is officially codified and expressed in constitutions, statutes, rules, and ordinances, is shadowed by underlaw, a system of racial subordination that undergirds formal law.[1] In this concept, law embodies a community's express social contract: the agreement among the community's members concerning the freedoms, rights, and protections attendant to membership in that community.[2] Our mythology teaches that the American social contract is built on the truth that all people have equal rights and equal value.[3] In reality, only those who the community considers "persons" benefit from the social contract, and the benefits have historically depended upon the exclusion, subjugation, and exploitation of "subpersons" who fall outside of the contract's protection.[4] Underlaw, the belief that this reality reflects the proper state of society is, therefore, not a rejection of principles of law such as the right to life, liberty, and due process; it is the belief that these principles cannot survive in the absence of subordination. Thus, where underlaw holds sway, the subjugation of "subpersons" is not a failure of law; it is the bedrock upon which law and the social contract are built.

From the United States' earliest days and throughout its history, the distinction between "persons" and "subpersons" has been racial.[5] Initially, the law explicitly distinguished between white persons and Black "subpersons," and freedoms, rights, and protections were bestowed or

1 *See, e.g.*, Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?, in* From Lynch Mobs to the Killing State: Race and the Death Penalty in America 21, 33 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

2 *See* Charles W. Mills, The Racial Contract 53–57 (1997).

3 *See* Exec. Order No. 13950, 85 Fed. Reg. 60,683, 60,683–89 (Sept. 22, 2020); *see also* David Cole, *No Equal Justice*, 1 Conn. Pub. Int. L.J. 19, 24 (2001).

4 *See* Daniel Kato, Liberalized Lynching: Building a New Racialized State 13–14 (2015); Mills, *supra* note 2, at 53–57. Historically, "subpersonhood" has been conceived of as a rational or cognitive inferiority intrinsically linked to some characteristic such as gender, ethnicity, culture, or religion. Because, under this conception, "subpersons" lack the defining "human" characteristic of rationality, they cannot be fully human and cannot enjoy the rights and liberties attendant to personhood. Mills, *supra* note 2, at 56, 59. *See also* Barack Obama, A Promised Land 398 (2020) ("[T]he basis of our nation's social order had never been simply about consent . . . it was also about centuries of state-sponsored violence by whites against Black and [B]rown people . . . .").

5 Kaufman-Osborn, *supra* note 1, at 24; *see also* Mills, *supra* note 2, at 53–55, 57–58. So-called subpersons are seen as "humanoid entities who, because of racial phenotype/genealogy/culture are not fully human and therefore have a different and inferior schedule of rights and liberties applying to them. In other words, it is possible to get away with doing things to subpersons that one could not do to persons, because they do not have the same rights as persons." Mills, *supra* note 2, at 56.

withheld on the basis of race.[6] Law and underlaw were in harmony, and there was little need to go outside the formal system of law to reinforce the white supremacy upon which the social contract was seen to depend. The end of slavery moved formal law toward a color-blind social contract and an understanding that freedom could be had without exploitation. However, this did not eliminate white communities' belief that the benefits they enjoyed depended on racial subjugation, or their strongly-felt need for a racially-defined subordinate class.[7] Although Jim Crow laws would enshrine Black "subpersonhood" in civil law for decades to come,[8] criminal law in Georgia had dropped explicit racial distinctions by the 1930s. Even this limited legal color-blindness unsettled those who had always enjoyed the benefits of the racialized social contract. Many held fast to the conviction that their security and well-being—even their very identities[9]—depended on the subjugation and exploitation of nonwhite "subpersons."[10] As the law moved away from this notion, those unwilling to divorce the social contract from racial subordination became uneasy about the law's ability to secure their rights, and they increasingly utilized other methods of reinforcing white supremacy.[11]

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6 *See* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 975 (1992). For example, the Naturalization Act of 1790 made only "free white person[s]" eligible to become naturalized American citizens. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). In its infamous *Dred Scott* decision, the United States Supreme Court declared that Black persons had "no rights which the white man was bound to respect." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

7 *See* MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 92–93, 96 (2011).

8 *See, e.g.*, GA. CODE ANN. §§ 18-206, 18-208, 18-201 (1933) (requiring racial segregation on passenger trains and authorizing railroad employees to eject passengers who refused to remain in assigned cars); GA. CODE ANN. § 35-225 (1933) (requiring racial segregation in hospitals); GA. CODE ANN. §§ 53-9902, 53-9903 (1933) (anti-miscegenation laws); KATO, *supra* note 4, at 7; LESLIE V. TISCHAUSER, JIM CROW LAWS xi–xii (2012).

9 The link between Black racial subjugation and white identity can be seen in William Faulkner's short story *Dry September*. In this fictional account, five white men sit in a barber shop in an unnamed Southern town and discuss rumors that a Black man has sexually assaulted a local white woman. When a white barber, a lifelong resident of the town, expresses doubt about the rumors and attempts to dissuade the others from lynching the Black man, the others immediately question his whiteness and his Southern-ness. *See generally* WILLIAM FAULKNER, DRY SEPTEMBER (1931), *reprinted in* THESE THIRTEEN (Random House 2012) (1931).

10 *See* TISCHAUSER, *supra* note 8, at xi–xii.

11 Kaufman-Osborn, *supra* note 1, at 26; *see also* BERG, *supra* note 7, at 92–93; Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL OF RTS. J., 215, 218 (1996) ("[L]ynchings were not

Lynchings, particularly gruesome public spectacle lynchings, served the underlaw of white supremacy by stripping their victims of their literal and figurative humanity.[12] By employing burning and other forms of torture, lynchers sought to deny their victims any semblance of personhood, to emphasize their "subhuman" status, and to drive the message of subjugation home "in the most graphic way possible."[13] Lynching marked Black bodies as belonging to a uniquely subordinate class, outside the protection of formal law, subject to savage and dehumanizing treatment at the hands of the dominating white class.[14] The fact that perpetrators and white communities considered this treatment to be consistent with—or even required by—the law is evident in the tendency of lynch mobs to imbue the grisly proceedings with the trappings of fairness and due process.[15] Contemporary accounts often emphasized the calm, orderly, and dispassionate manner in which the mob carried out its task.[16]

By 1935, Georgia's criminal law required color-blind equality and a state monopoly on lethal violence. Under this law, a person could not be put to death without due process—a dispassionate formal proceeding subject to laws written in the light of day by men who had ostensibly given form to humanity's best impulses.[17] A Black criminal defendant sentenced to death under this system would die, but he would die by electrocution in a state penitentiary, away from the public eye. Early-twentieth-century white communities where underlaw held sway struggled with the question of whether these formal legal proceedings were sufficient to meet the underlaw's demand for Black subjugation. Communities often acquiesced to law only when reasonably assured that that law would guarantee the death of Black defendants.[18] Yet underlaw often demanded more than death. Even where

simply the spontaneous venting of a thirst for retribution. Instead, lynchings were a brutal method of social control that was sanctioned by much of society.").

12 Kaufman-Osborn, *supra* note 1, at 33.

13 *Id.* at 30; Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 Law & Ineq. 263, 282 (2003).

14 *See* Kaufman-Osborn, *supra* note 1, at 33. Although white persons were also lynched, they were rarely killed in spectacle lynchings, and almost never subjected to the kind of torture or mutilation that characterized lynchings of Black persons. *Id.* at 29.

15 *See* Berg, *supra* note 7, at 93–94; Jeffrey L. Kirchmeier, Imprisoned by the Past: Warren McCleskey and the American Death Penalty 135 (2015); Margaret Vandiver, Lethal Punishment: Lynchings and Legal Executions in the South 10–11 (2005).

16 *See, e.g, Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, Thomasville Times-Enter. (Thomasville, Ga.), June 18, 1921, at 1.

17 *See* Kaufman–Osborn, *supra* note 1, at 32.

18 This tension can be seen in early-twentieth-century debates surrounding abolition of the death penalty. Colorado abolished the death penalty in 1897 and reinstated it in

the law guaranteed a Black defendant's death, a community's commitment to the law could be swept away in the face of underlaw's demand for a more violent, public exhibition.

In 1935, John Henry Sloan was accused of killing a white youth in Colquitt County, Georgia. The white community's response demonstrates the power of underlaw, the interaction between law and underlaw, and the effect of underlaw on the legal proceedings that followed.

1901. John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 541, 560 (1992). When lynchings occurred during the intervening years, the Rocky Mountain Daily News editorialized that the legislature "might as well face the fact that in the absence of capital punishment, under the law it is inflicted through the angry mob violence . . . . To prevent the recurrence of such horrors the death penalty should be restored in [Colorado.]" *Id.* at 560–61. "A jury may be relied upon to fix the penalty at death," the editorial continued, "and the certainty that it will do so will stop the blackening of [the state's] name with lynchings." *Id.*

II. Law and Underlaw in Colquitt County, Georgia, 1935: The Story of John Henry Sloan

A. *Prologue: The Lynching of John Henry Williams*

In June 1921, the body of a twelve-year-old white girl was found in a swamp outside Autreyville, Colquitt County, Georgia.[19] John Henry Williams, a Black man, was arrested and charged with the murder. Immediately, a white mob formed, bent on lynching him.[20] Colquitt County Sheriff Tom Beard managed to elude the mob and delivered Williams to authorities in neighboring Thomas County for safekeeping.[21] Its fury unsated, the mob rampaged through the countryside the following night.[22] When a search party looking for Williams descended on the home of Black Autreyville resident, Everet Hill, Hill responded by firing a shotgun at the men.[23] The men returned fire, shooting "scores of shots" into the home occupied by Hill and his family, wounding Hill in the head.[24] Meanwhile, gangs spread out to search jails in nearby Bainbridge, Cairo, and Thomasville, and officials managed to evade the mob only by moving Williams between four county jails over two days.[25]

With the county embroiled in violence, Colquitt County Superior Court Judge W.E. Thomas convened an extraordinary session of the grand jury to investigate the charge against Williams, promising a trial immediately after the almost-certain indictment.[26] The mob, in turn, assured that it would not interfere when Williams was returned for trial to the courthouse in Moultrie, the seat of Colquitt County.[27] The grand jury indicted Williams, and he was tried the next day.[28] Judge Thomas appointed local attorney William Alonzo Covington to defend the accused.[29] After deliberating for less than five minutes, the jury declared John Henry Williams guilty of assault and murder, and Judge Thomas sentenced him to be hanged three

19 *Colquitt Grand Jury Is Called*, Thomasville Times-Enter. (Thomasville, Ga.), June 16, 1921, at 7.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.
27 *Colquitt Grand Jury Is Called*, *supra* note 19.
28 *Id.*
29 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

weeks later.[30]

Meanwhile, a crowd of about 500 gathered outside the courthouse, and about 20 officials stood ready at the courthouse doors to keep order.[31] Despite this law enforcement presence, when Sheriff Beard escorted Williams from the courthouse, the mob surged forward, "overpower[ing]" him and the other officers.[32] They seized Williams and placed him into a car, and within five minutes, 100 cars or more were streaming from the Moultrie courthouse toward the Autreyville swamp where the young girl's body had been found.[33] There, before a semi-circle of 500 people, Williams allegedly confessed to the murder and assault in an "unconcerned, unemotional manner."[34] The mob then chained Williams to a tree trunk and surrounded him with gasoline-soaked wood.[35] Newspapers reported that Williams calmly smoked a cigarette as the fire was lit but cried aloud as the flames rose.[36] Spectators claimed he sang the hymn "Nearer My God to Thee" as he died.[37]

According to reports, the crowd stood about quietly as Williams's body burned and dispersed without further excitement when he was dead.[38] The lynching was "orderly," one newspaper account reported, with "no noise nor excitement."[39] There was "[n]ot a drop or a smell of whiskey," or a "single gun . . . in evidence."[40] Hundreds returned to the scene to view Williams's remains over the next several days.[41] No attempt was made to

30 *Id.*

31 *Id.*; *Georgia Lynch Hounds Raise Savage Record: Two Southern States Stage Human Sacrifices in One Week*, CHI. DEFENDER, June 25, 1921, at 1.

32 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16. One newspaper account reported that no weapons were present and "no effort was made to injure the officers." *Id.* This report indicates that an officer was slightly injured and his clothing torn as he attempted to fight off the crowd but does not report that Sheriff Beard resisted the mob. *Id.* Another account reported that "the officers gave up the man without a struggle." *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee,"* BALT. AFRO-AM., June 24, 1921, at 1.

33 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

34 *Id.* at 1, 8.

35 *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.

36 *Ne[***] Murderer Burned to Death*, *supra* note 16; *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.

37 *Southern Mob Couldn't Wait for Hanging: Georgians Burn John Williams While He Sings "Nearer My God to Thee," supra* note 32.; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

38 *Ne[***] Slayer of Girl Is Burned to Death: Convicted of Murdering Lorena Wilkes, Aged 12, Black Taken from Guards*, ATLANTA CONST., June 19, 1921, at A8; *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

39 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville*, *supra* note 16.

40 *Id.*

41 *Hundreds View Remains of Body Burned at Stake*, NORFOLK J. & GUIDE (Norfolk, Va.), July

apprehend or punish the persons responsible.[42]

Colquitt County's response to John Henry Williams revealed the tension between law and underlaw and the community's uneasiness with the law's outcomes. Initially, the community demonstrated some commitment to the law. When suspicion landed on Williams for the assault and murder of a white girl, the mob acquiesced to a trial. However, this commitment was fragile and ultimately did not withstand the community's fear that the law would fail to uphold the system of racial subordination. Although the law guaranteed Williams's death, the underlaw of racial subordination demanded not only his death but the annihilation of his personhood. For that, Colquitt County's white residents concluded, a lynching was required. Yet even in the most brutal moments of Williams's lynching, the Colquitt County mob, like many such mobs, paid a distorted homage to the law. Williams's lynchers allegedly extracted a confession from him before burning him, and newspaper accounts emphasized the calm, orderly, dispassionate manner in which the mob carried out its task, a gruesome approximation of the atmosphere of a courthouse.

Fifteen years later, a young intellectually disabled Black man was accused of murdering a white youth, and Colquitt County once again stepped into the tension between law and underlaw, with the life of a Black man hanging in the balance.

B. *The Killing of Ottis Gay and the Hunt for John Henry Sloan*

i. October 15, 1935: The Killing of Ottis[43] Gay

On the morning of October 15, 1935, John Henry Sloan, a young Black farm laborer[44] living in Colquitt County, Georgia, borrowed a shotgun

2, 1921, at 8.

42 *Chief's Hearing Friday*, Atlanta Const., Jan. 12, 1922, at 3. The following year, taxpayers in Colquitt County petitioned for the removal of J.O. Stewart, chief of the Colquitt County police, on grounds including that he had participated in Williams' lynching. *Id.* A grand jury was convened to investigate the accusations, but the petitioners did not go before the grand jury to present their evidence, and the grand jury declined to summons them. *Colquitt Chief Is Vindicated by Grand Jury*, Atlanta Const., Feb. 1, 1922, at 4.

43 Gay's name is variously spelled "Otis" and "Ottis" in contemporaneous accounts. I have used the spelling that appears on Gay's death certificate. Death Certificate of Ottis Gay (Oct. 15, 1935) (Ga. Dep't of Pub. Health, Registered No. 24794).

44 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors* (NAACP Branch Files I-G43-F4 (GA)); Brief of the Evidence at 7, Sloan v. State, 187 S.E. 670 (Ga. 1936) (No. 11468) [hereinafter Brief of the Evidence].

from a white neighbor to go hunting.[45] After a successful hunt, he made his way to return the gun and encountered a group of white men, who chased him down the road for some distance.[46] This was nothing new for Sloan. The young man had been tormented by white people for as long as he could remember.[47]

That same night, three young white couples went out driving along the same road that Sloan had traveled earlier.[48] They were Ottis Howell Gay, his fiancée Mary Smith, Mary's two cousins Ouida and Janie Smith, and the girls' dates, Ottis's brother, Wallace, and Rossie Lysle.[49] After grabbing some Coca-Colas and cruising around in the car for some time, the couples parked the car on the side of Thigpen Trail and separated.[50] Ottis Gay and Mary Smith walked up the road, away from the others, and sat on an embankment to discuss their upcoming wedding.[51] According to Smith, a Black man approached them while they were talking, pointed a shotgun at them, and pulled the trigger.[52] The others, hearing the shot, ran toward the sound.[53] As they did so, they saw a Black man with something in his hand running past them in the opposite direction.[54] Wallace Gay asked the man to stop, but the man said nothing and kept running.[55] The others ran on and discovered Ottis and Mary "shot all up."[56] They rushed them to a nearby house and from there headed to the hospital. Ottis Gay died in Janie Smith's arms as they carried him to town.[57] None of the white youths identified the shooter.[58]

A farmer who lived nearby heard the gunshot and the women's screams, and he rushed to the scene.[59] He found no one there but saw car tracks and "blood-signs" leading from the location of the shooting to the

45 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
46 *Tensity at Trial Is Told by Juror*, MACON NEWS (Macon, Ga.), Jan. 28, 1936, at 1, 2; Frank Hawkins, *John Henry Doesn't Know He Is to Die for Slaying*, MACON TEL. (Macon, Ga.), Nov. 18, 1935, at 10.
47 Hawkins, *supra* note 46.
48 Brief of the Evidence, *supra* note 44, at 8.
49 *Id.* at 8–9.
50 *Id.* at 8.
51 *Id.* at 8, 16.
52 *Id.* at 16.
53 *Id.* at 9.
54 *Id.* Gay testified that the moon was bright enough on that night to distinguish a Black man from a white man. *Id.* at 10.
55 *Id.* at 9.
56 *Id.*
57 *Id.* at 9, 14.
58 *Id.* at 7–14.
59 *Id.* at 14–15.

car.[60] He also found a shotgun shell by the side of the road, which he gave to a Colquitt County deputy sheriff.[61] Soon after, Colquitt County Sheriff Tom Beard arrived on the scene. He observed the blood on the ground and then went to the nearby home of Monroe Jackson.[62] As Sheriff Beard knew, there was a young Black man working for and living with Jackson—John Henry Sloan.[63] Sheriff Beard learned that Sloan had borrowed a shotgun from a neighbor that morning and had returned the gun and a single shell shortly after eleven o'clock that night.[64] He organized a manhunt for Sloan.[65]

ii. The Search Begins; The Killing of Bo Brinson

With John Henry Sloan now presumed to be Ottis Gay's killer, law enforcement and the local community quickly mobilized to find him. Posses roamed the countryside the following night, eventually arriving at a rural home where several men were keeping watch.[66] One of these men was a Black farm laborer named Bo Brinson.[67] When the posse arrived to search the farmhouse where he was staying, Brinson allegedly ran into the open and grappled with one of the armed men.[68] Members of the posse beat Brinson, shot him several times in the head and chest, and left.[69] One of the other men in the house covered Brinson with a quilt until he could be carried to the hospital, where he died the next morning from a rifle shot to the head.[70]

60 *Id.* at 15.

61 *Id.* at 15.

62 *Id.* at 17.

63 *See id.* at 5–6, 17. It is unclear whether Mary Smith or the other youths had identified the shooter as a Black man to Sheriff Beard when he went to Monroe Jackson's home.

64 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

65 *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 16, 1935, at 1.

66 *See Ne[***] Sought for Death of Moultrie Man Apprehended*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 29, 1935, at 1; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, Thomasville Times-Enter. (Thomasville, Ga.), Mar. 24, 1936, at 1.

67 Letter from W.A. Covington, to Commission on Interracial Cooperation (Mar. 27, 1936), *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

68 *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, Thomasville Times-Enter. (Thomasville, Ga.), Oct. 18, 1935, at 1.

69 NAACP, Lynching Record for 1935: Supplement No. 17 to Thirty Years of Lynching in the United States, 1889-1918 (on file at Yale Univ.), https://collections.library.yale.edu/catalog/2077126; *Ne[***] Is Slain by Georgia Posse*, Decatur Daily (Decatur, Ga.), Oct. 17, 1935, at 1.

70 Death Certificate of Bo Brinson (Oct. 17, 1935) (Ga. Dep't of Pub. Health, Registered No. 24802); *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, *supra* note 68.

Sheriff Beard was notified of Brinson's death, and he made arrangements for a coroner's inquest that afternoon.[71] However, the witnesses to the killing were unwilling or unable to identify Brinson's killers, and the coroner's jury returned a verdict that he had "come to his death 'through parties unknown to this body.'"[72] With this, the community ended its efforts to bring to justice those responsible for Brinson's death.

iii. John Henry Sloan's Arrest and Indictment

In the wake of Brinson's death, the hunt for John Henry Sloan continued, and no effort was spared in the attempt to find him. Armed civilian posses scoured the area for the alleged "slay[er]" for two weeks following Brinson's murder.[73] They tore through Colquitt and surrounding counties, eventually ranging as far south as Tallahassee, Florida.[74] Officials from Macon, 130 miles distant, were enlisted to join the hunt.[75] On October 28, 1935, local officials located John Henry Sloan near Havana, Florida, and delivered him to Sheriff Beard.[76] When Sheriff Beard brought Sloan back to Georgia, the mob that had killed Brinson attempted to lynch him; Beard was only able to thwart their efforts by moving Sloan forty miles away to a jail in Albany.[77]

With the mob held at bay for the time being, Judge W.E. Thomas of the Colquitt County Superior Court convened a grand jury, which quickly indicted Sloan.[78] Judge Thomas set Sloan's trial to take place in Moultrie on November 14, 1935, less than three weeks later.[79] He appointed William Alonzo Covington to represent the defendant, as he had fifteen years earlier

71 *Ne[***] Shot to Death by Colquitt County Posse Last Night*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Oct. 17, 1935, at 6. A coroner's inquest is "[a]n inquiry by a coroner or medical examiner, sometimes with the aid of a jury, into the manner of death of a person who has died under suspicious circumstances, or who has died in prison." *Inquest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

72 *Coroner's Jury Probes Death of Ne[***] Shot by Colquitt Posse*, *supra* note 68.

73 *See Ne[***] Sought for Death of Moultrie Man Apprehended*, *supra* note 66.

74 *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65; *Ne[***] Shot to Death by Colquitt County Posse Last Night*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Oct. 17, 1935, at 6.

75 *Half-Witted Killer Is Sought by Police*, MACON TEL. (Macon, Ga.), Oct. 23, 1935, at 5.

76 *Ne[***] Sought for Death of Moultrie Man Apprehended*, *supra* note 66.

77 *See id.*; *Demented Man, Twice Saved from Mob, to Die*, PITTSBURGH COURIER, Apr. 4, 1936, at 7.

78 Brief of the Evidence, *supra* note 44, at 2–4.

79 *Ne[***] Is Found Guilty Today at Moultrie*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Nov 14, 1935, at 1.

with John Henry Williams.[80] Covington, Judge Thomas, and the other legal actors charged with the task of upholding the law and ensuring justice would once again have to navigate the relationship between law and underlaw in Colquitt County.

iv. Accepting the Appointment

From the moment Judge Thomas appointed him to represent Sloan, the tension between law and underlaw created difficult decisions for Covington, including the decision of how vigorously to defend his client. Fears of social opprobrium, loss of business, and even physical harm often kept Southern attorneys from willingly representing Black clients in inflammatory cases.[81] When white mobs clamored after a lynching, their community might condemn the accused's attorney not only for preventing the speedy resolution sought by the lynch mob but for disparaging the community's chosen form of justice.[82] White attorneys who took up the defense of such clients could be perceived as traitors to their race and culture, bringing threats of violence against them.[83] In this climate, many attorneys preferred to avoid these cases altogether, with some even refusing to take appointments.[84] Others demanded that judges appoint more than one attorney so as to diffuse the stigma of representing Black criminal defendants.[85]

Covington chose to accept the task of defending Sloan and to take it on alone, a choice that may have been a function of his circumstances, his beliefs, or both. For one, Covington may not have anticipated much harm to his career or reputation. By 1935, Covington was sixty-six years old and had enjoyed decades of professional, political, and social success in Colquitt County and across South Georgia.[86] Within four years of arriving in Moultrie as a newly-minted attorney, he had been appointed the first judge of the

80 Letter from W.A. Covington to Harry S. Strozier, Commission on Interracial Cooperation (Nov. 30, 1935), *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

81 *See* Emanuel, *supra* note 11, at 226 nn. 65–66, 236; *see also* Alex Heard, The Eyes of Willie McGee 82 (2010). Covington's life was apparently threatened as a result of his defense of Sloan. *Witnesses Tell of Sloan's Trial*, Macon Tel. (Macon, Ga.), Jan. 28, 1936, at 1–2.

82 Emanuel, *supra* note 11, at 236.

83 *See* Heard, *supra* note 81, at 161, 167, 178.

84 *See* Michael J. Klarman, *Scottsboro*, 93 Marq. L. Rev. 379, 383 (2009).

85 *See* Emanuel, *supra* note 11, 226–27.

86 *See Death Claimed Judge Covington at Moultrie Home*, Thomasville Times-Enter. (Thomasville, Ga.), June 25, 1945, at 4. Covington was born on January 19, 1869. W.A. Covington, History of Colquitt County 104, 242–43 (1937).

Moultrie City Court, a role in which he was described as "uncommonly able."[87] He resigned his judgeship in 1904 to campaign for a seat in the state legislature, where he eventually served four terms.[88] He was elected to two non-consecutive terms as mayor of Moultrie in 1919 and 1921, and although unsuccessful, he ran for seats in both the United States Senate and House and was at least once put forth as a potential candidate for governor.[89]

As a lawyer and a legislator, Covington believed in the law's ability to bring about justice. He spent years in the Georgia legislature fighting for laws to address what he saw as the greatest concerns of the time—intoxicating liquors, convict leasing, child labor, and women's suffrage.[90] He advocated for changes to the law to address lynching.[91] He spent decades defending clients in courts of law.[92] At the same time, he recognized that law could be an imperfect tool and even a means of perpetuating injustice.[93] As for Covington's view of the Colquitt County community, he saw them as "the most law-abiding in the world" (as long as they remained sober) and believed

87 W.A. COVINGTON, *supra* note 86, at 104, 243; *Death Claimed Judge Covington at Moultrie Home*, *supra* note 86, at 4; *Letters of Congratulation Pour In on Bishop Candler*, ATLANTA CONST. (Atlanta, Ga.), Sept. 15, 1903, at 6.

88 *Judge W.A. Covington Resigns*, ATLANTA CONST. (Atlanta, Ga.), Mar. 19, 1904, at 2. Covington served two terms in the Georgia legislature from 1905 to 1908, and two more in 1919–20 and 1923–24. W.A. COVINGTON, *supra* note 86, at 243.

89 *Elected Mayor*, ATLANTA CONST., Oct. 6, 1921, at 4; *Covington Announces to Run for Congress*, ATLANTA CONST., Oct. 4, 1913, at 5; *Governor Smith Elected Senator by Big Majority*, ATLANTA CONST., July 13, 1911, at 1; *Covington for Governor if Hoke Smith Wants Toga*, ATLANTA CONST., Aug. 4, 1907, at B5.

90 *See The Chairman Broke the Tie*, ATLANTA CONST., July 8, 1919, at 8; *Laborer Worthy of Hire; In a Sense Responsible for Wrongs He Suffers*, ATLANTA CONST., Sept. 7, 1909, at 12; *Lease System Is Condemned*, ATLANTA CONST., July 27, 1908, at 3; *Will Introduce Prohibition Bill*, ATLANTA CONST., July 13, 1905, at 9.

91 Covington believed that giving the governor authority to remove sheriffs who refused to resist lynch mobs and to send National Guard troops on his own initiative would prevent nine-tenths of lynchings. W.A. Covington, *A Way to Stop Lynchings*, ATLANTA CONST., Mar. 14, 1918, at 8; W.A. Covington, *To Stop Lynchings, Give the Governor More Power*, ATLANTA CONST., Feb. 8, 1916, at 8.

92 *See Death Claimed Judge Covington at Moultrie Home*, *supra* note 86, at 4.

93 In a 1909 Labor Day speech, he proclaimed: "The laboring man in America has been plundered under forms of law. His burdens have been placed upon him by the assistance of government, state and national . . . I can recall to mind no demand made by organized labor in any form in Georgia not in harmony with the plainest mandates of justice." *Laborer Worthy of Hire; In a Sense Responsible for Wrongs He Suffers*, *supra* note 90, at 12. Later that year, in a letter to the editor of the Atlanta Constitution, he denounced "government favoritism," which created two classes of citizens, the specially-privileged and "the class that is plundered under forms of law." *New Line Up, Says Covington, Letters from People*, ATLANTA CONST., Nov. 18, 1909, at 8.

lynching was the act of a small, contemptible minority of the population.[94]

v. Change of Venue

Upon choosing to proceed as Sloan's counsel, Covington had to decide whether he could trust his community to deliver justice for his client, in essence divining the ultimate outcome of the tension between law and underlaw. The Code of Georgia of 1933 allowed criminal defendants to move for a change of venue if they believed an impartial jury could not be empaneled in the county where the crime was alleged to have been committed.[95] A judge was obligated to grant such a motion upon a reasonable showing that danger of lynching or other violence existed in that county.[96] Given that posses searching for Sloan had already killed another man and a lynch mob had forced officials to move Sloan out of the county,[97] Covington easily could have supported a motion for change of venue. Yet he chose not to, opting instead to place Sloan's fate in the hands of a Colquitt County jury—an extraordinary gamble for any attorney seeking justice for a client in Sloan's situation.

Covington evidently believed the white residents of Colquitt County would permit the law to take its course. Perhaps this reflected Covington's deep confidence in the community he loved, bolstered by a white attorney's blindness to how deep and strong the currents of the underlaw ran.[98] It is also possible Covington saw a prompt local trial as the only way to forestall the continued violence endangering his client.[99] For a white Southern community, the promise of a speedy trial for a Black defendant often formed a negotiation of sorts between the law and the underlaw: the mob would agree to abandon lynching efforts if the law guaranteed the defendant's execution.[100] But the truce was tenuous; any indication that the accused's

94 *A Way to Stop Lynchings*, *supra* note 91; *Letters of Congratulation Pour In on Bishop Candler*, *supra* note 87.

95 Ga. Code Ann. § 27-1201 (1933).

96 *Id.*

97 *Demented Man, Twice Saved from Mob, to Die*, *supra* note 77.

98 Many years before, before John Henry Williams's lynching, Covington had declared that "[o]ur people, white and black, are the most law-abiding in the world when sober." *Letters of Congratulation Pour In on Bishop Candler*, *supra* note 87, at 6. Even after Sloan's trial he expressed a belief that there were "plenty of folks" in the community who deplored the idea of lynching Sloan. Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

99 Covington may have also feared for his own safety. At least one lynching-era attorney reported receiving death threats as a result of moving for a change of venue. Heard, *supra* note 81, at 82.

100 In 1919, an Arkansas town erupted into violence after a group of white men attacked

death was uncertain or would be delayed could result in reignited violence. Perhaps Covington sensed that Colquitt County's commitment to the law was fragile in this way—that it would hold only insofar as the law promised to deliver Sloan's death. He may have realized Sloan was almost certainly doomed and, by ensuring a swift trial, sought only to increase his client's chances of a comparatively sterile death in the electric chair over a grislier end.

vi. National Guard Protection

Another decision that required Covington and Judge Thomas to assess Colquitt County's relationship with law and underlaw was whether to seek National Guard protection at Sloan's trial. Georgia statute provided that a judge or city official who anticipated an outbreak of violent opposition to the enforcement of the law could petition the governor for assistance from the National Guard.[101] The Georgia National Guard had prevented lynchings before,[102] but seeking Guard involvement was not without risk. Calling out the Guard could inflame tensions and set up a standoff that put white citizens at risk in a way that a lynch mob did not.[103] Attempts to avert a lynching could also bring hatred and threats of violence down on white

and fired on a group of Black people who had gathered to discuss the extortionary practices of local landowners. Moore v. Dempsey, 261 U.S. 86, 87–88 (1923). In the aftermath, a white man was killed. *Id.* at 87. Several Black men were arrested for the murder, and according to these men, a governor's committee appointed to investigate the violence kept a lynch mob at bay by promising to execute the accused. *Id.* at 88–89. The committee "whipped and tortured" Black witnesses into implicating the men, who were then tried and convicted of murder in a trial lasting less than one hour. *Id.* at 89. The convicted men alleged that "no juryman could have voted for an acquittal and continued to live in [the county], and if any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob." *Id.* at 89–90. When it seemed some of the defendants' sentences might be commuted, the local American Legion appealed to the governor in anger, saying that "a solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." *Id.* at 90. The local Rotary Club and Lions Club, purportedly representing dozens of leading industrial and commercial enterprises, passed resolutions supporting the statement. *Id.*; *see also* Downer v. Dunaway, 1 F. Supp. 1001, 1002 (M.D. Ga. 1931); Emanuel, *supra* note 11, at 228–29.

101 GA. CODE ANN. § 86-1302 (1933).

102 For example, concerted efforts by the Georgia National Guard prevented the lynching of six Black men accused of raping and assaulting a young woman in Elberton, Georgia in 1931. Emanuel, *supra* note 11, at 223–26.

103 *A Just Judge*, N.Y. AGE (N.Y.C., N.Y.), July 6, 1911, at 4.

guardsmen.[104] These threats to white citizens factored into white officials' decisions to request Guard presence at trials, and some judges were hesitant to call on troops, preferring to sacrifice the lives of Black citizens than to risk a confrontation that would potentially endanger whites.[105] A white person's death at the hands of the law's efforts to protect a Black "criminal" would be abhorrent to the conception of the social contract in a community whose need to satisfy the underlaw had brought it to the brink of a lynching. Such an outcome might lead to a total rejection of the law. Furthermore, a request for National Guard presence signaled officials' mistrust of the local community. This could be perceived as skepticism about the community's willingness to abide by the law or a repudiation of its chosen form of so-called justice. In either case, the implication could breed resentment, and resentment could poison a jury.

Covington and Judge Thomas had to weigh these concerns—along with their memory of what had happened to John Henry Williams—and decide whether they trusted Colquitt County to follow through with a fair trial and to accept the outcome. Ultimately, the "serious and alarming" threat of disorder led the men to appeal to the governor for National Guard protection at Sloan's trial.[106] Governor Talmadge granted the request and sent two companies of the Georgia National Guard under the command of Adjutant General Lindley Camp to avert possible mob violence against Sloan.[107]

C. *John Henry Sloan's Colquitt County Trial*

On the morning of November 14, 1935, a six-truck convoy of the 122nd infantry of the Georgia National Guard delivered John Henry Sloan from the Dougherty County jail in Albany to the Colquitt County

104 After guardsmen prevented a lynching in Elberton, Georgia in 1931, local whites threatened to kill a soldier who had shot and wounded a local white man in the fracas. Emanuel, *supra* note 11, at 223–26.

105 Georgia judge and future United States Senator Charles Hillyer Brand proclaimed in 1911 that he "would not imperil the life of one white man to save the lives of a hundred Ne[***] rapists." He would never forgive himself, he said, if he called out the militia and some young soldier or white citizen were killed. *A Just Judge*, *supra* note 103, at 4.

106 George D. W. Burt, *Troopers Guard Ne[***] at Trial in Moultrie*, Thomasville Times-Enter. (Thomasville, Ga.), Nov. 14, 1935, at 1. Sheriff Beard, for his part, considered the National Guard unnecessary; he believed he and a squad of deputies could keep order. This was not like what happened with John Henry Williams, he claimed—this time there was no organized plan to lynch the accused. *Witnesses Tell of Sloan's Trial*, Macon Tel. (Macon, Ga.), Jan. 28, 1936, at 1.

107 Burt, *supra* note 106.

Courthouse in Moultrie.[108] Thousands gathered on the courthouse square,[109] and over 100 guardsmen took up positions in and around the courthouse.[110] Sloan was escorted to his trial between lines of guardsmen.[111]

i. Trial Testimony

With the threat of violence looming outside, the trial lasted only hours.[112] In an effort to minimize mob violence and "complete all details as hurriedly as possible," Judge Thomas started the trial at nine thirty in the morning and ordered that it continue straight through the noon recess without a break.[113] Solicitor General George Lilly of Georgia's Southern Circuit prosecuted the case.[114] By all accounts, the most dramatic moment of the trial was Mary Smith's testimony of the events surrounding her fiancé's death, but no transcript of the trial survives, and accounts differ as to the details of this testimony. According to several newspapers, Smith claimed no words were exchanged between the couple and the gunman before the gunman fired his shot.[115] Another paper reports Smith testified that when she and Ottis Gay looked up and saw a man standing before them with a gun, Gay said, "Don't do that," and the gunman replied, "Yes, I will, too."[116] The same author later reported that Smith claimed the gunman told them, "I'm gonna shoot you both."[117]

The prosecution also called the other four white youths who had been with Ottis Gay and Mary Smith on the night of October 15. They all corroborated the story that they had taken a car ride that night and that Ottis Gay and Mary Smith were sitting alone, out of sight of the others, when they were shot.[118] They testified that they had heard a shot and "saw a Ne[***] run past them," but none saw the shooting or were able to identify

108 *Id.*

109 *Soldiers Rout Mob with Gas*, WASH. POST, Nov. 15, 1935, at 1; *Witnesses Tell of Sloan's Trial*, *supra* note 106.

110 *Slayer Gets Death Ballot in Moultrie*, MACON TEL. (Macon, Ga.), Nov. 15, 1935, at 1.

111 Burt, *supra* note 106.

112 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

113 *Id.*

114 *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

115 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44; Burt, *supra* note 106. This is consistent with accounts of the police interview of Smith on October 16, the day after the shooting. *Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65.

116 George D. W. Burt, *Untitled*, MACON TEL. (Macon, Ga.), Nov. 15, 1935, at 8.

117 *Id.*

118 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.

the man who ran past.[119] Sloan's neighbor testified that Sloan had borrowed a shotgun and two shells from him that morning and returned the gun and a single shell shortly after eleven o'clock that night.[120] Sloan's employer Monroe Jackson testified that Sloan had borrowed shells from him as well and had returned late that night for his clothes.[121]

As a criminal defendant, Sloan was prohibited by law from testifying under oath.[122] In an unsworn statement given on the stand, he stuttered, "I didn't aim to hit nobody with the shot[.]"[123] He stated that some white men in an automobile had chased him on the same road earlier on the day of the murder, so when he encountered two persons sitting by the road later that evening and heard one of them say, "There goes a Ne[***]," he feared for his life.[124] He said he shot because he was "afraid they were going to do something to [him.]"[125] After firing the shot, he said he returned the gun to his neighbor, got his clothes, and went to a party with a companion.[126] He then went to Cairo, Georgia, to visit his sick mother, and from there to Havana, Florida, where he was apprehended.[127]

ii. Defense Strategy

Covington did not argue that Sloan had not killed Ottis Gay.[128] Instead, he chose to focus on Sloan's limited mental capabilities, introducing testimony by the county health officer that Sloan was a "moron" with "the mental capacity of a twelve-year-old."[129] By doing so, he may have been attempting to argue that Sloan was not of sound mind and thus could not be held criminally responsible for Gay's killing. Alternatively, he may have been arguing that Sloan lacked the capacity to distinguish right from wrong, a necessary condition for criminal liability. No surviving record illuminates Covington's reasoning for this approach. It is possible he hoped that, by focusing on Sloan's identity as a "moron," he could shift focus from his

119 *Id.*
120 *Id.*
121 *Id.*
122 "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it." GA. CODE ANN. § 38-415 (1933).
123 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
124 *Guardsmen Disperse Georgia Mob*, ATLANTA DAILY WORLD, Nov. 15, 1935, at 6.
125 *Fear Caused Him to Shoot, the Slayer of Otis Gay Tells Jurors*, *supra* note 44.
126 *Id.*
127 *Id.*
128 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.
129 *Id.*

identity as a Black man, thereby casting him as a "special case" rather than a Black everyman whose death was required to reinforce Black subjugation.

Whatever Covington's motivation, even absent the exacerbating factor of racial animus, a mental incapacity defense was unlikely to succeed. Under the Georgia Code of 1933, so-called "idiots" (as well as "lunatics" and "persons insane") were deemed to be of unsound mind, and consequently, these persons could not be found guilty of any crime or misdemeanor.[130] All others, including so-called "morons," were presumed to be of sound mind.[131] Rebutting the presumption required a defendant to show by a preponderance of the evidence that he lacked the ability to distinguish right from wrong.[132] By introducing testimony that Sloan had the mind of a child, it appears Covington may have been attempting to prove this.[133]

However, whether Covington sought to prove that Sloan was categorically of unsound mind by virtue of being a "moron," or that as an individual, he lacked the capacity to distinguish between right and wrong, he stood little chance of succeeding. Just a few years earlier, a Georgia jury had convicted and sentenced to death an eighteen-year-old white man, despite testimony from a University of Georgia psychology professor that he had a "mental age" of no more than nine or ten.[134] In another case where "[t]he

130 GA. CODE ANN. §§ 102-104, 26-301, 26-303 (1933). In the early twentieth century, terms like "moron" and "idiot" had quasi-scientific significance. The eugenics movement of the late nineteenth and early twentieth century had brought the advent of IQ testing and the development of an IQ-based classification of persons with intellectual disabilities. The terms "idiot," "imbecile," and "moron" were terms used to identify three levels of disability, with IQ-cutoff scores of 25, 50, and 75, respectively. This scale was also considered to correspond with a person's "mental age." "Idiots" were those with a mental age of up to two years, "imbeciles" had a mental age between three and seven, and "morons" had a mental age of eight to twelve years. At the time of Sloan's trial, the term "idiot" had legal significance—denoting those who were totally ignorant or lacked the use of reason—but "imbecile" and "moron" did not. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots*," 124 YALE L.J. 2746, 2764 (2015); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 438 (1939); *see* GA. CODE ANN. § 38-1610 (1933). The early-twentieth-century enthusiasm for IQ theory, craniology, phrenology, and other pseudoscientific methods of measuring intelligence was driven in part by the desire to confirm the purported nonwhite intellectual inferiority that justified racial subjugation. *See* Mills, *supra* note 2, at 60.

131 *See* Murray v. State, 39 S.E.2d 842, 846–47 (Ga. 1946); Summerour v. Fortson, 164 S.E. 809, 814 (Ga. 1932).

132 *See Murray*, 39 S.E.2d at 847; *Summerour*, 164 S.E. at 814.

133 *See* Letter from W.A. Covington to Harry S. Strozier, *supra* note 80. No transcript of this trial has survived, and the exact nature of the defense strategy is unclear from the available record.

134 *See Summerour*, 164 S.E. at 814. In affirming the trial court's denial of a new trial, the Georgia Supreme Court held that proving a "degree of mentality [no] greater than

evidence amply authorized a finding that [the defendant] was an idiot (and a dangerous one at that)," a jury nonetheless found he had sufficient ability to distinguish right from wrong and convicted him.[135] Two years after Sloan's trial, a Georgia jury convicted a white man of burglary despite a physician's testimony that, although the defendant could distinguish right from wrong, he lacked the mental stability to keep from doing the wrong thing.[136] In fact, juries nationwide consistently rejected defendants' efforts to show a lack of criminal responsibility with evidence of low IQ or young "mental age."[137]

iii. Race and Perceptions of Intellectual Capacity

Furthermore, whether Covington intended it to or not, race and underlaw infected discussion of Sloan's mental capacity. Even before the trial began, Covington found potential witnesses thinning out, unwilling to testify to their assessment of Sloan's mental capacity for fear of the "lynching element" in Colquitt County.[138] "Oh, yes, he knows enough to keep from killing a white man," they told Covington as they faded away.[139] Even those who did testify did not go as far as Covington would have liked in describing Sloan's lack of mental capacity, and there was a racial cast to much of their testimony.[140] The county health officer, a physician who had talked with Sloan but not conducted a formal assessment, concluded that Sloan was a "moron" whose mental capability was "a little below the average mentality of a Ne[***]."[141] Another physician who had spoken with Sloan and examined the shape of his head agreed that Sloan had the mentality of a twelve-year-old but testified that he was a "moron" of the

that of a child" would not relieve a defendant of responsibility of a crime unless the defendant also proved he was unable to distinguish between good and evil. *Id.*

135 *See* Bridges v. State, 158 S.E. 358, 358 (Ga. Ct. App. 1931).

136 Johnson v. State, 189 S.E. 386, 386 (Ga. Ct. App. 1937).

137 "Following the popularization of intelligence tests early in [the twentieth century], defendants frequently sought to use the 'mental age' component of test results to seek exculpation based on analogy to the legal rules governing children whose chronological age compared with the defendant's mental age. These attempts were universally unsuccessful." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 435 (1985) (citing illustrative cases from New Jersey, Arkansas, Illinois, Massachusetts, Vermont, and Pennsylvania, decided between 1919 and 1931); *see also* Woodbridge, *supra* note 130, at 441–48.

138 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

139 *Id.*

140 Although no detailed record of the testimony at Sloan's first trial survives, a summary of the testimony given at his second trial is revealing on this point. There is no indication that testimony materially changed between the first and second trials.

141 Brief of the Evidence, *supra* note 44, at 20.

type who would know the difference between right and wrong if confronted with a dangerous situation.[142] "I think he ought to know it is wrong to kill a man," he concluded.[143]

The prosecution's witnesses also may have weighed in on Sloan's intellectual capacity. Sloan's employer testified later that Sloan "had as much sense as the average Ne[***] farmer" and could differentiate right and wrong.[144] Sheriff Beard, who had spoken to Sloan on several occasions after his arrest, concluded that Sloan was "short mentally" and "not . . . a normal Ne[***]," but had enough sense to tell right from wrong in a circumstance of surprise and fright.[145]

As these witnesses' testimony shows, to win an acquittal for Sloan on the basis of his diminished intellectual capacity, Covington would have had to overcome not only a law that failed to give special solicitude to the intellectually disabled but a widespread assumption that "low mentality" was simply normal for Black people. The comments of the trial witnesses reveal that, when assessing Sloan's abilities, they compared him not to themselves, to their social peers, or to a universal standard of intelligence, but to a lower "Ne***" standard. Sloan may have possessed limited mental abilities, they reasoned, but he was at most a small step below any other Black man in the community, and other Black men certainly understood enough not to shoot a white man. Not only this, but to conclude that a man "a little below the average mentality of a Ne[***]" lacked the capacity to be held criminally responsible would come perilously close to saying that Colquitt County's thousands of other Black residents, over a quarter of the population, were similarly incapacitated.[146] In a world where Blackness and criminality were inexorably linked in the minds of whites, this conclusion was inconceivable.[147]

142 *Id.* at 21.

143 *Id.*

144 *Id.* at 5, 7.

145 *Id.* at 19. The solicitor general also agreed that Sloan was "not all there," but nonetheless refused to accept a plea for a life sentence. Letter from W.A. Covington to Harry S. Strozier, *supra* note 80.

146 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FIFTEENTH DECENNIAL CENSUS OF THE UNITED STATES: 1930, POPULATION, VOLUME III, PART 1, at 481 (1932), https://www.census.gov/library/publications/1932/dec/1930a-vol-03-population.html.

147 Whites' unwillingness to allow Black criminal defendants to escape death through diminished capacity arguments can be seen in the case of Willie McGee, a Black man accused of raping a white woman in Laurel, Mississippi in 1945. During McGee's trial he had been portrayed as an "imbecile," barely able to speak. Following McGee's conviction and death sentence, newspapers reported that McGee had attempted a violent escape from the county jail. These reports, potentially fabricated, sought to undermine the claim that McGee suffered from any mental incapacity that would

In focusing on Sloan's mental capacity, Covington may have sought to convince the jury that Sloan was not of sound mind and could not be held criminally liable. It is more likely that he understood his community, and his hopes reached no further than a recommendation of mercy. A murder conviction carried a death sentence, but a jury could recommend mercy, in which case the defendant would be sentenced to life imprisonment.[148] The recommendation was at the discretion of the jury, and any evidence introduced during the guilt or innocence phase of the trial could potentially influence sentencing. By introducing evidence of Sloan's limited mental capabilities, Covington's strategy may have been to convince the jury to conclude that it was unjust to execute a man with the mind of a child. Here, however, Covington fought a losing battle. The men deciding Sloan's sentence were also the men that heard Mary Smith's tearful account of her young fiancé's death, a testimony unlikely to incline their hearts toward mercy. Furthermore, the demands of the underlaw—the need to make an example of Sloan and drive home the message of white supremacy—might have easily overwhelmed any mercy the jury felt toward him as an individual, especially with a lynch mob gathering in the courthouse square.

iv. The Verdict and the Mob's Response

Outside the courthouse, the day had begun quietly, but tension mounted as the trial progressed.[149] One newspaper reported that murmurs of "lynch him" began in the crowd while the jury was deliberating.[150] These murmurs grew to shouts when a rumor began circulating that Mary Smith had collapsed while testifying.[151] This display of a young white woman's suffering strained, nearly to the breaking point, whatever commitment to the law the community had felt to that point. Shouts of "[t]ake him out and lynch him and save expense" were heard from the crowd, and "[t]ake him away in spite of the troops—they have instructions not to shoot[.]"[152] Covington's son reported hearing persons in the crowd calling for his father's death, as well as for Sloan's.[153]

Inside the courthouse, Sloan's case went to the all-white jury at

stand between him and the electric chair. HEARD, *supra* note 81, at 63–64.

148 GA. CODE ANN. § 26-1005 (1933).

149 *Guardsmen Disperse Georgia Mob*, *supra* note 124.

150 *Dixie Lynch Mob Routed by Soldiers,* N. Y. AMSTERDAM NEWS (N.Y.C., N.Y.), Nov. 23, 1935, at 11.

151 *See id.*

152 *Witnesses Tell of Sloan's Trial, supra* note 81.

153 *Id.*

about one o'clock in the afternoon, and the jury deliberated for nearly two hours.[154] Perhaps Covington felt hopeful about what was an unusually long deliberation for a Black defendant in a capital case—after all, Williams's jury had been out for only five minutes.[155] However, any such hopes were ill-placed; the jury returned a verdict of guilty without a recommendation of mercy.[156] Judge Thomas sentenced Sloan to die by electric chair three weeks later, on December 10.[157] Sloan allegedly "exhibited no emotion . . . when the verdict was read and sentence pronounced."[158]

Sloan was taken from the courthouse in manacles, and the crowd surged toward the lines of guardsmen shouting, "Get him!"[159] As the guardsmen struggled to bring Sloan to a waiting convoy of vehicles, a melee broke out.[160] Guardsmen used fists, rifle butts, and tear gas to subdue the mob as they attacked with sticks and stones.[161] Several persons were beaten by gun butts and another cut by a bayonet.[162] Sloan was eventually brought through the fray unharmed and rushed by motor convoy to the Bibb County jail in Macon.[163]

154 *Guardsmen Disperse Georgia Mob*, *supra* note 124; Letter from E. Sprye, President, Albany Georgia NAACP, to Walter White (Nov. 22, 1935) (NAACP Branch Files I-G43-F4 (GA)). Although it had been established for more than fifty years that systematic exclusion of Black citizens from a jury violated a criminal defendant's right to equal protection, six months before Sloan's trial, the United States Supreme Court in *Norris v. Alabama* lowered a defendant's burden to show that Black jurors were wrongfully excluded. Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880). However, even under *Norris*, a defendant had to prove that there were Black citizens eligible for jury service in the county, and that they were excluded from the jury rolls. Such a challenge was likely to inflame a jury (the motion in *Norris's* trial provoked open death threats on his attorney) and would place at substantial risk any Black resident who dared testify to his exclusion from the rolls. Such a motion would also almost certainly fail. Black people were excluded from the jury rolls in Colquitt County, but Covington never challenged the exclusion of Black people from Sloan's jury, perhaps for these reasons. *See* Emanuel, *supra* note 11, at 239–40.

155 *Ne[***] Murderer Burned to Death Near Scene of His Crime at Autreyville, supra* note 16. *See also* Emanuel, *supra* note 11, at 231–32.

156 *Soldiers Rout Mob with Gas*, *supra* note 109; *Guardsmen Disperse Georgia Mob*, *supra* note 124.

157 *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

158 *Guardsmen Disperse Georgia Mob*, *supra* note 124.

159 *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

160 *Troops Save Ne[***] from Georgia Mob*, N.Y. TIMES, Nov. 15, 1935.

161 *Id.*; *Dixie Lynch Mob Routed by Soldiers*, *supra* note 150.

162 *Soldiers Rout Mob with Gas*, *supra* note 109; *Guardsmen Disperse Georgia Mob*, *supra* note 124.

163 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, BALT. AFRO-AM., Nov. 30, 1935, at 1.

v. Post-Trial Motion: Judge W.E. Thomas, Law, and Underlaw

Covington submitted a motion for a new trial, but Judge Thomas prematurely adjourned the court two days after Sloan's trial and refused to file the motion.[164] Judge Thomas's communications with Covington around this time reveal his understanding that the Colquitt County community's commitment to the law was tenuous in situations like these. He wrote that he seriously doubted the propriety of keeping the court open under the circumstances, as doing so would only invite "postponements and delays which impair confidence in the law and the court's procedure."[165] Earlier, he had refused to participate in making an application to the governor for a commission to examine Sloan's mental capacity and advised Covington against doing so himself.[166] If Covington did wish to make such an application, Judge Thomas warned, he should do so quickly because "[t]he unrighteous delay of cases tried in Courts frequently causes some people to undertake to justify an attempt to lynch people charged with crime."[167] "I am trying to handle these cases in a way to avoid justification for anybody to claim that the court failed in the discharge of its duty," he wrote.[168]

Judge Thomas's actions demonstrated that he was willing to bend the legal apparatus to the breaking point, maintaining a veneer of legal legitimacy while in reality sacrificing Sloan's rights (and his life) to the demands of the lynch mob. As his words to Covington the week after the trial show, Judge Thomas believed that delivering Sloan's death was the only way to avoid violence and maintain the community's confidence in the law and the courts; a tacit recognition that the only way law was permitted to operate at all in Colquitt County was in subjugation to the underlaw.

vi. Sloan in Prison

Sometime in the weeks after his conviction, Sloan was interviewed in the "mob-proof" Bibb County jail in Macon, Georgia.[169] Although he

164 *Tensity at Trial Is Told by Juror*, *supra* note 46. Customarily, the judge would have allowed the term of court to run until five days before the beginning of the following term, which in this case would have been in April 1936. *Deaver Grants Stay for Sloan*, Macon News (Macon, Ga.), Dec. 6, 1935 at 1, 8.

165 *Witnesses Tell of Sloan's Trial, supra* note 81.

166 Letter from W.E. Thomas, to W.A. Covington (Nov. 25, 1935) *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l).

167 *Id.*

168 *Witnesses Tell of Sloan's Trial, supra* note 81.

169 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, *supra* note 163; *Hancock Ne[***es]*

remained visibly shaken from the memory of the mob on the day of his trial, he expressed gratitude for the National Guardsmen who protected him.[170] As his execution date drew near, Sloan was evidently unaware that he had been sentenced to death.[171] Trembling, he expressed relief that his "days of being chased by white folks . . . [had] finally ended."[172] When asked if he knew why he was in prison, he said, "I thinks I'm in here for a life sentence."[173] No one corrected him.[174]

D. *Next Steps: Harry S. Strozier and Orville A. Park*

Meanwhile, Sloan's conviction had caught the attention of prominent Macon attorneys Harry S. Strozier and Orville A. Park, and the two men contacted Covington.[175] Strozier considered Covington to be "a high class man" with "advanced social ideas" who nevertheless was too frightened to move forward with Sloan's case.[176] Although Covington remained convinced that Sloan had acted out of the "fears of an imperfectly developed intellect" and that the jury would have recommended mercy had the "lynching element" not cowed those in the community who deplored killing him, he believed he had done all he could do and was ready to leave Sloan's fate to "[t]he good Lord."[177]

Strozier, for his part, believed attorneys still had a role to play. In assessing the case, Strozier demonstrated his understanding of the relationship of law and underlaw: "I think it is a crime against civilization to execute this man under these circumstances," Strozier wrote. "It isn't a thing in the world but a lynching under form of law to try a weak-minded Ne[***] under the protection of the military in order that a court may kill him instead

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Removed to City, MACON TEL. (Macon, Ga.), Nov. 20, 1935, at 9.

170 Hawkins, *supra* note 46.

171 *Ga. Convict, Unaware of Death Sentence, Feels Safer in Pen.*, *supra* note 163.

172 *Id.*

173 Hawkins, *supra* note 46.

174 *Id.*

175 Ann Wells Ellis, The Commission on Interracial Cooperation, 1919-1944: Its Activities and Results 121 (1976) (Ph.D. dissertation, Georgia State University) (on file with author).

176 Letter from Harry S. Strozier, to R.B. Eleazer, Commission on Interracial Cooperation (Nov. 30, 1935) *microformed on* The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191 (Univ. Microforms Int'l) [hereinafter Strozier I].

177 Letter from W.A. Covington to Harry S. Strozier, *supra* note 80. Covington reported to Strozier that, at the end of Sloan's trial, he told Judge Thomas: "The good Lord made this man; you and I have done our best for him; I now feel that it is His time to move." *Id.*

of a mob."[178] Believing that Southern judges must be made to understand that convicting a man under such circumstances was unacceptable, Strozier was unwilling to let Sloan's conviction go unchallenged.[179] He encouraged Covington to continue with the case with his and Parks's help.[180]

After an all-night session weighing their options, the three attorneys decided to file a writ of habeas corpus in the United States District Court for the Middle District of Georgia.[181] By doing so, Strozier said, he hoped to send a message that "the courts of the United States would not countenance a trial where the army is necessary to keep a mob from lynching the defendant."[182] "[T]he time is coming when that sort of thing is going to stop," Strozier declared.[183] He had little hope that that day would come in time for Sloan, however. "[T]he sickening thing about the whole matter," he said, "is that after everything is done, the Ne[***] will finally be executed."[184]

E. *John Downer, Judge Bascom Deaver, and Underlaw*

i. John Downer

Sloan's attorneys had good reason to believe that the federal court would grant Sloan's petition for a writ of habeas corpus. Less than five years earlier, the same federal judge who would hear Sloan's petition, Judge Bascom Deaver, had granted John Downer, another of Harry Strozier's clients, a writ of habeas corpus under very similar circumstances.

On May 26, 1931, a Georgia jury sentenced John Downer, a Black man, to death for raping a white woman.[185] In the days before the trial, a mob of 1,500 had stormed the jail where Downer was kept, undeterred by National Guard troops guarding the building with a machine gun. They fired shots into the building, smashed windows, threw dynamite, and threatened to blow up the structure.[186] Downer escaped and survived to stand trial only

178 Strozier I, *supra* note 176.
179 *Id.*
180 *Id.*
181 Letter from Harry S. Strozier, to R.B. Eleazer, Commission on Interracial Cooperation (Dec. 6, 1935) microformed on The Commission on Interracial Cooperation Papers, 1919–1944, reel 8, file 191) (Univ. Microforms Int'l) [hereinafter Strozier II].
182 *Id.* In 1923, the Supreme Court had held that allegations of mob dominance of a trial authorized a federal district court to proceed with a hearing on a habeas corpus petition. Moore v. Dempsey, 261 U.S. 86 (1923).
183 Strozier II, *supra* note 181.
184 Strozier I, *supra* note 176.
185 Downer v. Dunaway, 53 F.2d 586, 588 (5th Cir. 1931).
186 *Id.*

with the assistance of the National Guard, who disguised him in one of their uniforms.[187] During Downer's trial, a large unruly crowd gathered outside the courthouse, and two hundred National Guardsmen were required to keep order.[188] Downer's habeas petition averred that an atmosphere of mob violence had continued from the time the crime was committed until after the trial and that it would have been impossible to hold the trial without the National Guardsmen present.[189] It also alleged that the fear of mob violence prevented Downer's counsel from moving for a continuance, for a change of venue, or for a new trial.[190]

Judge Deaver initially denied Downer's petition for a writ of habeas corpus.[191] On appeal, the Fifth Circuit reversed, holding that the petition sufficiently alleged that the threat of violence surrounding the trial had reduced the proceedings to a sham.[192] Relying on the United States Supreme Court's decisions in *Frank v. Mangum* and *Moore v. Dempsey*, the Fifth Circuit held that if the trial truly had been held under the conditions alleged, the proceedings had been reduced to "the form of a court under the domination of a mob," depriving Downer of his constitutional right to due process.[193] The Fifth Circuit remanded the case for a hearing to determine whether the allegations in the petition were true, holding that the writ should issue if

187 *Id.*
188 *Id.* at 589.
189 *Id.*
190 *Id.*
191 Downer v. Dunaway, 53 F.2d 586, 588 (5th Cir. 1931).
192 *Id.* at 589–91.
193 *Id.* at 589. The *Frank* Court held that:

> [I]f a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

Frank v. Mangum, 237 U.S. 309, 335 (1915). Subsequently, the Court in *Moore* held:

> [I]f the case is that the whole proceeding is a mask— that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

Moore v. Dempsey, 261 U.S. 86, 91 (1923).

they were.[194]

Judge Deaver heard Downer's petition again on remand. After hearing witnesses' testimony, he found that there could be "scarcely . . . any doubt that the petitioner was denied due process of law in violation of the Fourteenth Amendment of the Constitution."[195] Judge Deaver's opinion acknowledged that no serious violence had taken place on the day of trial but gave credence to witnesses who testified that a lynching would have occurred had it not been for the National Guard.[196] In accordance with the Fifth Circuit's instruction, Judge Deaver granted the writ.

ii. Judge Bascom Deaver, Law, and Underlaw

Judge Deaver's opinion in Downer's case demonstrated his keen understanding of law and underlaw, as well as a desire to throw light on the relationship between the two. He addressed the belief held by some that Downer's death sentence should be carried out, whether the trial was legal or not, because the trial had prevented a lynching.[197] He also addressed the belief that if lynch mobs had reason to believe that the law would allow their intended victims to escape death, they would simply "take the law into their own hands."[198] Judge Deaver rejected this argument, claiming that the people of Georgia understood the importance of "preserving inviolable the due process clause of the Constitution."[199]

Notwithstanding this faith in the citizens of Georgia, Judge Deaver dedicated a substantial portion of his opinion to extolling the virtues of law.[200] In doing so, he pushed against the idea that the protection of life, liberty, and property required racial subjugation and warned that depriving certain persons of rights would instead erode the rights of all. He concluded by saying:

> The Constitution says that no person shall be deprived of life, liberty, or property without due process of law. It contains no provisos, limitations, or exceptions. It does not say that no person shall be deprived of life, liberty or property without due process of law, except when a mob will not permit the courts to afford due process, or unless courts, by dispensing with due process, can prevent a lynching, or provided due process can be had without

194 *Downer*, 53 F.2d at 590.
195 Downer v. Dunaway, 1 F. Supp. 1001, 1003 (M.D. Ga. 1931).
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *See generally id.*

> any harmful attendant circumstances. . . . There is more involved in this case than the life of one lowly citizen. The people of this country have declared that no person shall be deprived of life, liberty, or property without due process of law, and the loyal, law abiding citizens expect that provision to stand as a protection to each one of them. If it may be ignored in one case, it may be ignored in any other case; and, when it becomes ineffective through disregard or evasion, one of the most important rights of the people is destroyed.[201]

Judge Deaver's decision in Downer's case and his understanding of the forces at play in situations like Sloan's likely gave Sloan's attorneys confidence that filing the writ in Deaver's court would lead to a favorable outcome for their client.

F. *Sloan's Habeas Petition*

i. Habeas Hearing

Sloan's attorneys filed the writ of habeas corpus in the United States District Court at Macon on December 6, 1935, arguing that due process was not observed in Sloan's trial.[202] Adopting language from *Moore*, the petition alleged that "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion in the belief that the immediate conviction of the petitioner was the only way of avoiding an immediate outbreak by [the] mob."[203] Judge Deaver stayed Sloan's execution until the writ could be heard.[204] In jail, Sloan had difficulty taking in the new development, but with the help of a fellow prisoner, he was finally made to understand that he could have another chance at trial.[205] He stated that he was glad.[206]

Judge Deaver presided over a two-day hearing that revealed the underlaw's possible influence over the jury in Sloan's trial.[207] One citizen testified that he saw jurors looking out the windows of the jury room at the

201 *Id.* at 103.

202 *Condemned Colquitt County Ne[***] Given Stay of Execution*, THOMASVILLE TIMES-ENTER., (Thomasville, Ga.), Dec. 6, 1935, at 4; Strozier II, *supra* note 181; *Court Order Gives Doomed Ne[***] Chance*, MACON TEL. (Macon, Ga.), Dec. 7, 1935, at 1.

203 *Court Order Gives Doomed Ne[***] Chance*, *supra* note 202; *see* Moore v. Dempsey, 261 U.S. 86, 91 (1923).

204 *Deaver Grants Stay for Sloan*, *supra* note 164.

205 *Court Order Gives Doomed Ne[***] Chance*, *supra* note 202.

206 *Id.*

207 *Hearing on Sloan Case Is Delayed*, MACON NEWS (Macon, Ga.), Jan. 6, 1936, at 10; *Convicted to Die as Lynch Orgy Loomed*, PITT. COURIER, Feb. 8, 1936, at A8.

"dense throng" on the square.[208] J.L. Baxter, a Moultrie lumberman who had been the last of five jurors to hold out for a life sentence, testified to his belief that it was "more expedient for one Ne[***] to die than for 20 or 25 white people to be killed by the troops."[209] Baxter also believed that the guardsmen at Sloan's trial had prevented a lynching and that Judge Thomas had been scared.[210] His testimony suggests that at least one juror understood that the mob's demand for Sloan's life would not yield to a law that allowed a Black man to live at the risk of white lives. It also suggests that the jury ultimately capitulated to underlaw, regardless of what it believed about the law.

Others disavowed any improper influence over the trial proceedings. Several jurors testified that there had been no great atmosphere of tension at the trial.[211] Although they had seen the crowd outside the courthouse, they heard nothing and claimed they had arrived at their verdict without fear or outside influence.[212] Adjutant General Lindley Camp and other guardsmen testified that the atmosphere had been "serious but not necessarily dangerous," and Sheriff Beard doubted that calling in the National Guard had been necessary at all.[213] He guessed that he and a squad of special deputies might have been able to keep order.[214] He said there was no great amount of disorder, and what there was had been caused by a handful of men who had been drinking.[215] On cross-examination, Sheriff Beard was asked about John Henry Williams's lynching fifteen years earlier.[216] He stated his belief that Sloan's case was different; unlike what occurred with Williams, there had been no organized plan to lynch Sloan, he claimed.[217] He asserted Sloan was taken to Albany after his arrest "merely as a precautionary measure."[218]

On the stand at the hearing, Covington spoke vigorously in Sloan's defense for more than two hours.[219] He argued that Sloan had not had a

208 *Witnesses Tell of Sloan's Trial*, *supra* note 81.

209 *Juror's Remark at Trial of Ne[***] Brought into Habeas Corpus Hearing*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Jan 27, 1936, at 2; *Ne[***] Is Fighting for Second Trial*, MACON NEWS (Macon, Ga.), Jan 27, 1936, at 1; *Trial of Ne[***] Held as Unfair*, MACON NEWS (Macon, Ga.), Jan 29, 1936, at 6.

210 *Tensity at Trial Is Told by Juror*, *supra* note 46.

211 *Id.* at 2.

212 *Id.*; *Witnesses Tell of Sloan's Trial, supra* note 81.

213 *Deaver Holds Sloan's Trial Was Unfair*, MACON TEL. (Macon, Ga.), Jan. 29, 1936, at 10; *Witnesses Tell of Sloan's Trial, supra* note 81.

214 *Witnesses Tell of Sloan's Trial, supra* note 81.

215 *Id.*

216 *Id.*; *Southern Mob Couldn't Wait for Hanging*, *supra* note 32.

217 *Witnesses Tell of Sloan's Trial, supra* note 81.

218 *Id.*

219 *Id.* Covington was widely recognized as an exceptionally skilled orator. *See* James A.

fair trial or opportunity to seek review of the case and concluded with a "diatribe against Georgia justice."[220] Surviving excerpts of this speech provide a glimpse into his perception of the case. He proclaimed:

> In all the years of this state's existence there never has been a rich man to have his neck broken on the gallows or burn in the electric chair. I am opposed to capital punishment because it is undemocratic. In practice it applies only to the poor whites and ne[***es]. Any man in Georgia worth as much as $30.00 can escape the electric chair.[221]

Newspaper accounts report that during these proceedings, Sloan "dozed peacefully in [the] corner of the courtroom," surrounded by sheriff's deputies.[222]

ii. Judge Deaver's Decision

On January 29, Judge Deaver granted Sloan's petition, finding that he had been denied due process of law.[223] The testimony of juror J.L. Baxter, in particular, had impressed upon Deaver that it was likely there would have been a recommendation of mercy had it not been for the threat of mob violence.[224] The state court officials had acted with integrity and had done the best they could, he found, but nevertheless, "some other people over whom they had no control created an influence that affected the court machinery."[225] Judge Deaver granted the writ of habeas corpus, setting aside Sloan's conviction.[226] Sloan evidently understood little of what happened at the hearing, but he seemed to grasp that he had another chance at life, and he left the courthouse grinning.[227]

Hollomon, *In the Trend of Events*, ATLANTA CONST., July 26, 1919, at 8.

220 *Juror's Remark at Trial of Ne[***] Brought into Habeas Corpus Hearing*, *supra* note 209.

221 *Id.*

222 *Ne[***] Is Fighting for Second Trial*, *supra* note 209.

223 *Trial of Ne[***] Held as Unfair*, *supra* note 209; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

224 *Trial of Ne[***] Held as Unfair*, *supra* note 209.

225 *Id.*; *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213. Judge Deaver also held that the district court had no power to review Judge Thomas's decision to adjourn the term of the Colquitt County Court and that the legality of the adjournment had no bearing on the case. The only important question, Judge Deaver said, was the influence created by the threatened or expected violence. *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213.

226 *New Trial Sought for John Henry Sloan, Doomed Ne[***]*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), July 20, 1936, at 4.

227 *Deaver Holds Sloan's Trial Was Not Fair*, *supra* note 213.

G. *Re-Trial: Dougherty County Superior Court*

Following the grant of the writ of habeas corpus, Sloan enjoyed about twelve hours of "technical freedom" in the Bibb County jail before a new warrant was issued and he was re-arrested.[228] A week later, Solicitor General George Lilly announced that the state would re-try Sloan and that Sloan's second trial would be held in "a county where the names of ne[***es] are placed on the jury rolls."[229] His decision was likely motivated by the Supreme Court's recent decision in *Norris v. Alabama*, one of the famous Scottsboro Boys cases.[230] Because Black jurors were excluded from the rolls of Colquitt County and in each of the other four counties in Georgia's Southern Circuit, Judge Thomas transferred Sloan's case out of the circuit to the Dougherty County Superior Court in Albany.[231] Sloan remained in jail until his second trial, though at some point, he was moved from Bibb County to a "secret prison" elsewhere.[232] All this "shuffl[ing] back and forth," Covington said, was "because of the sadistic tendencies of certain people who wanted to protect civilization."[233]

On March 24, 1936, without previous publicity, Sloan was re-tried before Judge B.C. Gardner of the Dougherty Superior Court in Albany.[234] Covington once again represented Sloan.[235] The sole Black man in the jury venire asked to be excused, a request that was "readily granted."[236] The testimony appears to have been largely the same as in the first trial, although there are indications that Mary Smith's account took on new details. Earlier, some accounts reported that she had claimed that no words were exchanged between herself, Ottis Gay, and the shooter.[237] Now, she testified that the

228 *Convicted to Die as Lynch Orgy Loomed*, *supra* note 207.

229 *State Completes Plans to Try Moultrie Ne[***] Again*, Thomasville Times-Enter., Feb. 5, 1936, at 1.

230 *Sloan May Face Retrial in Bibb*, Macon News (Macon, Ga.), Feb. 5, 1935, at 5. *See generally* Norris v. Alabama, 294 U.S. 587 (1935); Klarman, *supra* note 84, at 407–08. In *Norris v. Alabama*, the Court had reversed a Black boy's rape conviction, holding that the systematic exclusion of Black persons from the jury pool in the Alabama county where he was tried had denied him equal protection of law. *Norris*, 294 U.S. at 596–99.

231 *Ne[***es] Missing on Lowndes Jury*, Macon News (Macon, Ga.), Feb. 24, 1936, at 12.

232 *Demented Man, Twice Saved from Mob Sentenced to Die*, *supra* note 77; *Sloan Being Held in Secret Prison*, Macon News (Macon, Ga.), Feb. 9, 1936, at 9.

233 *New Trial Asked for John Sloan*, Macon News (Macon, Ga.), July 20, 1936, at 1.

234 *Sloan Is Placed on Second Trial*, Macon News (Macon, Ga.), Mar. 24, 1936, at 1; *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

235 *Once Doomed Moultrie Ne[***] Goes on Trial Again at Albany*, *supra* note 66.

236 *See Demented Man Twice Saved from Mob Sentenced to Die*, *supra* note 77; *Sloan Is Placed on Second Trial*, *supra* note 234.

237 Brief of the Evidence, *supra* note 44, at 16; *see Ne[***] Kills White Man Near Moultrie; Slayer Is Sought*, *supra* note 65.

gunman had used profanity and announced, "I will kill you both."[238] After he shot, she said, the shooter told them, "if he had not killed us, he would kill us."[239]

Sheriff Beard testified to some of the events surrounding Sloan's arrest and his alleged confession—information missing in accounts of the first trial.[240] He testified that once officials had located Sloan in Havana and brought him back to Georgia, he "had a talk with him as to his connection with the shooting."[241] According to Sheriff Beard, Sloan first said that another man had borrowed the gun from him and said he was going to shoot somebody.[242] Sloan told Beard he tried to get the other man not to do it.[243] Beard testified that he told Sloan that the story "did not connect up well" and asked if it was really the truth.[244] He reckoned that this prodding "laid the foundation" for Sloan to tell the truth.[245] Beard further testified that Sloan then told him that he was going along the road and "all at once he saw somebody sitting side the road." Sloan said that he heard this person say, "[t]here goes a Ne[***]; let's do something to him."[246] According to Beard, Sloan claimed he then "throwed up and shot," reloaded the gun and ran on down the road.[247] Sheriff Beard testified that Sloan's statement was made "freely and voluntarily," with no threat or "offer of reward."[248] On cross-examination, he could not recall whether he had mentioned Sloan's initial statement about another man shooting Gay at the first trial.[249] He also testified that Sloan was "short mentally" but that he had the sense to tell "right from wrong."[250]

The defense again argued that Sloan had "the mentality of a 12-year-old."[251] For this argument, they relied again on testimony by doctors who had examined Sloan in the weeks prior to his first trial.[252] Sloan gave largely the same account of the events that he gave at the first trial.[253] After

238 Brief of the Evidence, *supra* note 44, at 16–17.
239 *Id.* at 17.
240 *Id.* at 17–19.
241 *Id.* at 17–18.
242 *Id.* at 18.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.* at 19.
250 *Id.*
251 *Id.* at 20–21.
252 *Id.*
253 *Id.* at 27.

deliberating a mere twenty-eight minutes, the Dougherty County jury convicted Sloan of first-degree murder and sentenced him to die less than six weeks later, on May 1, 1936.[254]

H. *Sloan's Second Motion for Re-Trial and Other Post-Conviction Remedies*

Following the Dougherty County trial, Sloan was delivered to the Dougherty County jail in Albany, where he remained seemingly unaware of his fate.[255] A newspaper account quoted him again, saying, "[a]ll of my life I have been running from white folks, but when I am put in the State prison, my running days will be over. They can't touch me there."[256]

Sloan's attorneys continued to seek justice for Sloan, relying on increasingly technical legal arguments. They moved for a retrial on the basis of statements Solicitor General Lilly made during closing arguments.[257] Lilly allegedly told the jury that if they recommended mercy, Sloan would "spend the remainder of his life in the penitentiary unless he is pardoned."[258] This remark, the motion argued, was highly prejudicial and "held out to the jury that the thing to do was to kill this man before some governor turns him out."[259] The motion contended that this comment was sufficient to destroy Sloan's chances of a recommendation of mercy from the jury.[260] Whether intentionally or not, the prosecutor's statement seemed designed to appeal to underlaw; a reminder that death was the only acceptable outcome for Sloan and that any possible obstacle to that outcome must be avoided. The court denied the motion, and Sloan was again sentenced to be executed.[261] Sloan appealed, and the Georgia Supreme Court upheld the trial court's denial of the motion.[262]

254 *Sloan Sentenced to Die on May 1,* Macon News (Macon, Ga.), Mar. 25, 1936, at 7.
255 *Demented Man, Twice Saved from Mob Sentenced to Die*, *supra* note 77.
256 *Id.*
257 Amendment to Motion for New Trial at 34, Sloan v. State, 187 S.E. 670 (Ga. 1936) (No. 11468).
258 *Id.*
259 *Id.*
260 *Id.* at 35.
261 *See id.* at 42.
262 *Sloan*, 187 S.E. at 671.

I. *Execution*

Following the unsuccessful appeal to the Georgia Supreme Court, Sloan's execution was set for October 16, 1936.[263] On October 15,[264] attorneys Park and Strozier filed a writ of habeas corpus in the Superior Court in Greensboro,[265] alleging, among other things, that the trial judge "in resentencing Sloan . . . did not notify his counsel."[266] The Superior Court judge granted a stay of execution pending the outcome of a hearing on the writ and set aside Sloan's second conviction on the grounds that Sloan's attorneys had not been present when it was imposed.[267] He "remanded the case to the Dougherty Superior Court for further action."[268] "After 'making some investigations' that '[he did] not care to divulge,' Judge Gardner resentenced Sloan to death, his execution now set for December 31, 1936."[269]

The Georgia Prison Commission and Governor Talmadge rejected Sloan's petitions for clemency, and by mid-December, his attorneys had run out of options.[270] The day before Sloan's scheduled execution, the prison announced that the execution might have to be delayed due to the electrician's illness.[271] The Prison Commission consequently put out a request for a qualified electrician.[272] "For preparing the condemned for the chair, fixing the electrodes on his body and seeing that everything is in readiness for the three switches . . . to be pulled," the request said, "the electrician receives $75."[273] People from all over the country wrote to volunteer for the job.[274]

263 *Ne[***] Is Saved for Third Time*, MACON TEL. (Macon, Ga.), Oct. 31, 1936, at 2.

264 *Id.*

265 *Sloan Execution Halted by Court*, MACON TEL. (Macon, Ga.), Oct. 16, 1936, at 5. They brought the writ in Georgia Superior Court of the Ocmulgee Judicial Circuit because the circuit included Baldwin County, where the electric chair was located. *Ne[***] Is Saved for Third Time*, *supra* note 263; *Doomed Man Receives Stay of Execution*, ATLANTA DAILY WORLD, Oct. 16, 1936, at 1.

266 *Doomed Man Receives Stay of Execution*, *supra* note 265.

267 *Id.*; *Judge Gardner Delays Sentencing Sloan as Investigation Made*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Nov. 16, 1936, at 8.

268 *Ne[***] Is Saved for Third Time*, *supra* note 263.

269 *Judge Gardner Delays Sentencing Sloan as Investigation Made*, *supra* note 267; *Fourth Death Sentence Is Passed Upon Slayer*, MACON TEL. (Macon, Ga.), Dec. 20, 1936, at 25.

270 *John Henry Sloan Must Die on Last Day of This Year*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Dec. 21, 1936, at 1; *State Executioner Ill; Sloan Death May Be Delayed*, ATLANTA DAILY WORLD, Dec. 31, 1936, at 1.

271 *State Executioner Ill; Sloan Death May Be Delayed*, *supra* note 270.

272 *Commission Needs an Electrician*, MACON NEWS (Macon, Ga.), Dec. 30, 1936, at 3; *State Executioner Ill; Sloan Death May Be Delayed*, *supra* note 270.

273 *Commission Needs an Electrician*, *supra* note 272.

274 *John Henry Sloan Electrocuted at the State Prison*, THOMASVILLE TIMES-ENTER. (Thomasville, Ga.), Dec. 31, 1936, at 1.

On December 31, 1936, Sloan arrived in the execution chamber at the Milledgeville State Prison.[275] He was weak and tired; "prison officials claimed he had been 'starving himself for weeks.'"[276] In a death chamber statement, Sloan allegedly admitted to killing Ottis Gay but again claimed he acted in self-defense.[277] After receiving two electric shocks, John Henry Sloan died.[278] He is buried in the Georgia State Penitentiary Cemetery.[279]

275 *Id.*
276 *Id.*
277 *Id.*
278 *Colquitt Ne[***] Pays for Murder*, Macon Tel. (Macon, Ga.), Jan. 1, 1937, at 10.
279 *John Henry Sloan (1911-1936)*, Find a Grave (Feb. 25, 2014), https://www.findagrave.com/memorial/125611687.

III. JOHN HENRY SLOAN: UNANSWERED QUESTIONS

The influence of the underlaw, manifested in the angry mob surrounding the courthouse, rendered John Henry Sloan's Colquitt County trial and conviction illegitimate under the law, despite the veneer of legal legitimacy created by the proceedings. Ultimately, however, Sloan was not executed as a direct result of this trial. The federal court recognized that the atmosphere of violence violated Sloan's right to due process and set aside his conviction, leaving him to be re-tried and re-convicted four months later and fifty miles away in Dougherty County. Did this second trial rectify the injustice of the first? In the end, was it the fair and impartial application of the law that sent Sloan to the electric chair, or was it the demands of white supremacy and Black subjugation? Did the law ultimately prevail over underlaw for John Henry Sloan?

This question cannot be answered with certainty. There are no reports of violence or threats thereof in Dougherty County during the weeks or months preceding Sloan's trial there. No mob gathered outside the courthouse, and the National Guard was not present. On the other hand, although Sloan's trial was held in Dougherty County at least in part because Black persons were on the jury roll in that county, the judge and attorneys readily agreed to excuse the single Black venireman, leaving Sloan once again to face an all-white jury. One can only speculate about the Black venireman's reasons for stepping away and whether the trial's outcome would have differed if he had been seated on the jury. As in the first trial, the prosecution's case rested on Sloan's confession, witnesses' testimony that the shooter was a Black man, and testimony that Sloan had borrowed a shotgun earlier in the day. If Covington's suspicions that "the lynching element" deterred Colquitt County residents from testifying for Sloan in the first trial, this remained true in the second: no new witnesses stepped forward for Sloan. Perhaps an impartial jury would have sentenced an intellectually disabled white man to death on this evidence, perhaps not. It took the Dougherty County jury less than thirty minutes to determine it was sufficient to condemn John Henry Sloan, despite the serious questions raised about his mental capacity. A judge today likely would have granted a new trial on the basis of Solicitor General Lilly's prejudicial remarks to the jury, but would Sloan's trial have ended differently absent those remarks? Perhaps the greatest unknowable question is the extent to which the underlaw's demands permeated the minds of the legal actors in Sloan's Dougherty County trial and subsequent proceedings; demands not overtly displayed in an angry mob or shouts of "lynch him!," yet still bending the machinery of the law inexorably toward John Henry Sloan's death.

IV. Underlaw Lives On

A. *Evidence of Underlaw in the Modern Criminal Justice System*

Public spectacle lynchings and courthouses surrounded by lynch mobs appear to be a thing of the past in American society. Such activity was declining by the time of John Henry Sloan's trials and had largely disappeared by the end of the 1940s.[280] Some attribute the disappearance of public lynchings to a shift in public attitude.[281] Others dispute the proposition that white society's felt need for Black racial subjugation subsided in the mid-twentieth century, arguing that society abandoned spectacle lynchings not because it came to disavow racial subjugation but because it accepted that the law could be trusted to deliver substantially the same outcome without the need for public acts of extrajudicial violence.[282] Modern-day evidence supports the latter.[283]

Racial disparities persist in the criminal justice system, despite the

280 William I. Hair & Amy Louise Wood, *Lynching and Racial Violence*, in 24 The New Encyclopedia of Southern Culture 91 (Thomas C. Holt et al. eds., 2013).

281 *Id.*

282 *See* Kirchmeier, *supra* note 15, at 136 ("With the decline of lynching, many southern whites renounced the inhumanity of the mob, preferring instead to rely on the harsh justice of the state."); Vandiver, *supra* note 15, at 13–15; Stuart Banner, The Death Penalty: An American History 229 (2003) ("The line between a lynching and an official execution could be thin . . . . Official trials and executions in the South could take place astonishingly fast, so fast as to closely resemble lynchings, when a case carried racial implications."); Carol S. Steiker & Jordan M. Steiker, *The Racial Origins of the Supreme Court's Death Penalty Oversight*, 42 Hum. Rts. 14, 14 (2016) ("One of the strongest predictors of a state's propensity to conduct executions today is its history of lynch mob activity starting more than a century ago."); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 439 (1995) ("The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America.").

283 "The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color." The Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 1 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (click "Download PDF"). "Despite its formal adherence to the principle of colorblindness, the contemporary U.S. criminal justice system has been described as a 'system of racial control.' This control is not merely legal, it is political. Major expansions of the criminal justice system have their roots in campaigns to reverse the political gains made by Black Americans in the Reconstruction and Civil Rights eras." Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 Perspectives on Pols. 400, 401 (2018).

system's formal color-blindness.[284] Black Americans are more likely than white Americans to be arrested and convicted and more likely to experience lengthy prison sentences and harsh incarceration.[285] Black Americans make up 13.4% of the population but 22% of fatal police shootings and 35% of executions.[286] When death sentences are examined, 47% of persons found to have been wrongfully convicted are Black. The disparate application of the death penalty is particularly clear when the race of victims is accounted for: between 1977 and 2019, 295 Black defendants were executed for murders involving a white victim.[287] Only 21 white defendants were executed for murders involving a Black victim.[288]

B. *Underlaw and the Backlash to Black Lives Matter*

i. Black Lives Matter

On August 9, 2014, in Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, an unarmed Black eighteen-year-old.[289] In the wake of Brown's killing and a grand jury's failure to indict Wilson, a broad and largely decentralized protest movement coalesced, adopting the name Black Lives Matter (BLM).[290] Although BLM is a complex and nuanced movement, media coverage has framed it primarily as a movement opposing the treatment that Black Americans experience at the hands of police—treatment that BLM activists have characterized as excessive, brutal, and the product of a "virulent anti-black racism that

284 THE SENTENCING PROJECT, *supra* note 283.

285 *Id.*; Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ (last visited Feb. 6, 2021).

286 Inman, *supra* note 285.

287 NGOZI NDULUE, THE DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 29 (Robert Dunham ed., 2020).

288 *Id.*

289 Larry Buchanan et al., *Q&A: What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.

290 Barbara A. Biesecker, *From General History to Philosophy: Black Lives Matter, Late Neoliberal Molecular Biopolitics, and Rhetoric*, 50 PHIL. & RHETORIC 409, 410 (2017). The popularization of the phrase "Black Lives Matter" originated with activists Alicia Garza, Patrisse Cullors, and Opal Tometi's response to the death of Black teenager Trayvon Martin and acquittal of his killer George Zimmerman in 2013. Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement.

permeates our society."[291] On May 25, 2020, George Floyd, a forty-six-year-old Black man, was killed when a Minneapolis police officer used his knee to pin Floyd's neck to the ground for over eight minutes.[292] His death sparked a new wave of BLM protests, with thousands of demonstrations occurring in all fifty states and Washington D.C., as well as all over the world, between May and August 2020.[293]

ii. Blue Lives Matter

The backlash against the BLM movement frequently casts the movement as an existential threat to law and order and to American society. This response belies a belief that, for many Americans, the treatment of Black people that BLM opposes is not, in fact, anathema to American ideals but is necessary to the American way of life. In this, the continued salience of underlaw is apparent.

BLM's protests and demonstrations against systemic police violence against Black persons have sparked a "Blue Lives Matter" counter-movement.[294] On one level, Blue Lives Matter "supports police officers and the dangers that they experience every day in the conduct of their work."[295] On another level, it represents "a more antagonistic response to police critics" and "a pushback against the imagined breach of white racial order."[296]

The meaning behind the "Thin Blue Line," the symbol most commonly associated with the Blue Lives Matter counter-movement, particularly demonstrates currents of underlaw running through the counter-movement.[297] The "Thin Blue Line" represents the idea that police

291 Biesecker, *supra* note 290, at 411, n.1.

292 Dhaval M. Dave et al., *Black Lives Matter Protests, Social Distancing, and Covid-19* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 27408, 2020).

293 Grace Hauck et al., *"A Fanciful Reality": Trump Claims Black Lives Matter Protests Are Violent, but the Majority Are Peaceful*, USA Today (Oct. 25, 2020), https://www.usatoday.com/in-depth/news/nation/2020/10/24/trump-claims-blm-protests-violent-but-majority-peaceful/3640564001/.

294 Johanna Solomon et al., *Expressions of American White Ethnonationalism in Support for "Blue Lives Matter,"* Geopolitics 4 (July 23, 2019), https://www.tandfonline.com/doi/abs/10.1080/14650045.2019.1642876?journalCode=fgeo20.

295 *Id.*

296 *Id.*; Yuanyuan Liu, Blue Lives Matter? An Analysis of Blue Lives Matter News Comments 7 (2019) (M.A. dissertation, North Carolina State University) (on file with North Carolina State University Libraries).

297 Solomon et al., *supra* note 294, at 5; Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the 'Thin Blue Line' American Flag*, Marshall Project (June 8, 2020), https://www.themarshallproject.org/2020/06/08/the-short-fraught-history-of-the-thin-blue-line-american-flag.

are the dividing line between order and chaos, between law and savagery: the primary force that secures liberty, security, and law.[298] The "Thin Blue Line" characterizes those who conflict with police as "not merely transgressors of positive law," but as inhuman beasts and enemies of humanity.[299] It casts police as both the arbiters of who is human and who is not and as the protectors of the human from the inhuman.[300] Often, this line between human and inhuman is seen as fundamentally racial, and the dehumanization of the populations with whom police engage helps justify "exterminating violence against racialized subjects" in the name of preserving humanity.[301]

The prominence of the "Thin Blue Line" imagery within the Blue Lives Matter counter-movement betrays an ideology rooted in underlaw: the belief that law, order, and the very survival of society require the brutal subjugation of a racialized class of "subhumans." In this modern manifestation of underlaw, police—the embodiment of the law on the streets—ensure that the demands of underlaw are met.[302] BLM's challenge to that system calls into question the law's ability to meet those demands, giving rise to strong opposition.

iii. Former President Donald Trump's Response to Black Lives Matter

The persistent power of underlaw is also apparent in the words of former President Donald Trump. As BLM protests and demonstrations against police brutality swept across the country in the summer of 2020, Trump gave voice to the backlash in public addresses aimed squarely at casting the movement as an existential threat to American society. In a Fourth of July speech before a majority-white crowd at Mount Rushmore, Trump began by representing the United States as "the culmination of

298 Joe DiFazio, *Dividing Line: Thin Blue Line Flag Source of Division on South Shore*, ENTER. (Aug. 21, 2020), https://www.enterprisenews.com/story/news/crime/2020/08/21/dividing-line-thin-blue-line-flag-source-of-division-on-south-shore/42908185/ ("It simply represents the police officer's role of separating the good from the bad while creating order from the chaos. This is what separates the world from them."); *see* Tyler Wall, *The Police Invention of Humanity: Notes on the "Thin Blue Line,"* 16(3) CRIME MEDIA CULTURE 319–21, 328 (2020); *The Thin Blue Line*, FLAGS OF VALOR, https://www.flagsofvalor.com/blogs/news/the-thin-blue-line (last visited Dec. 6, 2020); *Mission*, THIN BLUE LINE FOUND., https://thinbluelinefoundation.org/read-me (last visited Dec. 6, 2020).

299 Wall, *supra* note 298, at 321.

300 *Id.* at 320, 323.

301 *Id.* at 323, 327–29.

302 *Id.* at 327 ("The law of the police really marks the point at which the state can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.") (internal quotation marks omitted).

thousands of years of western civilization."[303] Alluding to the ongoing protest movement, he claimed our nation was facing a "merciless campaign to wipe out our history, defame our heroes, erase our values, and indoctrinate our children."[304] He spoke of angry mobs attempting to strip the American people of their values, history, and culture and of a radical assault on liberty and the American way of life.[305] He railed against the "left-wing cultural revolution . . . designed to overthrow the American Revolution."[306] Alluding to BLM's targeting of statues and monuments to Confederate soldiers, slave owners, and other historical figures whose legacies the movement maintained were tainted by racist acts,[307] Trump denounced the "destruction of [our] resplendent heritage" and warned that the ideology underlying those acts would demolish justice and society.[308] The movement's goal, he claimed, was not a better America, but the end of America.[309]

Trump again took aim at the BLM movement in remarks at the White House Conference on American History on Constitution Day, September 17, 2020.[310] Alluding to the ongoing protests, he characterized protestors as "left-wing mobs" who had "launched a vicious and violent assault on law enforcement—the universal symbol of the rule of law in America."[311] These protestors would "burn down the principles enshrined in our founding documents, including the bedrock principle of equal justice under law," he claimed.[312] He went on to decry the New York Times' 1619 Project and critical race theory[313] as hateful lies, toxic propaganda, and ideological poison

303 Donald Trump, President of the United States, Remarks at South Dakota's 2020 Mount Rushmore Fireworks Celebration (July 4, 2020).

304 *Id.*

305 *Id.*

306 *Id.*

307 *Thomas Jefferson Statue Toppled in Portland, Oregon*, CBS News (June 15, 2020), https://www.cbsnews.com/news/thomas-jefferson-statue-toppled-in-portland-oregon/.

308 Remarks at South Dakota's 2020 Mount Rushmore Fireworks Celebration, *supra* note 303.

309 *Id.*

310 *President Trump Remarks at White House History Conference*, C-SPAN (Sept. 17, 2020), https://www.c-span.org/video/?475934-1/president-trump-announces-1776-commission-restore-patriotic-education-nations-schools.

311 *Id.*

312 *Id.*

313 The 1619 Project "aims to reframe the country's history by placing the consequences of slavery and the contributions of Black Americans at the very center of our national narrative." *The 1619 Project*, N.Y. Times Mag., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Nov. 27, 2020). Critical race theory is "a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power." Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 3 (2d ed. 2012).

aimed at "repression of traditional faith, culture, and values."[314] Again, he warned that such thinking would destroy America. Trump concluded by announcing the creation of the National Garden of American Heroes, "a vast outdoor park that will feature the statues of the greatest Americans who have ever lived."[315] One such statue, Trump declared, would be of Caesar Rodney, a signer of the Declaration of Independence and slave owner whose statue had been removed from a public square in Wilmington, Delaware, amidst controversy over his legacy.[316] Trump promised to restore this "very brave man, who was so horribly treated[, to] the place of honor he deserves."[317]

With BLM widely understood as a movement challenging acts of police brutality against Black Americans, the President's strident condemnation of that movement implies that to challenge such action is to challenge the foundations of American law, values, and society. It is worth noting that, while many of those who condemn BLM purport to oppose only the alleged violence committed by the movement—the riots, looting, and arson[318]—Trump's statements are largely devoid of reference to any such violence. They focus instead on the threat posed by BLM's ideology, challenging not merely the means by which BLM seeks to convey its message but the very ends the movement hopes to achieve. These statements betray an adherence to the ideology of underlaw: that the racially-disparate criminal justice system challenged by BLM, particularly acts of police violence against Black persons, is not a failure of American law to live up to American ideals; it is the embodiment of America's true values.

The views expressed by Trump and Blue Lives Matter are not fringe views. They are views supported by millions of voters, by those who make law, enforce law, and practice law. President Trump's Twitter attacks

314 Ishaan Tharoor, *Trump Joins Dictators and Demagogues in Touting 'Patriotic Education,'* WASH. POST (Sept. 21, 2020), https://www.washingtonpost.com/world/2020/09/21/trump-patriotic-education-china-orban/.

315 *President Trump Remarks at White House History Conference*, *supra* note 310.

316 Jacob Owens, *Wilmington Removes Columbus, Rodney Statues Amid Threats*, DELAWARE BUS. TIMES (June 12, 2020), https://delawarebusinesstimes.com/news/wilmington-columbus-rodney; *President Trump Remarks at White House History Conference*, *supra* note 310.

317 *President Trump Remarks at White House History Conference*, *supra* note 310.

318 *See* Kevin Roberts, *'Mostly Peaceful' Lets Black Lives Matter Off the Hook for Real Violence*, WASH. EXAMINER. (Sept. 24, 2020), https://www.washingtonexaminer.com/opinion/mostly-peaceful-lets-black-lives-matter-off-the-hook-for-real-violence; James S. Robbins, *Opinion: Rioting Is Beginning to Turn People off to BLM and Protests While Biden Has No Solution*, USA TODAY (Aug. 31, 2020), https://www.usatoday.com/story/opinion/2020/08/31/riots-violence-erupting-turning-many-away-blm-and-protests-column/5675343002/.

threatening "law and order" measures against BLM activists have been echoed by devoted supporters, and over 70 million Americans voted to re-elect him in November 2020.[319] The National Fraternal Order of Police, the largest police union in the United States, proclaims on its Facebook page: "We are the #ThinBlueLine—the only thing standing between Order and Anarchy. We protect the prey from the predators, the good from the bad."[320] Legislators in four states have passed "Blue Lives Matter" laws, calling for police to be included as protected victim categories in hate crime statutes.[321] In June 2020, Missouri attorneys Mark and Patricia McCloskey achieved notoriety when they pointed guns at BLM protestors marching through their well-to-do St. Louis neighborhood.[322] The couple received the support of then-President Trump and were ultimately rewarded with an opportunity to speak at the 2020 Republican National Convention.[323] They used the opportunity to paint BLM protestors as violent revolutionaries who would bring anarchy and chaos into American communities. Mark McCloskey concluded the couple's remarks with a warning that "if you stand up for yourself and for the values our country was founded on, the mob . . . will try to destroy you."[324] The ideology of underlaw has not been purged from American society; its influence remains, reaching far and wide and to the highest levels of government. We ignore it at our peril.

319 Brigitte L. Nacos et al., *Donald Trump: Aggressive Rhetoric and Political Violence*, Persp. on Terrorism, Oct. 2020, at 2, 4; Claudia Deane & John Gramlich, *2020 Election Reveals Two Broad Voting Coalitions Fundamentally at Odds*, Pew Rsch. Ctr., (Nov. 6, 2020), https://www.pewresearch.org/fact-tank/2020/11/06/2020-election-reveals-two-broad-voting-coalitions-fundamentally-at-odds/.

320 National Fraternal Order of Police, *We Are the Thin Blue Line*, Facebook (Sept. 15, 2020), https://www.facebook.com/watch/?v=3239842919426028.

321 Gail Mason, *Blue Lives Matter and Hate Crime Law*, Race & Just. (forthcoming 2021) (manuscript at 2), https://journals.sagepub.com/doi/abs/10.1177/2153368720933665.

322 Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went On in St. Louis That Day?*, BBC News (Aug. 25, 2020), https://www.bbc.com/news/election-us-2020-53891184.

323 *Id.*

324 ABC News, *The McCloskeys Speak at 2020 RNC*, YouTube (Aug. 24, 2020), https://www.youtube.com/ watch?v=UJ62o7TGQlw (last visited Dec. 5, 2020).

CONCLUSION

The trials and execution of John Henry Sloan demonstrate that underlaw was a powerful force in Colquitt County in 1935. Its ever-present demands influenced legal actors' decisions and constrained their actions, resulting in a legal process tainted by the belief that the law should deliver not impartial justice but Black subjugation. Evidence indicates that underlaw still holds sway for a significant portion of Americans in 2020. Achieving justice in this environment requires awareness of this reality, just as it did for our counterparts nearly one hundred years ago. Like Covington, Judge Thomas, Harry Strozier, and Judge Deaver, we must determine when to trust our communities and when and how to challenge them. We must learn to see where underlaw taints our legal processes, bending the formally color-blind law toward outcomes that are anything but. Only if we recognize and eradicate the powerful, insidious influence of underlaw can we hope to accomplish what the law promises—true justice for all.

THE FAIR CREDIT REPORTING ACT AND THE CONSUMER CREDIT INFORMATION SYSTEM: WHY ERRORS PERSIST AND FURNISHERS SHOULD PLAY A GREATER ROLE IN ENSURING ACCURACY

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* J.D., May 2020, Northeastern University School of Law. I am grateful to Professor Dan Danielsen for his incredible and indispensable guidance as I pursued this project.

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INTRODUCTION

The consumer credit reporting system touches the lives of hundreds of millions of Americans.[1] Indeed, it is difficult for an American consumer to avoid becoming the subject of a credit report.[2] Unless consumers are very wealthy, they will need to access credit to buy a house, attend college,[3] or simply finance everyday purchases through a credit card. Any of these transactions will begin to generate a credit history and enter the consumer into the credit information system. Consumers' credit histories then follow them throughout their public and economic lives, affecting the availability of credit and the terms on which it is extended for home loans, car loans, credit cards, and other consumer financial products.[4] Credit history may also impact the availability of employment opportunities,[5] insurance policies, and housing.[6] A negative credit evaluation can cause consumers to be excluded from economic and social opportunities. Specifically, about one in twenty consumers are affected by an error that substantially interferes with their ability to access credit, as will be discussed *infra* in Section I.C. Additionally, while the effects on other consumers might be marginal, they are nevertheless significant, especially when considered in the aggregate.[7] Negative credit histories raise the cost of acquiring money, resulting in greater overall debt burdens for consumers seeking financial products.[8]

These negative impacts are a largely accepted consequence of having

1 *An Overview of the Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 1 (2018) (statement of Peggy L. Twohig, Assistant Director of Supervision Policy in the Division of Supervision and of Enforcement and Fair Lending, Bureau of Consumer Financial Protection), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act (follow "Download Testimony" hyperlink under "Witnesses").

2 Chi Chi Wu, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. BANKING INST. 139, 180–81 (2010).

3 *Id.*

4 CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 12 (2012); BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 8, 10 (2007).

5 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: THE IMPLICATIONS OF CREDIT BACKGROUND CHECKS ON THE DECISION TO HIRE OR NOT TO HIRE 2 (2010). The Society of Human Resource Management reported that 60% of employers conducted background checks for some of their candidates in 2010. *Id.*

6 *See, e.g.*, Wu, *supra* note 2, at 139, 155.

7 *See id.*

8 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 4, at S-5.

a consumer credit reporting system.[9] The purpose of our consumer credit information system is primarily to provide lenders with accurate information about consumers,[10] enabling those lenders to make more informed decisions about to whom to extend credit and on what terms to offer it. Accurately reporting about a consumer, in turn, requires reflecting both the good and the bad in an individual consumer's history. The development and growing application of the consumer credit reporting system have broadly been associated with decreasing costs of consumer credit and increased availability of credit, especially to lower-income consumers.[11]

However, the utility of the consumer credit reporting system relies on the accuracy of the reports. The regulation of consumer credit reporting, therefore, is concerned with accuracy, particularly because derogatory inaccuracies can cause undue harm to a consumer's ability to access credit. In passing the Fair Credit Reporting Act of 1970 (FCRA), Congress was concerned with cases of consumer harm resulting from inaccurate information in their credit reports.[12] Inaccurate negative information, if left uncorrected, has the double effect of undeservedly hurting a consumer's financial prospects and undermining the predictive value of the reports and the integrity of the system. Inaccuracies, taken in the aggregate, result in the misallocation of credit and, ultimately, an increase in the cost of credit.[13] The FCRA creates a role for each actor in the system to draw attention to and

9 It should be acknowledged that Congress has embraced a certain degree of forgiveness for past credit behavior. For instance, under the Fair Credit Reporting Act (FCRA), notices of delinquencies, charge-offs, repossessions, and collection activity must be removed after seven years. Michael E. Staten & Fred H. Cate, Does the Fair Credit Reporting Act Promote Accurate Credit Reporting? 19 (2004). Notices that a consumer has filed for a Chapter 7 bankruptcy must be removed after ten years. Will Dobbie et al., Bad Credit, No Problem? Credit and Labor Market Consequences of Bad Credit Reports 2 (2019). Although not required by statute, the credit reporting agencies (CRAs) also delete notice of filing under Chapter 13 after seven years. *Id.* n.4.

10 It is worth noting first that credit reports may be used for employment decisions and that there is some debate about the predictive value of credit reports for this purpose. *See* Pauline T. Kim & Erika Hanson, *People Analytics and the Regulation of Information Under the Fair Credit Reporting Act*, 61 St. Louis U. L.J. 17 (2016).

11 *See* Michael Staten, Ctr. For Capital Mkts. Competitiveness, Risk-Based Pricing in Consumer Lending 7 (2014).

12 115 Cong. Rec. 2410–15 (1969) (statement of Sen. Proxmire); Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions,* 25 U. Mem. L. Rev. 37, 38–41 (1994) (arguing that the enactment of the FCRA in the 1970s attempted to remedy abuses of the credit reporting system, including CRAs that circulated false and inaccurate information about consumers and the consumers' inability to challenge those inaccuracies).

13 Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, 5 (2012) [hereinafter FTC Study].

correct inaccuracies in individual reports. This includes roles for consumers, furnishers of credit information, credit reporting agencies (CRAs), and end-users.[14]

The Federal Trade Commission (FTC) commissioned a study on credit reporting errors and published the results of this study in 2012.[15] The study provided data on the rate of confirmed material errors,[16] among other measures of errors.[17] Confirmed errors are those which were disputed by a consumer and confirmed as inaccurate by the CRA.[18] A material error is defined as "an inaccurate item falling within the categories used to generate a credit score."[19] Confirmed material errors, therefore, are both confirmed by the CRA that reported them and likely to impact a consumer's access to credit.[20] The FTC's study showed that in their sample, 21% of participants had a confirmed material error,[21] and 12.9% of all participants saw a change in their credit score as a result of the dispute.[22] Assuming that the study's findings can be extrapolated to the greater population and taking the figure of approximately 200 million consumers in the system as a baseline,[23] these findings suggest that millions of consumers may be unjustifiably charged higher rates for credit or denied access to credit altogether.[24]

Both the CRAs and the lending institutions that furnish information to the CRAs, known as "furnishers," have duties under the FCRA to prevent and address these errors.[25] CRAs, however, bear a substantially greater risk of liability in this system.[26] This difference in the potential for liability exists primarily because furnishers are shielded from private actions brought by consumers for failing in their duty to ensure accuracy and integrity.[27] The

14 15 U.S.C. §§ 1681e, 1681g, 1681i, 1681m, 1681s-2.

15 FTC STUDY, *supra* note 13.

16 *Id.* at iv.

17 *Id.* at iv–vi.

18 *See id.*

19 *Id.* at 12.

20 *See id.* at 4.

21 *Id.* at 64.

22 *Id.* at v.

23 *Id.* at 2.

24 It should be noted that, because the FTC study relied on consumers to dispute perceived inaccuracies, the study did not capture the rates of errors that would likely benefit the consumers. *Id.* at iii–iv, 64. Consequently, it is likely that the rate of error is substantially undercounted.

25 15 U.S.C. §§ 1681e, 1681s-2.

26 *See infra* Sections I.B.ii, I.B.iii.

27 *See* Perry v. First Nat'l Bank, 459 F.3d 816, 822 (7th Cir. 2006) (stating that the FCRA provides an exemption for private rights of action under Section 1681s-2(a)); Nelson v. Chase Manhattan Mortg. Corp., 282 F.3d 1057, 1060 (9th Cir. 2002) ("Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental

difference in the risk of liability, along with the greater organization of duties in the FCRA, effectively places the onus on CRAs and consumers alone to ensure the quality of the information included in credit reports. However, furnishers are likely able to do far more to address errors than they are currently incentivized to do.

Congress's emphasis on CRAs is sensible to a degree. The CRAs are often specialists in credit reporting and are directly responsible for creating consumer credit reports.[28] However, the CRAs do not necessarily have direct experience with consumers regarding their performance on lines of credit[29] and likely do not have the account-level data to support the accuracy of information provided to them by furnishers. The furnishers, on the other hand, as the original authors of information circulated in the consumer credit reporting system, have the best access to the information needed to verify that information and correct errors.[30] By placing greater responsibility on CRAs as opposed to furnishers, the regulatory framework may result in errors that remain undetected and uncorrected or simply raise the total cost of correction by failing to place the burdens of ensuring accuracy on the actors that can do so most efficiently.

From its introduction in the Senate in 1969, the FCRA was intended to be a means to empower consumers to correct inaccuracies and envisioned consumers as the primary enforcers of the FCRA.[31] It enables consumers

bodies."); Lang v. TCF Nat'l Bank, No. 06-C-1058, 2008 WL 5111223, at *3 (N.D. Ill. Dec. 1, 2008) ("No private right of action exists, however, for violations of section 1681s-2(a)."); Rollins v. Peoples Gas Light & Coke Co., 379 F. Supp. 2d 964, 967 (N.D. Ill. 2005) ("It is undisputed that there is no private right of action under § 1681s2(a)."); Carney v. Experian Info. Sols., Inc., 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999) ("The FCRA limits enforcement of subsection (a) of § 1681s-2 governing supplying accurate information exclusively to certain federal and/or state officers."); *see also* 15 U.S.C. § 1681s-2(c)–(d) (limiting the enforcement of claims asserted under § 1681s-2(a) to "[f]ederal agencies and officials and the State officials identified in section 1681s of this title").

28 FTC Study, *supra* note 13, at 2.

29 *Id.* at 8.

30 *See* Seamans v. Temple Univ., 744 F.3d 853, 867 n.11 (3d Cir. 2014) ("[T]he furnisher, not the CRA, is in the best position to determine whether [a] dispute is bona fide.").

31 115 Cong. Rec. 2411–12 (1969) (statement of Sen. Proxmire); Meredith Schramm-Strosser, Comment, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165, 183 (2012) ("[T]he agency's position is that private litigation best enforces the FCRA."); G. Allan Van Fleet, Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 Colum. L. Rev. 458, 506 (1976) (noting the FTC argued consumers should serve the role of private attorneys general and contended success of the FCRA depends on private litigation to ensure compliance).

to request a free credit report from each of the CRAs once per year.[32] It requires furnishers to provide notice to consumers when furnishing negative information about them to a CRA.[33] Creditors who decline to extend credit based on a consumer's credit report must also notify the consumer of the reasons why.[34] These rights help consumers discover inaccuracies included in their reports, especially derogatory errors and, in principle, to act on such errors by raising a dispute with a CRA or a furnisher.[35]

Empowering consumers to police the accuracy of their own credit reports is helpful, but consumer disputes alone are insufficient. An individual consumer may have substantial knowledge about their financial affairs and recognize inaccurate information on a report. Often, however, the ability to initiate a consumer dispute is useless. Many consumers are unaware of the contents of their own credit reports, and most do not check these reports regularly.[36] Further, even if a consumer learns of an inaccuracy, they may not understand its significance. Finally, the steps required to correct an inaccuracy may deter consumers who are not incentivized to address the error. Consequently, the FCRA's enforcement model of providing for consumer disputes likely does little to ensure accuracy.

Ultimately, the FCRA's emphasis on the regulation of CRAs over furnishers and the reliance on consumer disputes present significant regulatory gaps. This article explores why these regulatory gaps are likely to contribute to the persistence of errors in the consumer credit reporting system and how they might be addressed through relatively modest reforms. Part I provides background on the consumer credit reporting system, explores the FCRA's regulatory framework, and discusses the various actors in the consumer credit reporting system and the burdens imposed on each by the FCRA. In addition, Part I reviews the types and prevalence of errors in credit reports. Part II evaluates the FCRA framework by pointing out the limitations of consumer disputes to correct inaccuracies in the system and discusses the FCRA's simultaneous over-emphasis on CRAs and under-emphasis on furnishers. Part III makes the case for amending the FCRA to place greater responsibility on furnishers for ensuring the quality of the information in the consumer credit reporting system. Part III also suggests

32 15 U.S.C. §§ 1681g, 1681j.

33 *Id.* § 1681s-2(a)(7).

34 *Id.* § 1681m(b).

35 Consumers have the right to dispute information to a CRA, *id.* § 1681i(a)(1), or with the furnisher of the disputed information directly, *id.* § 1681s-2(a)(8). *See also id.* § 1681s-2(b) (concerning disputes forwarded from a CRA to a furnisher).

36 NAT'L FOUND. FOR CREDIT COUNSELING & NETWORK BRANDED PREPAID CARD ASS'N, 2012 CONSUMER FINANCIAL LITERACY SURVEY 3 (2012).

potential policy reforms that could improve the overall quality of credit reporting information while providing consumers with more avenues to seek redress for harms caused by inaccuracies in the credit reporting system.

I. THE INSTITUTIONAL AND REGULATORY CONTEXT OF THE CONSUMER CREDIT REPORTING SYSTEM

A. *The Emergence of the Modern Consumer Credit Reporting System and Its Benefits*

The national consumer credit reporting system developed most of its current features during the late twentieth century. First, consumer credit began to be offered in national markets in the 1960s. The legal architecture emerged in 1970 with the passage of the FCRA, which was amended significantly in 1996.[37] Meanwhile, credit cards were first offered nationally in the mid-1980s.[38] Statistical scoring became the industry standard for credit decisions from the mid-to-late 1980s to the mid-1990s, depending on the financial product.[39]

All of these events characterized the emergence of what commentator Michael Staten has termed "risk-based pricing."[40] Risk-based pricing is the practice, now applied by consumer lenders on a virtually universal level, of making decisions regarding whether or not to extend credit and on what terms to extend credit, based on the risk associated with each consumer-applicant.[41] The primary purpose of the consumer credit reporting system is to enable risk-based pricing. In the 1980s and '90s, the expansion of risk-based pricing and development of the consumer credit reporting system was associated with a dramatic increase in the availability of consumer loans, especially general-purpose credit cards, to the lower half of the income distribution.[42] By tying the cost of credit to the risk of default and delinquency posed by individual borrowers, risk-based pricing lowers the cost of credit for the majority of borrowers while also expanding credit availability to higher-risk borrowers and is associated with an increase in the availability of credit to all income groups.[43]

The development of the consumer credit reporting system and CRAs occurred throughout the twentieth century and was associated with

37 Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, §§ 601–22, 84 Stat. 1127 (codified at 15 U.S.C. §§ 1681–1681t); MICHAEL E. STATEN & FRED H. CATE, THE IMPACT OF NATIONAL CREDIT REPORTING UNDER THE FAIR CREDIT REPORTING ACT: THE RISK OF NEW RESTRICTIONS AND STATE REGULATION 2 (2003).

38 STATEN, *supra* note 11, at 15.

39 *Id.* at 13–14.

40 *Id.* at 4.

41 *Id.*

42 *Id.* at 5, 9.

43 *Id.* at 7.

increasing demand for consumer loans following World War II.[44] Prior to the passage of the FCRA, credit bureaus compiled reports from information collected by the bureaus' investigators and provided by creditors.[45] Creditors supplied information voluntarily based on reciprocal arrangements, which enabled creditors to receive information from the bureaus to determine whether to grant credit to consumer-applicants.[46] The investigators often inquired into the consumer-subject's personal reputation, presenting significant privacy concerns and producing unreliable reports.[47]

Until the passage of the FCRA, there was no federal statute regulating credit reports and only one state statute doing so.[48] Senator William Proxmire, who introduced the bill that later became the FCRA, argued for the bill on the Senate floor in 1969 based on the need for Congress to address three issues: "inaccurate or misleading information[,] irrelevant information[, and] confidentiality."[49] While identifying the most serious problem as inaccurate or misleading information, Proxmire conceded that "it is unrealistic to expect 100 percent accuracy."[50] Nevertheless, he concluded that the prevailing level of inaccuracy in the system was intolerable.[51] With the passage of the FCRA in 1970, Congress created substantial legal duties for the CRAs in the Act to ensure the accuracy of the information they include in the report[52] and to adopt procedures for addressing consumer disputes.[53] The FCRA also sought to remedy the privacy concerns associated with consumer credit reporting by restricting who may access a consumer's credit report and the purposes for which a credit report could be used.[54]

The credit reporting industry in the U.S. currently "consists primarily of three national CRAs that maintain a wide range of information on approximately 200 million consumers."[55] Each CRA is individually responsible for collecting and organizing information about consumers and presenting this information in a report.[56] Acting collectively through the

44 Staten & Cate, *supra* note 9, at 4–5.
45 *Id.* at 5.
46 *Id.*
47 *Id.* at 5–6.
48 *Id.* at 4–5, 8. Five states also adopted legislation contemporaneously with the FCRA. *See* Robert M. McNamara, Jr., *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. Pub. L. 67, 72 n.24 (1973).
49 115 Cong. Rec. 2410–15 (1969) (statement of Sen. Proxmire).
50 *Id.*
51 *Id.*
52 15 U.S.C. § 1681e(b).
53 *Id.* § 1681i.
54 *Id.* § 1681b.
55 FTC Study, *supra* note 13, at 2.
56 15 U.S.C. § 1681a(p).

Consumer Data Industry Association (CDIA), the CRAs also regulate the language used when furnishing information.[57] The CRAs sell information to their customers on a subscription basis.[58] Subscribers may be the final users of consumer reports, or they may resell the information to another user.[59] Further, "these subscribers may or may not provide information about their own consumers to the CRAs."[60] Almost all "large banks and finance companies furnish information about their credit accounts to all three of the national CRAs."[61]

In the mid-1970s, the CDIA, then known as Associated Credit Bureaus, created the Metro format.[62] Metro, and its successor Metro 2, are standardized formats for furnishers to use when providing information to the CRAs.[63] The purpose of these reporting languages has been "to facilitate the routine provision of accurate and complete information" using automated systems.[64] The industry's adoption of a standardized reporting language, in turn, enabled the use of statistical scoring, and by the early to mid-1990s, the use of statistical scoring based on the contents of consumer credit reports became the norm across consumer financial products.[65]

Congress amended the FCRA in 1996.[66] The purpose of these reforms was to create additional means for consumers to correct inaccuracies in their reports and to better regulate both CRAs and furnishers under a unified national scheme.[67] This amendment extended liability under the

57 *See* Chi Chi Wu & Richard Rubin, *The Latest on Metro 2: A Key Determinant as to What Goes into Consumer Reports*, NAT'L CONSUMER L. CTR. (Oct. 17, 2018), https://library.nclc.org/latest-metro-2-key-determinant-what-goes-consumer-reports.

58 FTC STUDY, *supra* note 13, at 3.

59 *Id.*

60 *Id.*

61 *Id.*

62 *About CDIA*, CONSUMER DATA INDUS. ASS'N, https://www.cdiaonline.org/about/about-cdia/ (under "History") (last visited Feb. 3, 2021).

63 *Id.*

64 Wu & Rubin, *supra* note 57.

65 *See* STATEN, *supra* note 11, at 11, 13, 13 n.9.

66 Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2401, 110 Stat. 3009–426 (1996).

67 *See* 141 CONG. REC. S5449–50 (daily ed. Apr. 6, 1995); 15 U.S.C. § 1681t(b) (prohibiting states from regulating the time to complete reinvestigations and the responsibilities of furnishers, among other subjects); Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellant and Urging Reversal, Nelson v. Chase Manhattan Mortg. Corp., 282 F.3d 1057, 2000 WL 33980550, at *15 (arguing that the 1996 FCRA amendments "clearly evince[] a congressional intent to make furnishers liable to consumers for specified FCRA violations").

FCRA to furnishers,[68] enabled state attorneys general to enforce the FCRA,[69] and preempted state regulation of the consumer credit reporting industry in key areas to provide for uniform national regulation.[70]

By the mid-1990s, the consumer credit reporting system began to have the essential features it does today. The system and its regulation were predominantly national in scope, it utilized a standard reporting format, and it was highly automated. Information in the system was used to develop statistical scoring models (the most prominent being FICO's scoring model) to categorize consumers on a uniform basis for risk assessment. At this point, the CRAs had developed what economist Daniel Klein characterized as "the most standardized and most extensive reputational system humankind has ever known."[71]

The development of risk-based pricing effectively ended the industry practice of pricing credit cards at one or two interest rates, which had effectively treated consumers as though they all posed the same risk of default.[72] A 2003 report sent from the Federal Reserve Bank of Philadelphia noted:

> the discount that lower risk customers receive on their APR has increased significantly since the early days of risk-indifferent pricing. The lowest risk customers, who once paid the same price as high-risk customers, now enjoy rate discounts that can reach more than 800 basis points. At the other end of the risk spectrum, these strategies have enabled issuers to grant more people (e.g., immigrants, lower income consumers, those without any credit experience) access to credit, albeit at higher prices.[73]

During the 1980s and 1990s, households in the lower half of the income distribution saw a 200–300% increase in access to general-purpose

68 *See* Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellant and Urging Reversal, *Nelson*, 2000 WL 33980550, at *15 ("Before those amendments, the FCRA imposed no specific duties on furnishers of information.").

69 15 U.S.C. § 1681s(c)(1) (authorizing state enforcement of the FCRA). Despite this amendment, there do not appear to be any examples of state attorneys general initiating enforcement actions against furnishers.

70 *Id.* § 1681t.

71 Daniel B. Klein, *Promise Keeping in the Great Society: A Model of Credit Information Sharing*, 4 Econ. & Pol. 117, 121 (1992).

72 Mark Furletti, Credit Card Pricing Developments and Their Disclosure, Discussion Paper 6 (2003), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/creditcardpricing_012003.pdf?la=en&hash=C681C5E95BF6626D8C0FDB0EFFBE0521.

73 *Id.* at 6–7 (footnote omitted).

credit cards[74] and a 30–70% increase in access to other types of consumer loans.[75] All told, the cost of consumer credit, in general, declined dramatically during this period while lower-income households, in particular, gained access to consumer credit products that had previously been unavailable.

B. *Principal Actors and Their Rights and Obligations Under the FCRA*

The consumer credit reporting system is essentially comprised of four actors, each of whom plays a role in generating, disseminating, and using consumer credit information. First, consumers of credit borrow credit and engage in other behaviors deemed relevant by CRAs and furnishers. Second, data furnishers, such as creditors, collection agencies, and public sources, record the financial behaviors of their consumer borrowers and send this information to the CRAs.[76] Third, the CRAs receive such information from furnishers and compile credit reports to sell to users. Finally, users rely on credit reports to make decisions about whether or not to extend credit, offer insurance, or offer employment.[77] The FCRA defines the legal relationships among these actors and assigns different duties and rights to each of the actors, creating a role for each actor in ensuring that the information circulated in the system accurately reflects the behavior and creditworthiness of consumers. Together, the interplay of these relationships forms the legal ecosystem of the consumer credit reporting system.

74 THOMAS A. DURKIN ET AL., CONSUMER CREDIT AND THE AMERICAN ECONOMY 302–04 (2014).

75 STATEN, *supra* note 11, at 5.

76 FTC STUDY, *supra* note 13, at 2–3.

77 Permissible purposes for disclosing a consumer report include the consideration of an intended credit transaction, employment purposes, underwriting of insurance involving the consumer, issuance of a government license or other benefit, evaluating the credit risk of an existing credit obligation, and other legitimate business purposes related to a transaction initiated by the consumer or an open account held by the consumer. 15 U.S.C. § 1681b(a)(3).

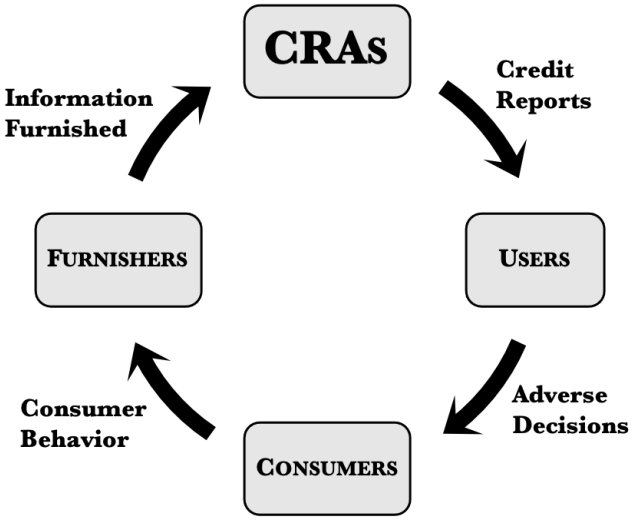

Figure 1: Consumer Credit Information Circle

i. Consumers

The first actor in the consumer credit reporting process is the consumer, the individual subject of a credit report. Each individual consumer's behavior on credit lines and personal information forms the basis of the consumer credit information system. Consumers have the greatest personal interest in maintaining the integrity of their individual reports and are proximate to much of the important underlying information which the reports seek to reflect. For these reasons, many argue that consumers are in the best position to ensure the accuracy of their reports, although I will address in Section II.A why this is not necessarily the case.[78] Accordingly, quality control under the FCRA is primarily driven by consumer disputes,[79] and the FCRA provides for attorney's fees upon successful enforcement of consumer rights under the Act.[80] This policy assumes individual consumers' familiarity with the information reported about their credit history and then relies on consumer disputes and, if needed, litigation as the primary mechanism for protecting the integrity of the credit reporting system.[81]

The FCRA attempts to ensure consumers are well-informed about the contents of their credit reports. First, the FCRA requires that each CRA

78 *See, e.g.*, Staten & Cate, *supra* note 9, at 20.
79 *Id.* at 21–22.
80 15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2).
81 Staten & Cate, *supra* note 9, at 12, 15, 21–22.

provide one free credit report per year to any consumer upon request.[82] Second, furnishers are obligated to notify consumers when furnishing "negative information" about them to a CRA.[83] Negative information is defined as "information concerning a customer's delinquencies, late payments, insolvency, or any form of default."[84] Critically, however, the FCRA fails to give consumers a cause of action against furnishers for failure to uphold this duty.[85] Third, in the event that a user of a credit report makes an adverse decision (e.g., a denial of credit) based on the contents of a consumer's credit report, the FCRA obligates the user to provide the consumer with a notice,[86] which must include the consumer's credit report, score, and the key factors impacting the score.[87] This process aims to make consumers aware of factors preventing them from accessing credit, insurance, or employment. However, because the notice requirement is only triggered when there is an adverse decision, the consumer may never be notified of negative items that do not result in a denial of credit but do result in a higher interest rate.[88] These three vehicles—the free credit report, the notice of furnishing negative information, and the user's automatic notice of adverse decision—are the means the FCRA provides to consumers to discover damaging inaccuracies in their credit reports and demonstrate the underlying policy of having consumers police the accuracy of their own reports.

Upon discovering such information, the consumer has two options for lodging a dispute.[89] However, only one of these gives rise to a private right of action.[90] To pursue the enforceable path, first, the consumer must dispute the alleged error with the CRA that issued the report containing the inaccuracy.[91] The CRA is then under a duty to conduct a reasonable

82 15 U.S.C. §§ 1681g, 1681j.
83 *Id.* § 1681s-2(a)(7).
84 *Id.* § 1681(a)(7)(G)(i).
85 *See id.* § 1681s-2(c).
86 *Id.* § 1681m(a).
87 *Id.* §§ 1681m(a), 1681g(f).
88 *Id.* § 1681m(a); STATEN & CATE, *supra* note 9, at 45.
89 Consumers have the right to dispute information to a CRA, 15 U.S.C. § 1681i(a)(1), or, under certain circumstances, with the furnisher of the disputed information directly, *id.* § 1681s-2(a)(8); 12 C.F.R. § 1022.43 (2020); *see also* 15 U.S.C. § 1681s-2(b) (concerning disputes forwarded from a CRA to a furnisher).
90 *Compare* 15 U.S.C. § 1681s-2(a)(8) (providing consumers with the right to dispute information directly with the furnisher), *and id.* § 1681s-2(c) (exempting furnishers from private action for noncompliance with any provision under 15 U.S.C. § 1681s-2(a)), *with id.* § 1681i (no exemption from private liability in the CRA duties), *and id.* § 1681s-2(b) (no exemption from private liability for disputes received from CRAs).
91 *Id.* § 1681i(a)(1)(A).

investigation.[92] Unless the CRA determines the dispute is frivolous or irrelevant,[93] the CRA must send the dispute on to the original furnisher of the information.[94] The furnisher then bears a duty to investigate the dispute.[95] The furnisher may then confirm the accuracy of the information furnished, correct the disputed information, or report that it is unable to confirm the accuracy of an item of information.[96] In the event a furnisher cannot confirm the accuracy of an item or does not respond to a request, then the item must be deleted or modified by the CRA.[97] The consumer's second option for lodging a dispute is to do so directly with the furnisher, but doing so does not create a duty that can be enforced by a private right of action.[98] Consequently, if a furnisher fails to investigate a dispute that is lodged directly with it, the consumer is left without legal recourse.

The options available to the consumer are modeled in *Figure 2*. This diagram expands on *Figure 1* and the general flow of information through the consumer credit reporting system by showing the points at which the consumer may intervene by lodging a dispute and whether these disputes are enforceable by private right of action.

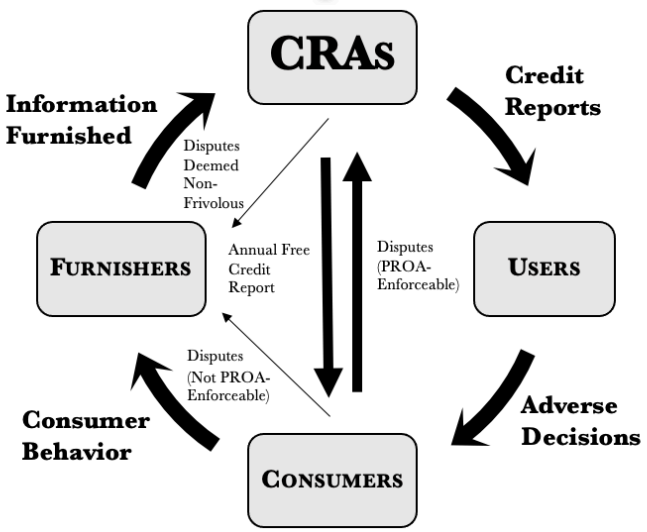

Figure 2: Consumer Credit Information Complex Circle

92 *Id.*
93 *Id.* § 1681i(a)(3)(A).
94 *Id.* § 1681i(a)(2)(A).
95 *Id.* § 1681s-2(b)(1).
96 *Id.* § 1681s-2(b)(1)(C)–(E).
97 *See id.* §§ 1681i(a)(5)(A), 1681s-2(b)(1)(E).
98 *Id.* §§ 1681s-2(a)(8), 1681s-2(c).

ii. Furnishers

The second actor is the furnisher. Anyone who provides information about a consumer to a CRA is a furnisher under the FCRA.[99] Furnishers are often, though not necessarily, creditors, and they provide information about credit transactions with their customers to CRAs.[100] As the original authors of information, creditor-furnishers have the ability to consult and retain the supporting documentation.[101] Furnishers do not bear the costs of inaccuracies, at least insofar as they are acting as furnishers. Although CRAs are likely to care whether the information provided by the furnisher is accurate, without access to the furnisher's underlying account level information, CRAs do not have the ability to verify accuracy. Consequently, creditor-furnishers could satisfy their obligations under a reciprocal agreement so long as they provide information that doesn't appear obviously flawed to the CRA.

Furnishers, like CRAs, are required to refrain from submitting information they know or have reason to believe may be inaccurate.[102] However, the furnisher's requirement does not apply if an address where consumers may submit disputes is posted.[103] Beyond this simple prohibition, the FCRA requires that furnishers[104] and CRAs implement reasonable procedures to ensure the accuracy of information.[105] The regulations pertaining to furnishers require information to be furnished with both accuracy and integrity,[106] meaning that furnished information must be accompanied with sufficient context to ensure it is interpreted correctly.[107]

Beyond prohibiting furnishers from knowingly furnishing

99 *See id.* § 1681s-2.

100 *Overview – For Furnishers of Data*, CONSUMER DATA INDUS. ASS'N, https://www.cdiaonline.org/resources/furnishers-of-data-overview/ (last visited Mar. 12, 2021) ("A data furnisher is an entity that reports information about consumers to consumer reporting agencies (CRAs), which may include credit bureaus, tenant screening companies, check verification services, medical information services, etc."); Wu, *supra* note 2, at 142 ("Furnishers include banks, credit card companies, auto lenders, collection agencies or other businesses.").

101 Certain furnishers, however, lack the underlying information to support the information they furnish. This situation may arise either because the furnisher has failed to retain the information or because the furnisher is reporting an account which they have acquired from another firm, as would be the case with a debt collector. Wu, *supra* note 2, at 152.

102 *See* 15 U.S.C. §§ 1681e(b), 1681s-2(a)(1)(A).

103 *Id.* § 1681s-2(a)(1)(C).

104 *Id.* § 1681s-2(e)(1)(b).

105 *Id.* § 1681e(b).

106 *Id.* § 1681s-2(e)(1).

107 12 C.F.R. § 1022.41(d) (2020).

inaccurate information, the FCRA specifically mandates the development of furnisher regulations addressing the accuracy and integrity of furnished information.[108] The regulations define "accuracy" to mean that information a furnisher provides to a consumer reporting agency must, among other things, correctly "[r]eflect[] the consumer's performance and other conduct with respect to the account or other relationship."[109] "Integrity" is defined as information that is, among other things, "furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report."[110]

Appendix E to Regulation V instructs furnishers on guidelines they should follow when establishing their policies and procedures regarding accuracy and integrity.[111] Among these is a requirement that the furnisher "[i]dentify [its] practices or activities . . . that can compromise the accuracy or integrity of information furnished to consumer reporting agencies[,]" including by "[c]onsidering any feedback received from [CRAs], consumers, or other appropriate parties."[112] While furnishers are not under a duty to survey for such information, the agencies which promulgated Regulation V do expect furnishers to review any such information actually in their possession.[113] Furnishers have a duty to update these policies and procedures "as necessary to ensure their continued effectiveness."[114] In particular, the agencies which promulgated Part 1022 expect furnishers to review and update their policies and procedures when they have identified significant deficiencies.[115] Finally, the furnishers should consider the impact their policies and procedures have on consumers when implementing them.[116]

However, the furnisher's duties to ensure accuracy and integrity are exempted from the civil liability provision for negligent or willful noncompliance and therefore are not enforceable by a private right of

108 15 U.S.C. § 1681s-2(e).
109 12 C.F.R. § 1022.41(a) (2020).
110 *Id.* § 1022.41(d).
111 *Id.* § 1022 app. E(II).
112 *Id.* § 1022 app. E(II)(a)(3).
113 Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 74 Fed. Reg. 31,484, 31,495 (July 1, 2009) (to be codified at 12 C.F.R. pt. 222).
114 12 C.F.R. § 1022.42(c) (2020).
115 Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 74 Fed. Reg. at 31,493.
116 12 C.F.R. § 1022 app. E(II)(a)(5) (2020).

action.[117] Further, states are preempted from creating a private right of action for their residents to act upon.[118] Finally, other duties created by common law or statute are largely precluded from application to the credit reporting field by the FCRA.[119]

The exemption does leave a private right of action available for noncompliance with the furnisher's investigation duty upon notice of a dispute received from a CRA.[120] While many courts hold that a plaintiff must first prove that disputed information is inaccurate in order to hold furnishers liable for a failure to reasonably investigate a dispute,[121] the fact that an investigation incorrectly deems information accurate—despite reasonable investigative procedures—is not sufficient to establish liability.[122] Instead, the furnisher is liable only if there is an uncorrected inaccuracy and the investigation procedures were unreasonable.[123] In other words, a furnisher is only liable for failing to fix a mistake if reasonable procedures would have caught and corrected the issue. Although, if a furnisher determines that disputed information is false or "cannot be verified," the furnisher must notify the CRAs of this result.[124] Further, some circuits have used the details of the notice provided by the CRA to determine what a reasonable investigation requires.[125] Ultimately, the investigation duties do not regulate

117 15 U.S.C. § 1681s-2(c); *see also id.* § 1681s-2(d) (limiting enforcement to actions brought by designated federal and state agencies).

118 *See, e.g.*, Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181, 188–89 (D. Mass. 2006) (finding that a Massachusetts statute imposing a duty on furnishers resembling that of the FCRA was preempted insofar as it provided a private right of action).

119 *See* 15 U.S.C. § 1681t(b); *see also, e.g.*, Barbieri v. Wells Fargo & Co., No. 09-cv-3196, 2014 U.S. Dist. LEXIS 176835, at *21 (E.D. Pa. Dec. 22, 2014); Grossman v. Trans Union, LLC, 992 F. Supp. 2d 495, 497–99 (E.D. Pa. 2014).

120 15 U.S.C. §§ 1681s-2(b)(1), (c).

121 Pittman v. Experian Info. Sols., Inc., 901 F.3d 619, 629 (6th Cir. 2018).

122 *See* Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1161 (9th Cir. 2009) ("An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate.").

123 *Id.*

124 15 U.S.C. § 1681s-2(b)(1).

125 Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926–27 (8th Cir. 2011); *see also* Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 38 (1st Cir. 2010). *But see* Humphrey v. Trans Union LLC, 759 F. App'x 484, 491 (7th Cir. 2019) (finding that a reasonable jury could conclude that furnisher's lack of information about the nature of dispute was due to furnisher's "own failure to conduct a reasonable investigation, which should have turned up [consumer]'s letters, documentation about his phone calls, and his rejected applications"); Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016) ("[W]e reject the proposition that a furnisher may truncate its investigation simply because the CRA failed to exhaustively describe the dispute in its § 1681i(a)(2) notice.") (citing Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1157 n.11 (9th

the quality of the information but only the quality of the investigations. The investigation duties themselves can vary in strenuousness depending on the jurisdiction.[126]

In the absence of case law stemming from private litigation interpreting the accuracy duties of furnishers, the parallel duties of CRAs, as articulated in case law, are a reasonable and necessary basis for discerning the duties of furnishers. Therefore, we turn to describing the duties of CRAs in order to inform the duties of furnishers.

iii. CRAs

The third actor is the CRA. CRAs receive information from furnishers and organize it into a single report covering each consumer. CRAs have an interest in maintaining the integrity of the system since the accuracy and completeness of the reports they sell is the basis for their business. However, given the high degree of concentration in the market and the large volume of information recorded,[127] competition for accuracy is likely to be both expensive and poorly rewarded. As discussed above, the FCRA requires CRAs to investigate the consumer disputes submitted to them.[128] However, there is reason to believe that these dispute investigations are minimal at best.[129] The FCRA also requires CRAs to implement

Cir. 2009)).

126 *Compare* Ritchie v. Taylor, 701 F. App'x 45, 48 (2d Cir. 2017) ("Ritchie argues . . . FCRA required them to 'conduct an investigation with respect to the disputed information,' 'review all relevant information provided, and report the results of the investigation to [Experian].' . . . They did all those things. That they did so in as little as two minutes does not mean that they violated the statute."); *with* Hinkle v. Midland Credit Mgmt., Inc., 827 F.3d 1295, 1303 (11th Cir. 2016) ("These definitions support the conclusion that § 1681s-2(b) requires some degree of careful inquiry by furnishers of information. In particular, when a furnisher does not already possess evidence establishing that an item of disputed information is true, § 1681s-2(b) requires the furnisher to seek out and obtain such evidence before reporting the information as 'verified.'"); Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 430 (4th Cir. 2004) (quoting Am. Heritage Dictionary 920 (4th ed. 2000) ("The key term at issue here, 'investigation,' is defined as '[a] detailed inquiry or systematic examination.'").

127 Fed. Trade Comm'n & the Bd. of Governors of the Fed. Reserve Sys., Report to Congress on the Fair Credit Reporting Act Dispute Process 2–3 (2006) [hereinafter FTC 2006 Report]; Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, 89 Fed. Reserve Bull. 47, 49 (2003).

128 15 U.S.C. § 1681i(a)(1)(A).

129 *See* Wu, *supra* note 2, at 166 ("What these depositions and internal credit bureau documents show is that their employees are no more than data entry clerks in the dispute and investigation process. None of the credit bureaus permit these clerks to consider and exercise discretion over a consumer's dispute.").

reasonable policies and procedures to ensure the "maximum possible accuracy" of information included in their reports in the first place,[130] as discussed further below. Unfortunately, despite their duties to ensure the accuracy of the information, CRAs do not "exercise virtually any quality control over the information initially provided to them by furnishers."[131] The FCRA emphasizes the responsibility of the CRAs by exposing them to private enforcement. Requiring consumers to submit disputes to the CRAs in order to create an enforceable right to a reinvestigation places the CRA in the middle of quality control. Congress likely decided to put CRAs in this position because they are specialists.

The FCRA places duties on CRAs as authors of information circulated in the system. As with furnishers, the FCRA requires CRAs to ensure that information is accurate whether or not a consumer submits a dispute.[132] CRAs also must avoid submitting information they know or have reason to believe may be inaccurate.[133] Like furnishers, CRAs must also implement reasonable procedures to ensure the accuracy of information. The section pertaining to CRAs specifically refers to ensuring "maximum possible accuracy."[134]

In order to hold a CRA liable for inaccuracies in a credit report, a plaintiff must first establish that the information falls below the standard of maximum possible accuracy, either because it is false outright, or because, although technically true, the manner in which it is furnished is likely to mislead users.[135] Second, a plaintiff must establish that the CRA failed to implement reasonable procedures.[136] This can be judged by weighing the seriousness of the information, typically measured by the impact it would have on the consumer's ability to access credit, against the burden of attempting to confirm or clarify the information.[137] Finally, the inaccuracy must have caused the plaintiff's injury.[138] While the loss of economic opportunities caused by an inaccuracy is an obvious means to demonstrate injury, an injury may also be shown by the emotional distress consumers face

130 15 U.S.C. § 1681i(e)(b).

131 Wu, *supra* note 2, at 152.

132 *See* 15 U.S.C. § 1681e(b) (the CRA accuracy rule); *id.* § 1681s-2; 12 C.F.R. § 1022.41 (2020) (the furnisher accuracy and integrity rule).

133 *See* 15 U.S.C. § 1681e(b).

134 *Id.* § 1681e(b).

135 *See, e.g.*, Cortez v. Trans Union, LLC, 617 F.3d 688, 708–09 (3d Cir. 2010).

136 *See* Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996), *abrogated on other grounds by Cortez*, 617 F.3d at 721 n.39.

137 Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984) (quoting Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982)).

138 *Philbin*, 101 F.3d at 963.

in having to repair their reputations.[139] Ultimately, CRAs must implement robust procedures which ensure (1) that the information provided in reports is true and is likely to be correctly interpreted by a user, and (2) that the CRA's procedures must take items of information that have a greater impact on the lives of consumers more seriously than those which have only slight impacts. To understand the meaning of the FCRA's requirements on CRAs in practice, we must consider how the courts have interpreted its provisions.

Most circuits have weighed in on the meaning of the term "maximum possible accuracy," but circuits are split on whether technical accuracy qualifies as maximum possible accuracy. Some distinguish the standard of maximum possible accuracy from simple or technical accuracy.[140] In *Pinner v. Schmidt*, the U.S. Court of Appeals for the Fifth Circuit explained the distinction as the difference between reporting that "a [consumer] was 'involved' in a credit card scam" and reporting that the consumer was "one of the victims of the scam."[141] The approach, borne out of *Pinner v. Schmidt*, requires that CRAs do more than merely report information that is technically accurate; instead, it imposes liability when CRAs report technically accurate information that nevertheless is likely to mislead users and harm consumers.[142] The Third Circuit, in *Cortez v. Trans Union*, defined the meaning of "maximum possible accuracy" by holding that when the information reported, despite being technically accurate, could easily be interpreted to mean something contrary to actual fact and detrimental to the consumer who is the subject of the report, it does not meet the "maximum possible accuracy" standard.[143] In addition, information

139 *Id.* at 962; *Cortez*, 617 F.3d at 701, 719.

140 Pedro v. Equifax, Inc., 868 F.3d 1275, 1281 (11th Cir. 2017); *Cortez*, 617 F.3d at 709; Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1163 (9th Cir. 2009); Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 415 (4th Cir. 2001); Sepulvado v. CSC Credit Servs., Inc., 158 F.3d 890, 895 (5th Cir. 1998); Pinner v. Schmidt, 805 F.2d 1258, 1261, 1263 (5th Cir. 1986) (quoting Alexander v. Moore & Associates, Inc., 553 F.Supp. 948, 952 (D. Haw. 1982)); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984). *But see* Turner v. Experian Info. Sols., Inc., No. 17-3795, 2018 U.S. App. LEXIS 5395, at *8 (6th Cir. Mar. 1, 2018); Dickens v. Trans Union Corp., 18 F. App'x 315, 318 (6th Cir. 2001) (quoting Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1157 (11th Cir. 1991) (holding that "a credit reporting agency satisfies its duty under section 607(b) if it produces a report that contains factually correct information about a consumer that might nonetheless be misleading or incomplete in some respect")).

141 *Pinner*, 805 F.2d at 1263 (quoting *Alexander*, 553 F.Supp. at 952).

142 *Cortez*, 617 F.3d at 709–10.

143 *Id.* at 709; *see also Dalton.*, 257 F.3d at 415; Schweitzer v. Equifax Info. Sols. LLC, 441 F. App'x 896, 902 (3d Cir. 2011) (quoting Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 148 (4th Cir.2008)) (citing *Dalton*, 257 F.3d at 415); *Sepulvado,* 158 F.3d at 895 ("A credit entry may be 'inaccurate' within the meaning of the statute either because it is patently incorrect, or because it is misleading in such a way and to such an extent

that is arguably technically accurate may be considered to be beneath the standard of "maximum possible accuracy" if the manner in which the information is furnished is inconsistent with standard industry usage and creates a materially misleading impression.[144] Consequently, in most circuits that have defined maximum possible accuracy in their case law, the term is understood to require that information be unlikely to create a misleading impression that would be detrimental to the consumer-subject of the report.

Some circuits, however, have articulated a technical accuracy defense for CRAs under the CRA accuracy rule, holding that a CRA has not violated the maximum possible accuracy rule if the information is technically accurate.[145] In *Dickens v. Trans Union*, Trans Union reported that a loan on the plaintiff's credit report had been discharged in bankruptcy.[146] The Sixth Circuit Court of Appeals held that this report was accurate despite the fact that the plaintiff in *Dickens* had not filed for bankruptcy and was only the cosigner on a loan that was discharged in bankruptcy and later paid off in full.[147] Although the information reported by Trans Union would likely mislead a user of the credit report in a way that would be likely to harm the consumer, the Sixth Circuit found that the information was technically accurate and therefore satisfied the CRA accuracy rule.[148]

In addition to interpreting the accuracy provision, the court has considered the reasonableness of CRAs' procedures to ensure accuracy. The reasonableness of a CRA's procedures may be determined by weighing the seriousness of the inaccuracy at issue against the difficulty presented by correcting or preventing the inaccuracy.[149] Under the *Koropoulos* test, the greater the inaccuracy's potential to mislead and the more readily available the clarifying information is, the higher the CRA's burden to clarify their reporting.[150] Conversely, if the inaccuracy is "relatively insignificant," then the CRA need not undertake a "burdensome task [to] provide clarifying" information.[151]

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that it can be expected to adversely affect credit decisions.").

144 Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002) (referring to industry usage in attempting to determine how a reported term would be understood, and consequently whether such term would be accurate).

145 *See, e.g.*, *Dickens*, 18 F. App'x at 318.

146 *Id.* at 316.

147 *Id.* at 318.

148 *Id.*

149 *See* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 42 (D.C. Cir. 1984) (quoting Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982); *see also* Pedro v. Equifax, Inc., 868 F.3d 1275, 1283–84 (11th Cir. 2017) (Rosenbaum, J., concurring); Henson v. CSC Credit Servs., 29 F.3d 280, 285–86 (7th Cir. 1994).

150 *Koropoulos*, 734 F.2d at 42 (quoting *Alexander*, 553 F. Supp. at 952).

151 *Id.*

In sum, most circuits, though not all, require CRAs to ensure that the information they report is not likely to be misunderstood in a way that harms the consumers. In both designing and following the procedures required to ensure accuracy, the CRA must weigh the seriousness of the information at hand and its potential to harm the consumer in question against the difficulty of trying to confirm or correct the information. The interpretation of CRAs' duties under the FCRA provides a useful model for the legal duties of furnishers following possible reforms placing greater responsibility on them, which will be discussed *infra* in Part III.

iv. Users

The final actor in the consumer credit reporting system is the user, who receives a consumer's report upon request and uses it for one of the statutorily sanctioned purposes.[152] Users have a substantial interest in the accuracy of the credit reporting system; however, they normally lack access to the supporting information behind the reports and therefore can only play a limited role in ensuring the accuracy of reports.[153] Accordingly, the FCRA only requires users to provide adverse decision notices to consumers.[154]

Figure 3: Consumer Credit Information Ladder

Critically, the primary use that credit reports are designed for is to support risk-based pricing of credit.[155] Bearing in mind that the primary users of credit reports are creditors,[156] and given that furnishers are also predominantly creditors of one kind or another,[157] it is apparent

152 *See* 15 U.S.C. § 1681b(a)(3) (including the extension of credit, employment purposes, determining eligibility for government licenses or other purposes, assessing the risk associated with a current credit obligation, and other legitimate business needs related to transactions which the consumer has initiated).

153 *See* STATEN, *supra* note 11, at 10.

154 15 U.S.C. § 1681m(a).

155 *See* STATEN, *supra* note 11, at 10–11.

156 *Id.*

157 *See* FTC 2006 REPORT, *supra* note 127, at 4 ("Examples of furnishers include banks,

that the furnisher and the user are often very similar firms. As such, we can reconceive the system as a ladder rather than as a circle, with furnisher-users positioned in the middle and communicating directly with both the consumers and the CRAs. This dynamic points to the possibility that by increasing the responsibility of furnishers for ensuring the accuracy of information, furnishers, in their capacities as users, would actually benefit from increased accuracy, even if their compliance costs increase. This will be discussed in Part III.

Ultimately, the FCRA creates a network of responsibilities among the principal actors within the consumer credit information system. The Act places primary responsibility for ensuring the quality of information on the consumers themselves and on the CRAs while leaving furnishers with a realistic risk of liability only when they fail to properly reinvestigate a disputed item of information.

C. *Types and Prevalence of Credit Report Errors*

Before describing the types of errors, it is first necessary to set out what constitutes an error. The FTC provides two definitions of errors in their 2012 study on credit report errors.[158] The most conservative definition used by the FTC showed that 9.7% of study participants had at least one confirmed material error, while a less conservative definition showed a rate of 21%.[159]

All errors in the consumer reporting system, even small ones, degrade the overall quality of the reports, the confidence lenders can place on them, and the ability to accurately score across large populations. The implementation of risk-based pricing of credit has contributed to the increasing availability and decreasing cost of consumer credit.[160] Therefore, errors in consumer credit reports, especially if widespread, could interfere with these beneficial developments. However, errors vary significantly in the cause, magnitude, and directional impact on the consumer.

As categorized by their causes, errors can be regarded as clerical, systematic, descriptive, or willful. The simplest cause is a clerical error.

thrifts, credit unions, savings and loan institutions, mortgage lenders, credit card issuers, collection agencies, retail installment lenders, and auto finance lenders.").

158 FTC STUDY, *supra* note 13, at ii, iv ("The most conservative definition of a confirmed error is the situation where the consumer disputes an item . . . and the CRA agrees with every element of the consumer dispute and follows all of the consumer's instructions . . . *A less conservative definition*: Defining a consumer with a 'confirmed material error' as someone who identifies, disputes, and has any modification made to a report.").

159 *Id.* at iv.

160 STATEN, *supra* note 11, at 4.

Errors caused purely by accident are likely, though not guaranteed, to be isolated incidents and, if discovered, to be correctable. However, clerical errors are unlikely to be detected by consumers, and in a correction system driven by consumer disputes, none of the other actors are likely to detect or correct such an error on their own.

Systematic errors are more complex, involving the implementation of policies and procedures that result in the repeated furnishing or reporting of information in a misleading manner. The Consumer Financial Protection Bureau's (CFPB) suit against student loan servicer Navient provides an example.[161] Navient, as a student loan servicer, was frequently responsible for furnishing information about certain loan discharges[162] that are required when a student loan borrower is totally and permanently disabled. [163] According to the CFPB's complaint, the special comment code (from the Metro 2 reporting language) Navient used to report student loans that were discharged due to a determination of total and permanent disability was misinterpreted by CRAs as an indication of default on the loan.[164] Navient's use of this faulty Metro 2 code for all the student loans that were discharged due to disability had a systematic impact across a broad population of consumers. With systematic errors related to reporting codes, detection by consumers is especially unlikely because a consumer is unlikely to access or understand the coded communication between furnishers and CRAs.

Next, an accuracy error may be caused by the descriptive details, or lack thereof, in the information provided. The error at issue in *Dickens v. Trans Union* is an example of this type of error. In that case, as discussed in Section I.B.iii, a loan on the plaintiff's credit report was reported to have been discharged in bankruptcy when the plaintiff was only the cosigner on a loan that was discharged in bankruptcy, and that loan was later paid off in full by the cosigner.[165]

Unlike the aforementioned errors, some are intentional and intended to harass or coerce a consumer into paying a debt. Debt collectors, in particular, are likely to act or threaten to act as furnishers in order to exact leverage by affecting a consumer's credit report.[166] Such behavior, while potentially significant, has not received significant attention in the

161 *See* Complaint for Permanent Injunction and Other Relief at 3–4, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM, (M.D. Pa. Jan. 18, 2017), 2017 WL 191446 [hereinafter *Navient Complaint*].

162 *Id.* at 31–32.

163 *Total and Permanent Discharge (TPD) 101*, Fed. Student Aid (last visited Feb. 28, 2020), https://www.disabilitydischarge.com/TPD-101.

164 *Navient Complaint*, *supra* note 161, at 31–34.

165 Dickens v. Trans Union Corp., 18 F. App'x 315, 318 (6th Cir. 2001).

166 *See* Wu, *supra* note 2, at 153–55.

scholarship of this area and, unfortunately, is beyond the scope of this article.

Next, we turn to describing errors by their magnitude. A 2012 FTC report which assessed the impact of correcting perceived inaccuracies demonstrates that consumer-detected errors often have a considerable impact on credit scores.[167] Of the study's 1,001 randomly selected participants, 26% found a "potentially material error," and 21% of the participants had a modification to a "credit report[] after the dispute process."[168] Of the reports that experienced a score change, 61% had a score increase of more than ten points, and 29% had a score increase of more than twenty-five points.[169] Another aspect of the report demonstrated that in about one in six reports containing confirmed errors, those errors were significant enough to substantially affect the consumer-subject's access to credit. [170] These substantial errors affect about one in every twenty consumers, substantially and unjustifiably interfering with these consumer's ability to access credit, insurance policies, and employment opportunities.[171]

It is worth noting that while most confirmed errors on credit reports which result in a score change do not result in a change in credit risk classification, the prevalence of inaccurate information and distorted scoring is likely to raise the prevailing cost of credit. Although such errors may have small to non-existent effects on the individual consumer, in the aggregate, these degrade the quality of the reporting system and interfere with the benefits of accurate risk-based pricing, inflating the cost of consumer credit.

Regarding the directional impact of errors, there are three principal types: those which are derogatory, or which hinder an individual consumer's ability to access credit; errors which are beneficial, or which unjustifiably enhance a consumer's ability to access credit; and those which have no impact one way or the other. While this analysis is largely focused on derogatory errors, beneficial errors are likely to cause consumer harm in the aggregate by causing credit to be misallocated and raising the uncertainty in statistical scoring models, both of which can be expected to raise the prevailing cost of credit. Errors that are neither derogatory nor beneficial are not uncommon.[172] While these errors are likely to have smaller impacts, they still raise the possibility of distortionary effects in the aggregate.

167 FTC STUDY, *supra* note 13, at iv–v.

168 *Id.* at i.

169 *Id.* at v.

170 *Id.* at iv–v. The scale of this difference is suggested by FICO's reporting that as of May 2, 2012 "the interest rate for a five year auto loan might be as low as 3.701% for consumers with credit scores in the range 720-850 and as high as 17.292% for consumers with credit scores in the range 500-589." *Id.* at 46 n.83.

171 *See id.* at v.

172 *Id.* at iv–v.

II. Assessing the FCRA Framework: Making the Case for Amendments to the FCRA

The organization of the FCRA has several notable consequences. First, it relies too heavily on consumer disputes, which are insufficient for several reasons, as a means of enforcement. Second, it effectively positions CRAs, who have little control over the accuracy of the information in credit reports, as gatekeepers for consumer disputes, leaving furnishers without a privately enforceable duty to ensure the accuracy of the information they furnish. Finally, the regulatory framework worsens the extant market distortions and fails to incentivize the furnishing of accurate credit report information.

A. *Misplaced Reliance on Consumer Disputes*

While the consumer dispute system leverages an individual consumer's familiarity with their own financial affairs and personal information, the consumer dispute is insufficient to correct inaccuracies in many cases. Consumers are unlikely or completely unable to detect errors and are usually poorly incentivized to correct inaccuracies. The FCRA's positioning of the CRAs as gatekeepers further undermines the efficacy of consumer disputes and likely leads to the dismissal of meritorious disputes.

Despite bearing the greatest interest in ensuring the accuracy of reports, many consumers lack specific knowledge about their credit reports.[173] A 2012 study showed only 38% of respondents had requested a copy of their credit report within the previous twelve months,[174] despite the requirement that CRAs provide each consumer with a credit report for free upon request once every twelve months.[175] It is unlikely that the FCRA's requirement that a consumer is notified of a denial of credit adequately addresses this issue, especially because subtler categories of negative errors that do not lead to a denial of credit, which are likely pervasive, do not trigger this requirement.[176] Further, consumer surveys suggest that more than two-thirds of American consumers do not understand the basic purpose of credit reports,[177] and

173 Angela C. Lyons et al., *What's in a Score? Differences in Consumers' Credit Knowledge Using OLS and Quantile Regressions*, 41 J. Consumer Affs. 223, 225–26 (2007).

174 Nat'l Found. for Credit Counseling & Network Branded Prepaid Card Ass'n, *supra* note 36, at 11.

175 15 U.S.C. §§ 1681g, 1681j(a)(1)(A).

176 *See id.* § 1681m(a).

177 *Consumer Understanding of Credit Scores Improves but Remains Poor*, Consumer Fed'n of Am. (July 10, 2008), https://consumerfed.org/press_release/consumer-understanding-of-credit-scores-improves-but-remains-poor-results-of-cfawamu-credit-score-survey/

many erroneously believe that a credit score is determined by factors such as income or age.[178] This suggests that even if consumers check their reports or are notified of denials of credit, they are unlikely to understand their contents and implications. Even if consumers check and understand the significance of their credit reports, consumers are unlikely to detect systematic errors related to coding in Metro 2 because such coding is not reflected in the resulting report. Although some consumers may check their reports, understand the inaccuracies, and wish to dispute them, consumers are also often ill-informed about their rights to submit disputes.[179] In the unlikely case that a consumer does wish to submit a dispute, consumers face substantial hurdles when seeking to enforce their rights in court and will rarely be sufficiently incentivized to do so.[180] Consumers are likely to ignore rather than dispute low-impact errors, judging that the effort involved in filing a dispute is not worth the benefit of correction. Finally, consumer disputes are unlikely to address inaccuracies that benefit consumers because they are unlikely to correct such errors out of self-interest.

In addition to these factors inhibiting the efficacy of consumer disputes, even the consumer disputes that are lodged are unlikely to result in the correction of a furnisher's systematic error. Although the consumer dispute may benefit that individual consumer, there is no private mechanism available to require the furnisher to correct other accounts affected by the same systematic mistake.

The ability of consumer disputes to effectively correct inaccuracies is further diminished by the CRA's role as a gatekeeper under the FCRA. As discussed above, the FCRA lays out a path for consumer disputes which must be followed in order for consumers to enforce their rights.[181] This path requires consumers to send disputes to the CRA issuing the report

("Less than [one-third] of Americans (31%), for example, understand that credit scores indicate risk of not repaying a loan, rather than factors like knowledge of, or attitude toward, consumer credit.").

178 *Id.* ("Significant percentages erroneously believe that credit scores are influenced by income (74%), age (40%), marital status (38%), the state in which they live (29%), level of education (29%), and ethnicity (15%).").

179 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-223, CREDIT REPORTING LITERACY: CONSUMERS UNDERSTOOD THE BASICS BUT COULD BENEFIT FROM TARGETED EDUCATIONAL EFFORTS, 10–11 (2005).

180 Jeffrey Bils, *Fighting Unfair Credit Reports: A Proposal to Give Consumers More Power to Enforce the Fair Credit Reporting Act*, 61 UCLA. L. REV. DISCOURSE 226, 234–37 (2013). These include difficult pleading requirements often calling for facts consumers cannot access and inconsistent interpretations of CRA and furnisher duties in different jurisdictions. *Id.*

181 *See supra* Section I.B.iii.

containing the disputed information.[182] The CRA then has the power to terminate a dispute upon deciding that it is frivolous or irrelevant,[183] and if the CRA determines the dispute may have merit, it must then provide notice to the furnisher of the dispute.[184]

The CRA's notice of the dispute necessarily frames the dispute and informs the furnisher's reasonable investigation.[185] Courts in some jurisdictions have held that the reasonableness of a furnisher's investigation hinges on "what is contained in the CRA's dispute notice as to the nature of the dispute."[186] Therefore, the CRAs must be relied upon not only to correctly diagnose a dispute as frivolous or non-frivolous, and at least in those aforementioned jurisdictions, to accurately convey the dispute to the furnisher. Even in jurisdictions where courts may, depending on the circumstances, expect furnishers to investigate beyond the mere contents of the notice,[187] the CRA's notice still provides the essential context of the investigation. The CRAs are not necessarily reliable partners in advancing disputes, sometimes sending notices to furnishers containing only vague or cursory information.[188] Consequently, especially in those jurisdictions which

182 15 U.S.C. § 1681i(a)(1)(A).

183 *Id.* § 1681i(a)(3).

184 *Id.* § 1681i(a)(2).

185 *See, e.g.*, Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 617 (6th Cir. 2012) ("In *Johnson*, the Fourth Circuit held that electronically confirming only a name and address—as opposed to 'consult[ing] underlying documents such as account applications'—was unreasonable when the furnisher had received information from the CRA explaining that its consumer was disputing her status as a co-obligor on her husband's debt. . . . By contrast, the Seventh Circuit held that a similarly cursory review of internal, electronic documents was reasonable because the CRA provided only 'scant information . . . regarding the nature of [the consumer's] dispute.'") (citations omitted); Gorman v. Wolpoff Abramson, LLP, 584 F.3d 1157, 1160 (9th Cir. 2009) (citing Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 431 (4th Cir. 2004)).

186 Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926–27 (8th Cir. 2011); *see also* Forgues v. Select Portfolio Servicing, Inc., 690 F. App'x 896, 904 (6th Cir. 2017); Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 38 (1st Cir. 2010). *But see* Humphrey v. Trans Union LLC, 759 F. App'x 484, 491 (7th Cir. 2019); Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016).

187 *See, e.g.*, Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1160 (9th Cir. 2009) (citing Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 431 (4th Cir. 2004)).

188 *See, e.g.*, Hinkle v. Midland Credit Mgmt., 827 F.3d 1295, 1306 (11th Cir. 2016) ("Midland also argues that its investigative burden was less extensive because the notice of dispute it received from the CRAs stated only that the GE/Meijer and T-Mobile accounts were '[n]ot his/hers.'"); Edeh v. Midland Credit Mgmt., 413 F. App'x 925, 926 (8th Cir. 2011); Chiang v. Verizon New Eng. Inc., 595 F.3d 26, 38 (1st Cir. 2010) ("[A] more limited investigation may be appropriate when CRAs provide the furnisher with vague or cursory information about a consumer's dispute.").

allow furnishers to limit their investigation based on the notices they receive, the position of CRAs as gatekeepers likely causes some meritorious disputes to go unaddressed.

All told, these issues suggest that broad categories of errors remain unaddressed by the consumer dispute system. Since the consumer dispute regime envisioned by the FCRA can only be an effective protection where consumers check their reports, recognize and understand an inaccuracy when they see one, and take action to dispute it with the CRAs, the realities of consumer knowledge and behavior substantially limit the validity of relying on consumer claims to police inaccuracies in the credit reporting system. In order to achieve the FCRA's goals of fostering a reliable consumer credit reporting system that protects the interests of consumers, a mechanism beyond the consumer dispute framework is needed.

B. *Misguided Emphasis on CRAs Rather than Furnishers*

Furnishers are in an equally good, if not better, position than consumers and CRAs to ensure the accuracy of the information they furnish to CRAs. Furnishers are likely to be in control of their own document retention policies and information practices, giving them control over the documentary support for their information. Given that furnishers are often sophisticated lending institutions with access to and expertise in the Metro formats used to communicate within the system,[189] furnishers should be expected to handle supporting the accuracy of the information they produce. Instead of holding furnishers responsible for the accuracy of the information they produce, however, the FCRA focuses on CRAs, which are generally not responsible for or able to rectify errors.

While the duties of CRAs and furnishers are comparable,[190] the absence of a private right of action to enforce furnishers' duties dilutes the importance of furnisher requirements under the FCRA. The similarities between the duties of furnishers and CRAs under both the FCRA and corresponding regulations[191] demonstrate that the law is concerned both with prohibiting outright falsehood and with preventing technically accurate but misleading information from being circulated. The failure of the FCRA to create a private right of action to enforce the furnishers' duties, however, makes these duties very different in practice from those applicable to the CRAs. Since government enforcement of furnisher deficiencies in any given transaction is unlikely, the system effectively operates without furnishers

189 *See supra* Section I.B.ii.

190 *See supra* Sections I.B.ii, I.B.iii.

191 *See supra* Sections I.B.ii, I.B.iii.

needing to worry about the accuracy of the information they furnish until after the information is disputed, which is a relatively rare occurrence.[192] Absent market-driven incentives or a real possibility of liability, it is unlikely that furnishers will devote additional resources to ensuring the accuracy and integrity of their information.

The FCRA's positioning of the CRA as a gatekeeper of consumer disputes also undermines the FCRA's ability to address issues originating with the furnisher, as previously discussed *supra* at Section II.A. This gatekeeping means that a furnisher, who may be the cause of the error, may never even be made aware of the existence of a dispute.

Congress likely decided to put CRAs in this position because they are specialists in the consumer credit information system. However, the emphasis on CRAs, who normally do not have access to underlying information about a disputed trade line, comes at the cost of leaving furnishers, who do have access to underlying information, without much effective responsibility for maintaining the accuracy of information.

C. *Distorted Incentives Leading to Errors*

Under the current system, there are incentives, both those inherent in the credit reporting market and those created by the FCRA, that are likely to lead to errors. We consider each kind in turn.

The market incentives that apply to furnishers are very weak. First, furnishers do not bear the costs of their own inaccuracies. Even if furnishers are also users of credit reports and therefore bear an interest in the overall integrity of the consumer credit information system, furnishers acting individually do not bear the costs of furnishing inaccurate information, so long as they satisfy their obligations under their information-sharing agreements with CRAs. However, CRAs may not set a high bar for scrutiny in this area. According to consumer advocate Chi Chi Wu, "[a]ny error sent by the furnisher in its computer file automatically appears in the consumer's credit report, even if the information patently contradicts information

192 Wu, *supra* note 2, at 140, 145 ("Indeed, many consumers with errors in their reports do not send disputes because of barriers such as lack of time or resources, educational barriers, and not knowing their rights. In the FTC study discussed above, only one of the consumers who definitely had a major error in her credit report was successfully able to dispute it, despite the assistance of the FTC's consultant. Another consumer filed a dispute on-line and the credit bureau did not respond. The third consumer explained that she did not file a dispute because 'she was a single mother with twins and could not muster the time to file a dispute.' The consultant mused that '[w]e expected that participants would be motivated to have any errors in their credit reports corrected promptly. This did not generally occur.").

appearing in other parts of the credit report."[193] Further, furnishers may be incentivized to provide derogatory information about consumers insofar as this gives them leverage to collect a debt from a consumer. For instance, this occurs when a debt collector "re-ages" a debt, purposefully misrepresenting the date of delinquency so that it falls within the seven-year period wherein it can be reported.[194] This allows the debt collector to use inaccurate negative information to effectively withhold the consumer's access to additional sources of credit. Altogether, because furnishers do not bear the costs of inaccuracy as individual firms, we should expect them to maintain practices that are as cheap as possible to avoid attracting scrutiny from regulators, and under certain circumstances, to manufacture negative information.

Certain errors in credit reports emerge from the concentrated nature of the CRA market. The value of the product CRAs sell—credit reports—depends on the reliability and sufficiency of the reports. Ordinarily, this competitive pressure in the industry would produce a strong incentive to ensure accuracy. However, the CRA market consists primarily of three national CRAs, and just thirty companies make up 94% of the entire market.[195] Therefore, competitive pressures are likely weak in such a concentrated market.

Insofar as competitive pressures do exist, the incentive for accuracy competes with an inherent incentive for CRAs to retain derogatory information. While making lending decisions, a creditor's costs from providing credit to the "wrong" person generally exceed the costs incurred from denying credit to the "right" person.[196] In other words, a creditor is likely to lose more money making a bad loan, that is, if a borrower defaults, than they stand to gain from making a good loan, that is, from interest payments from a non-defaulting borrower. Consequently, lenders are likely

193 Wu, *supra* note 2, at 152.

194 *Id.* at 153.

195 FTC STUDY, *supra* note 13, at 2; *An Overview of Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 1 (2018) (statement of Peggy L. Twohig, Assistant Director of Supervision Policy in the Division of Supervision, Enforcement and Fair Lending, Bureau of Consumer Financial Protection), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act (follow "Download Testimony" hyperlink under "Witnesses").

196 FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTIONS 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 47 (2004), www.ftc.gov/reports/facta/041209factarpt.pdf ("For many lenders, the loss incurred when a borrower defaults is much larger than the profit earned when a borrower repays a loan. Because of this, lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty."); STATEN & CATE, *supra* note 9, at 7.

to value even poorly supported negative information if it helps them avoid making a bad loan. Consequently, the CRAs have a market incentive to retain negative information even if there is a significant possibility of inaccuracy. As the FTC noted in a 2004 report, "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the credit bureaus an incentive to design algorithms that are tolerant of mixed files."[197] In addition, while ensuring the accuracy of reported information is likely expensive in many instances, retaining derogatory information, absent a consumer dispute, is cheap.

In addition to the inherent conditions of the consumer credit information industry, the regulatory environment under the FCRA creates perverse incentives for furnishers. Critics of the regulatory regime point out that, because of the liability imposed on furnishers related to their duties to reasonably reinvestigate furnished information, furnishers can minimize their compliance costs by simply deleting any information that is disputed.[198] This is because even if the furnisher did not conduct an investigation of the disputed item's accuracy, the consumer would have no damages to claim for a violation of the furnisher's investigation duty. Therefore, the furnisher could avoid liability, the expense of litigation, and the costs of conducting investigations by simply deleting disputed items. Therefore, if not designed correctly, increased liability for furnishers and CRAs could theoretically move the consumer credit information system to one in which only positive information, which a consumer will not be likely to dispute, is reported.[199] Because the credit report's greatest value to creditors lies in the negative items of information, positive-only reports would have "sharply reduced predictive power."[200] Although there would be short-term gains for individual consumers, the consequence of this reduction of predictive power would be a concomitant rise in the cost of consumer credit.

For these reasons, amending the FCRA to shift the incentives of furnishers and CRAs would result in an overall improvement in the quality of credit report information. This shift could be achieved by removing the shield on private enforcement of the furnishers' accuracy and integrity duties.

197 Fed. Trade Comm'n, *supra* note 196, at 47.
198 Staten & Cate, *supra* note 9, at 50.
199 *See id.*
200 *See id.* at 51.

D. *Note on the Impact of the COVID-19 Pandemic on the Consumer Credit Reporting System*

The COVID-19 pandemic dramatically impacted the financial resources of American consumers, causing many to delay or diminish payments on their financial obligations.[201] The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) requires certain creditors "to provide forbearance, loan extensions, a reduction in interest rates," or offer other options for repayment.[202] The CFPB has also generally encouraged lenders to "work constructively with borrowers and other customers affected by COVID-19 to meet their financial needs."[203] Such modifications are referred to in the CARES Act as "accommodations."[204] The CARES Act requires that any line of credit affected by such an accommodation, for example, by receiving forbearance, continue to be reported by the lender-furnisher with the status it had prior to the accommodation.[205] The CFPB issued guidance to furnishers on how to comply with the new requirements under the CARES Act and to outline their supervision and enforcement policies.[206] Following this guidance, the CDIA likewise issued guidance to their members on the use of Metro-2 in light of the CFPB's guidance and the CARES Act.[207]

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201 TRANSUNION, THE COVID-19 PANDEMIC'S FINANCIAL IMPACT ON U.S. CONSUMERS, 1, 3–4 (2020), https://www.transunion.com/financial-hardship-study.

202 Liane Fiano, *Protecting Your Credit During the Coronavirus Pandemic*, CONSUMER FIN. PROT. BUREAU (July 29, 2020), https://www.consumerfinance.gov/about-us/blog/protecting-your-credit-during-coronavirus-pandemic/.

203 CONSUMER FIN. PROT. BUREAU, STATEMENT ON SUPERVISORY AND ENFORCEMENT PRACTICES REGARDING THE FAIR CREDIT REPORTING ACT AND REGULATION V IN LIGHT OF THE CARES ACT 2 (2020), https://files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement_cares-act_2020-04.pdf.

204 Fiano, *supra* note 202.

205 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 4021, 134 Stat. 281, 489 (2020) (stating that, with certain exceptions, "if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—(I) report the credit obligation or account as current; or (II) if the credit obligation or account was delinquent before the accommodation—(aa) maintain the delinquent status during the period in which the accommodation is in effect; and (bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current").

206 CONSUMER FIN. PROT. BUREAU, *supra* note 203, at 2.

207 CONSUMER DATA INDUS. ASS'N, METRO 2® FORMAT COVID-19 POST-ACCOMMODATION REPORTING GUIDANCE NOW AVAILABLE!!, (2020), https://cdia-news.s3.amazonaws.com/CARES+Act+Post-Accommodation+Reporting+Guidance.pdf; *see also COVID-19*,

The disruption to many consumers' financial resources caused by the pandemic, especially when combined with the number of required and encouraged accommodations, raises a serious concern that there may be a substantial rise in inaccuracies associated with the pandemic. As with the disability accommodations at issue in the CFPB's case against Navient,[208] furnishers could err in implementing these accommodations and create credit problems for consumers. Fortunately, consumers appear to have paid more attention to monitoring their credit reports in late 2020,[209] showing a possible awareness of the risk of fraud and error during the pandemic. Regardless, the ultimate impact of the pandemic on the accuracy of consumer credit reports will likely only be determinable in the future.

Consumer Data Indus. Ass'n, https://www.cdiaonline.org/covid-19/ (last visited Feb. 22, 2021).

208 *See Navient Complaint*, *supra* note 161, at 3–4.

209 TransUnion, *supra* note 207, at 7.

III. POTENTIAL APPROACHES FOR HEIGHTENED SCRUTINY OF FURNISHERS AND REDUCED RELIANCE ON CONSUMER DISPUTES

While we cannot expect the system to achieve perfect accuracy, the organization of the FCRA appears to have critically misplaced the burdens of ensuring accuracy, resulting in rampant inaccuracy in the credit information system. In this Part, I will explore the reasons why furnishers should bear a greater responsibility and potential approaches to effecting such a policy. Given that consumer disputes are insufficient to correct several categories of errors, the consumer credit reporting system must rely on other means to ensure the accuracy of information. The current system includes three distinct strategies of regulation, regulation by the consumer through the dispute process, regulation by the government through oversight by agencies like the CFPB, and regulation by industry actors through organizations like the CDIA and CRAs. I will review each of these strategies and address why they have failed to prevent the high rates of error we see in the system and suggest potential reforms to improve each. In short, however, the system places insufficient checks on the conduct of furnishers, and these checks must be strengthened if any approach is to succeed.

Because of the complexity of the system, it is difficult to determine how to best reform the system to achieve greater scrutiny of furnishers. Furnishers as a class are composed of any entity that provides information to a CRA about a consumer and, therefore, are a highly diverse group of institutions. Critics of reform efforts have raised the concern that if regulatory scrutiny is attached only to derogatory information, then the reform runs the risk of turning the credit reporting system into a "positive-only 'feel good' system," where furnishers and CRAs simply choose to delete the derogatory information rather than address the underlying causes of inaccuracy in their system.[210] Given the ubiquitous use of credit reports, creditor-furnishers are not likely to opt out of the system entirely, especially because of the prevalence of reciprocal agreements between CRAs, furnishers, and users. However, furnishers may become reticent to furnish derogatory information if they can avoid doing so without violating the terms of any applicable reciprocal agreements with CRAs. As a consequence, regulatory reforms aimed at increasing the scrutiny of furnishers must go beyond correcting individual errors to focus on ensuring that the system as a whole supports the accuracy and quality of information across the diverse array of furnishers.

This note of caution, however, is not a call for complacency. Errors in credit reports are common, and even small errors, taken in the aggregate,

210 STATEN & CATE, *supra* note 9, at 50.

degrade the accuracy of the system as a whole and the confidence lenders can place on reports, thereby raising the prevailing cost of consumer credit. Furnishers are in the best position to bear the cost of accuracy, yet neither the inherent market conditions nor the regulatory framework creates much incentive for furnishers to do so. Further, it is worth reiterating that furnishers as a class likely share an interest in increasing the accuracy of circulated information because the most prominent furnishers are themselves users[211] and, therefore, depend on the accuracy of the information in credit reports for their own lending decisions. Reconceptualizing the consumer credit information system in this manner reveals an opportunity for reform that is in the interest of all stakeholders.

Regardless of what other approaches are considered, more empirical research ought to be done in this area. While at least one good study on the rate and impact of errors has been conducted, there is a gap in information concerning the causes of inaccuracies and the effect of different procedures on the quality of information. Studying these topics would help to effectively design reform, would inform effective enforcement, and would assist furnishers and CRAs alike in designing their own compliance. Beyond the need for additional research, Congress, the CFPB, and the FTC can work together to improve the regulation of the consumer credit information system.

A. *Regulation by the Consumer*

The current system relies largely on consumers to ensure the accuracy of their own reports.[212] As discussed in Section II.A, the ability of consumers to act as an effective check is substantially limited by their lack of familiarity with their own credit reports, their lack of access to underlying data used to produce the reports, and lack of incentives to fix minor errors or errors that benefit them as individuals. In general, consumer disputes are unlikely to be useful except to occasionally correct substantial derogatory errors that are relatively simple. Consumer disputes are especially unlikely to be effective in correcting widespread, systematic issues because furnishers are not obligated to correct other consumers' information that includes the same error as the individual consumer who raised the dispute. Ultimately, however, consumers have a strong incentive to ensure the accuracy of their own reports and, if given more power within the system of regulation, could

211 *See* FTC 2006 Report, *supra* note 127, at 4 ("Examples of furnishers include banks, thrifts, credit unions, savings and loan institutions, mortgage lenders, credit card issuers, collection agencies, retail installment lenders, and auto finance lenders.").

212 Staten & Cate, *supra* note 9, at 22.

shift the balance of incentives to produce much better outcomes for the system as a whole.

To empower consumers and achieve this systematic shift, Congress should consider creating a private right of action to enforce a furnisher's accuracy and integrity duties. This would cause furnishers to face effective liability, meaning liability that is likely to result in a monetary cost, for their original failure to maintain an effective system to ensure the accuracy and integrity of information. Currently, furnishers only face effective liability for failing to correct an inaccurate item of information or delete an unsupported item following a dispute.[213] Consequently, the introduction of a private right of action based on furnishers' accuracy and integrity duties would actually incentivize the furnishers to control information quality before a dispute arises.

Further, by creating an opportunity for potentially profitable suits, such a private right of action would allow the plaintiffs' bar to develop expertise and capacity to complement the executive agencies, which would be especially effective in addressing more complex and widespread issues. Although litigation would only arise in response to derogatory information and would be limited by the same problems applicable to consumer disputes—lack of sufficient understanding or engagement, as well as incentives that are too weak to motivate action—the expanded private right of action is ultimately aimed at incentivizing furnishers to have better systems in the first place. The increased incentive to ensure accuracy should have the additional effect of correcting beneficial errors as well. Finally, tying the private right of action to furnishers' accuracy and integrity duty means that many claims could be litigated regardless of whether the furnisher deletes the data.

B. *Regulation by the Government*

At present, the number of government enforcement actions, especially those taken against furnishers, pales in comparison to the size and complexity of the system and furnishers' role within it.[214] This may be an

213 *See* 15 U.S.C. § 1681s-2(c); *see also id.* § 1681s-2(d) (limiting enforcement to actions brought by designated federal and state agencies); Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1161 (9th Cir. 2009).

214 *See An Overview of Credit Bureaus and the Fair Credit Reporting Act: Hearing Before the H. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 6 (2018) (statement of Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission), https://www.banking.senate.gov/hearings/an-overview-of-the-credit-bureaus-and-the-fair-credit-reporting-act [hereinafter "Mithal Statement"] (follow "Download Testimony" hyperlink under "Witnesses"); FTC 2006 REPORT, *supra* note 127, at 3 ("The repositories issue more than 1 billion

inevitable consequence of the size of the system and the limited resources available to agencies like the CFPB and the FTC. Currently, these agencies play a critical role in defining the essential terms of the FCRA through regulations.[215] Agencies also have an opportunity to develop substantial internal expertise in dealing with this highly complex system. Therefore, they are well-positioned to provide high-level oversight of the system. Because of their position working on behalf of the public, agencies are also well suited to intervene to correct widespread, systematic errors.

If the private right of action for accuracy and integrity violations were introduced, there would still be a concern that furnishers would simply delete information to placate consumers with potentially meritorious claims even though the claim would not be rendered moot by the deletion. This is where executive agencies could step in and require claims to be registered with a specialized office. Even just requiring notification of a claim to an agency office would enable that agency to aggregate claims and determine trends of alleged errors within the system. Taking a step further and requiring notification both when claims were filed and resolved would enable the agencies to notice trends in both alleged and confirmed errors. This would make it much easier for agencies to notice systematic issues and, therefore, to correct these issues either through direct enforcement actions or by issuing corrective guidance. Further, tracking claims and their resolutions would enable the agency to notice when furnishers are reflexively deleting trade lines and to intervene to prevent that problem from distorting the accuracy of the system as a whole.

The agencies could also go a step further by requiring or allowing claims to be resolved through an administrative review process. Such a process, overseen by a specialized agency office, would provide a cheaper and likely faster means for dispute resolution compared to litigation and would, therefore, reduce the incentive to drop trade lines where the furnisher has reason to believe it is accurate but does not want to incur the expense of litigation. Such a process would also bring the government's attention to individual disputes and make it unlikely that a furnisher would simply delete a disputed trade line to resolve the issue without addressing the merits of the claim.

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consumer reports each year, the vast majority of which go to creditors, employers, and insurers"); Avery et al., *supra* note 128, at 49 ("According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month.").

215 Mithal Statement, *supra* note 220, at 2; *Fair Credit Reporting (Regulation V)*, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/rules-policy/final-rules/fair-credit-reporting-regulation-v/ (last visited Mar. 3, 2021).

C. *Regulation by the Industry*

As for the industry-regulation approach, the CDIA has been an effective venue for organizing common standards across the industry, which is made particularly important where communication is based upon the Metro 2 reporting language produced by the CDIA. However, the CDIA is unlikely to have the direct interface with furnishers that would be necessary to address the errors we see persisting in the system as it stands. The CDIA is also unlikely to be able to require furnishers to engage in potentially costly quality control activities.

The CRAs can and arguably are obligated to double-check the information that is furnished to them. However, the CRAs simply do not have access to the account-level information supporting the furnished data, so the extent to which CRAs can check the accuracy of information is limited. Further, CRAs do not have an incentive to conduct regular oversight. The CRAs only have a duty to follow *reasonable procedures* to ensure maximum possible accuracy. Absent information being furnished that is erroneous on its face, it seems highly unlikely that a court would require CRAs to know when they are provided with false information by a furnisher before a dispute is raised. Given that CRAs are not under a duty to oversee furnishers, that they lack the means to do so, and the high volume of data they receive, we should not expect CRAs to act as effective checks on furnishers without the prompting of a consumer dispute or regulatory action.

However, if furnishers are properly incentivized, they could regulate themselves. Furnishers are perfectly capable of retaining their own account-level records and using these to check all of the information they furnish for accuracy. Because of the furnishers' proximity to the underlying information and the sophistication of many creditor-furnishers, it is apparent that self-regulation, within the compliance functions of these firms, would be the most efficient way to control for accuracy in the consumer credit information system. The introduction of a private right of action based on furnishers' accuracy and integrity duties would create a strong incentive to implement robust quality control mechanisms for the information these firms produce. Further, internal compliance systems would not be limited in the same ways that consumers are. First, furnishers themselves should have access to and understanding of all the relevant underlying data. Second, if furnishers are appropriately dissuaded from deleting disputed trade lines, then they would be just as interested in correcting both derogatory and beneficial errors in the information they produce. This is because the only thing that will matter is whether the furnishers can provide appropriate documentation to support the information, not whether it benefits or harms an individual consumer's

access to credit.

CRAs certainly have a role to play in supporting efforts to enhance furnishers' incentives to increase the quality of produced information. In particular, the CRAs can and should use the reciprocal agreements between CRAs and furnishers to sanction the deletion of information without good cause.[216] This would help ensure that it is in the furnishers' interests to ensure that the information they produce is of a quality they can stand behind when and if it is challenged.

216 *See* Staten & Cate, *supra* note 9, at 49 ("One solution to the non-reporting problem would be for the bureaus to tackle the problem by adopting reciprocity codes. That is, they could dictate as part of their subscriber agreements that what a creditor doesn't report, it can't see on any purchased reports. Together with pricing incentives, this could encourage full-file reporting.").

CONCLUSION

The consumer credit reporting system affects the lives and finances of nearly every American. Errors can affect a consumer's ability not only to obtain credit but to qualify to rent housing, receive insurance, or be hired for a job. Less damaging errors, however, still have the aggregate effect of threatening the integrity of the consumer credit system, making everything a consumer buys on credit more expensive by raising the prevailing cost of credit. Empirical research shows that both high and low-impact errors are commonplace and likely affect tens of millions of Americans.

The system we have in place relies largely on consumers, who are often poorly engaged and informed, to police the accuracy of this highly complex system. The other actors in this system are limited in their access to crucial information, poorly incentivized to correct inaccuracies, or both. Given the prevalence of errors, it is clear that this system is failing.

As the original authors of information circulated in the system, furnishers are likely to be responsible for many of the errors. Further, because these firms are the most proximate to the underlying information, they are also in the best position to bear the costs of ensuring accuracy. Yet the current regulatory framework places little to no effective liability on furnishers for failing in their duties to ensure accuracy and integrity. Reform efforts should therefore focus on increasing the effective liability of furnishers related to accuracy and integrity. This can be achieved by empowering consumers to hold furnishers accountable when they fail to appropriately ensure the quality of the information in the first place. Care must be taken to ensure that the increased risk of liability does not produce a system where furnishers are reticent to produce information or will simply delete information whenever disputed. However, if reforms include oversight by third parties such as executive agencies and CRAs, we can effectively prevent such behaviors and focus furnishers on producing high-quality information before disputes arise.

The potential of such reforms is hard to overstate. First, because the prevalence of errors is so high, there is substantial room for improvement. Second, because the predictive value of credit reports depends on their accuracy, any significant improvement in the system's ability to produce accurate information should produce a significant improvement in predictive value. Third, because the development of the credit reporting system and of risk-based pricing of credit was associated with a dramatic decline in the cost of consumer credit and increase in access to consumer credit, especially at the lower end of the income distribution, we should expect that improving the predictive value of reports should enhance both of these

effects. Ultimately, such reforms could produce a system that is both fairer to consumers and more effective for users, who, again, are often furnishers and would likely support the growth of the American economy by making consumer credit more accessible and affordable.

CONSTITUTIONAL CHALLENGES TO VOTER REGISTRATION DEADLINES: STATE CONSTITUTIONS AS A TOOL FOR VOTING REFORM

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INTRODUCTION

In twenty-nine states, residents are denied the right to vote on Election Day if they fail to preregister days—or even weeks—before the election.[1] Such denials are the result of state-imposed voter registration deadlines, which, by one estimate, prevented 3 to 4 million eligible voters from registering for the 2012 presidential election.[2] In many instances, disenfranchisement was the purpose of these policies—designed to keep Black, poor, and immigrant voters from participating in the democratic process.[3] Purposeful or not, the negative impact on voter participation is

1 *See Voter Registration Deadlines*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx (last updated Oct. 2, 2020) (listing states that maintain voter registration deadlines and indicating that, while some of these states allow unregistered voters to participate in early voting, all twenty-nine deny unregistered voters the right to cast a ballot on Election Day). Since the majority of voters have historically cast their ballots on Election Day, this practice has a profound impact on the right to vote even when other means of voting are provided. *See* Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All 50 States*, FIVETHIRTYEIGHT (Feb. 9, 2021), https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/ (showing that, before an unprecedented increase in mail-in voting during the 2020 election due to the COVID-19 pandemic, a significant majority of voters cast their ballots on Election Day). These twenty-nine states are listed *infra* in the Appendix.

2 Alex Street et al., *Estimating Voter Registration Deadline Effects with Web Search Data*, 23 POL. ANALYSIS 225, 238 (2015).

3 The leniency courts exhibit towards state legislative enactments of voter registration requirements, discussed *infra* throughout this Note, all but ignores the historical motives behind the enactment of many registration requirements. The sanitized language courts adopt discussing the reasonableness of registration schemes and the need for orderly administration of elections ignores the reality that registration deadlines were often enacted with the deliberate intent to disenfranchise certain populations—namely Black, poor, and immigrant individuals. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 65–66, 153–55 (2000); David Litt, *The Racist History of Voter Registration*, TIME (June 18, 2020), https://time.com/5855885/voter-registration-history-race/. Far from an exhaustive list, the following examples illustrate this troubled history. In the 1830s, proponents of registration deadlines in New York were clearly motivated by animus towards Irish Catholic immigrants. KEYSSAR, *supra*, at 65–66. In the 1880s, dismayed by their declining political power, Chicago's elite enacted a registration scheme designed to suppress voter participation. *Id.* at 153–55. In Texas, voter registration deadlines were implemented as a direct replacement for the state's Jim Crow era poll taxes, obviating any question as to their intended purpose. Litt, *supra*. While this Note focuses on the many textual reasons for courts to scrutinize voter registration deadlines more closely, courts should also consider this discriminatory history when assessing the necessity and justification for registration schemes. Federal courts generally do not consider such discriminatory history unless the original law is still in force or it can be shown that subsequent legislatures were motivated by similar animus, but state courts are not bound by this precedent when applying the protections found in their own state

significant: voter registration deadlines unnecessarily impede millions of eligible voters from exercising the most fundamental right in a democratic society.[4] Eliminating these deadlines and allowing voters to register at the polls on Election Day is one of the most effective ways to improve voter participation.[5] Not only is Election Day registration a good policy, but the texts of many state constitutions compel it.

Since the Federal Constitution does not provide an affirmative right to vote but, rather, only provides limited rights of negative implication, state constitutions offer the most robust constitutional protection of the right to vote. Courts have construed the federal right to vote narrowly, deferring to states and providing prospective voters with limited protections against unnecessarily restrictive state election administration schemes. This narrow construction has developed despite a long history of deliberate disenfranchisement through the imposition of overly onerous voting laws, including voter registration systems.[6] Unlike their federal counterpart, forty-nine state constitutions confer an affirmative right to vote. Advocates for access to the ballot should look to this explicit positive right enshrined in state constitutions as a tool for voting reform. This Note argues that the texts of many state constitutions provide compelling bases upon which to

constitutions. *See* Abbott v. Perez, 138 S. Ct. 2305, 2326–27 (2018).

4 *See* Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J. FORUM 185, 188 n.11 (2019) (summarizing the academic literature and concluding that voter registration deadlines have a significant impact on voter participation); Street, *supra* note 2, at 238.

5 Twenty-one states and the District of Columbia provide for Election Day registration or do not require registration at all. *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx (last updated Oct. 6, 2020). Election Day registration increases voter participation while registration deadlines provide little, if any, practical value in the age of digital election administration. *See* Sean J. Young, *The Validity of Voter Registration Deadlines Under State Constitutions*, 66 SYRACUSE L. REV. 289, 289, 296 (2016) ("In the modern computer age, registration forms submitted on Election Day can be readily processed just like registration forms submitted prior to Election Day in a matter of hours, if not minutes."). Election Day registration reduces the logistical burden of democratic participation, allows for the correction of registration errors, and allows voters to register at the height of campaign season when they are most likely to be engaged by candidates, issue organizations, or election officials. Ho, *supra* note 4, at 190–91. "Starting in the early 1990s, political-science research has consistently found a statistically significant relationship between [Election Day registration] and turnout, ranging from an increase of two percentage points to double-digits." *Id.* at 188. Dale Ho, a leading expert on voting rights and election law, went as far as to say that "there is broader consensus among social scientists about the effect of [Election Day registration] on turnout than there is with respect to any other voting reform." *Id.* at 185–86.

6 *See supra* note 3 and accompanying text.

challenge voter registration deadlines.

Building on Professor Joshua Douglas's writing on the positive right to vote found in state constitutions,[7] this Note considers the constitutionality of voter registration deadlines through the prism of the robust state constitutional voter protections for which Douglas advocates.[8] Part I outlines the narrow interpretation of the right to vote found in the Federal Constitution and the resulting lenient judicial scrutiny that federal courts apply to state election administration schemes. Part II explores the positive right to vote provided by state constitutions and argues that the right should be construed more broadly than the federal right. Part III highlights three different approaches to voter registration deadlines found in state constitutions, with each approach suggesting differing levels of judicial deference to the imposition of registration deadlines.

Surveying these differences, this Note concludes that the texts of many state constitutions demand heightened judicial scrutiny of voter registration deadlines far beyond what is applied under the lenient federal test. In doing so, this Note reinforces Douglas's conclusion that state constitutions provide a right to vote that is more protective than what the Federal Constitution provides and identifies the states where voting rights advocates have the most compelling textual support for constitutional challenges to voter registration deadlines.

7 Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014).

8 Douglas details the positive right to vote found in all but one state constitution and argues that "[a] renewed, independent focus on state constitutions and their explicit grant of the right to vote is textually faithful to both the U.S. and state constitutions and will restore the importance of the most foundational right in our democracy." *Id.* at 143.

I. The Right to Vote Under the Federal Constitution Is a Limited Right of Negative Implication

The Federal Constitution only provides limited, negative protections of the right to vote. The U.S. Supreme Court has stated "that the Constitution of the United States does not confer the right of suffrage upon any one"[9] and that "the right to vote, per se, is not a constitutionally protected right."[10] The Federal Constitution mentions individual franchise seven times, but none of these references confer a positive individual right to vote.[11] These clauses provide limited protections by negative implication, prohibiting states from infringing upon the right in certain, specific ways but stopping short of conveying a broad positive right to vote. Section I.A explores the reasoning underlying federal court deference to state election administration and the development of the *Anderson-Burdick* test. Section I.B documents the difficulty of challenging voter registration deadlines under this deferential federal test.

A. *Negative Protections Are the Source of the Federal* Anderson-Burdick *Test*

The current federal constitutional test applied to state voting regulations emerged from the Supreme Court's rulings in *Anderson v. Celebrezze* and *Burdick v. Takushi*.[12] In *Anderson*, the Court considered a challenge to an Ohio statute requiring independent candidates for president to file a statement of candidacy in order to appear on the ballot.[13] The magnitude

9 Minor v. Happersett, 88 U.S. 162, 178 (1874).

10 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973).

11 *See* U.S. Const. art. I, § II ("Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . ."); *id.* amend. XIV (penalizing states by a reduction in representation if they deny or abridge the right of male citizens to vote); *id.* amend. XV (prohibiting denial of the right to vote based on race); *id.* amend. XIX (prohibiting denial of the right to vote based on sex); *id.* amend. XXIV (prohibiting denial of the right to vote based on inability to pay a poll tax); *id.* amend. XXVI (prohibiting denial of the right to vote based on age for citizens over the age of eighteen); *see* Douglas, *supra* note 7, at 95–97. *But see* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 188–89 (2012) (suggesting that the Fourteenth Amendment's reduction in representation clause confers a positive right to vote).

12 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992); *see also* Douglas, *supra* note 7, at 98 (discussing the combined implications of the *Anderson* and *Burdick* cases on the federal right to vote).

13 *Anderson*, 460 U.S. at 782–86.

of the plaintiff's First and Fourteenth Amendment interests were balanced against the state's asserted interest in safeguarding "political stability."[14] The Court struck down the statutory filing deadline, concluding that the burden on voters' rights "outweigh[ed] the State's minimal interest in imposing [the filing] deadline."[15] In *Burdick*, the Court heard a challenge to Hawaii's prohibition against writing in a candidate who did not appear on the ballot.[16] The Court upheld Hawaii's practice, declining to apply strict scrutiny to the law and holding that such scrutiny was only required when the law imposed a severe restriction on voters' rights.[17] A two-tiered approach to constitutional review emerged: strict scrutiny for laws that impose a severe burden on the right to vote and a permissive balancing test for those that impose a lesser burden.

If a state election law creates a severe burden on an individual's ability to vote, it is subject to strict scrutiny. *Burdick*'s holding made clear that only election laws imposing severe restrictions on First and Fourteenth Amendment rights are required to be "narrowly drawn to advance a state interest of compelling importance."[18] Since "[e]lection laws will invariably impose some burden upon individual voters," the Court reasoned that "subject[ing] every voting regulation to strict scrutiny and . . . requir[ing] that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[19] Therefore, if a plaintiff cannot demonstrate a severe burden, the court employs a permissive balancing test.[20] As suggested in *Anderson*, the Court balances the magnitude of the burden on First and Fourteenth Amendment rights against the state's asserted justification for the burden.[21] True to its promise not to tie the hands of states, this standard allows significant leeway to enact a range of election

14 *Id.* at 806.

15 *Id.*

16 *Burdick*, 504 U.S. at 430–32.

17 *Id.* at 432–33, 441–42.

18 *Id.* at 434 (internal quotations omitted) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

19 *Id.* at 433.

20 *Id.* at 434; *see also* Douglas, *supra* note 7, at 98 (characterizing the *Anderson-Burdick* test as a "lenient balancing test").

21 *Burdick*, 504 U.S. at 434 ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983))).

laws, including voter registration laws.[22]

Anderson-Burdick's deference to states is due in large part to the nature of the federal right it seeks to protect. The federal right is one of negative implication and has been construed to protect the electoral process, not individual voters. The *Burdick* Court characterized "the right to vote [as] the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."[23] As one election law scholar characterized it,

> [t]he underlying concerns that drive the Court's electoral mechanics interventions are not easy to decipher, nor are they likely to be unitary, but it is hard to make sense of the case law in conventional, individualistic terms. This body of law is not designed to enable the citizen or political organization that suffers a material burden to haul the state into court and make it provide a substantial justification for the imposition. The decisions are more readily understood as imperfect efforts to ensure that electoral systems manifest certain properties in the aggregate.[24]

Resolving the ambiguity of the federal right underlying the Court's election law jurisprudence is beyond the scope of this writing. However, it is important to emphasize that the deference of the *Anderson-Burdick* test is informed by considerations of the electoral process in aggregate, not the individual rights of voters. Federal jurisprudence simply does not focus on the impediments faced by individual voters. As this Note will show, this is in direct contrast to the right to vote established in state constitutions.

Furthermore, the Federal Constitution's delegation of the electoral process to the states underlies federal deference to state election administration. As the *Burdick* Court reasoned, "[t]he Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections."[25] This constitutional delegation of election management to states leaves federal courts cautious to intrude on that task. *Anderson-Burdick*'s permissive view of state election law has resulted in the federal courts' acceptance of voter registration deadlines as constitutionally permissible election regulations.

22 *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336 (2007) (suggesting the result of the Supreme Court's *Anderson-Burdick* standard is that "laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association").

23 *Burdick*, 504 U.S. at 441–42.

24 Elmendorf, *supra* note 22, at 336.

25 *Burdick*, 504 U.S. at 433 (internal citation omitted) (quoting U.S. CONST. art. I, § 4, cl. 1).

B. *Under* Anderson-Burdick*'s Permissive Lens, Voter Registration Deadlines Are Consistently Deemed Constitutional*

Federal courts have upheld state voter registration deadlines before and after the creation of the *Anderson-Burdick* test. Almost fifty years ago and more than ten years before *Anderson* and *Burdick* were decided, the Supreme Court justified voter registration deadlines as necessary to give election officials time to process voter registration applications and prevent fraud.[26] The Court's concern was more relevant at the time given the analog nature of election administration.[27] This justification has eroded as digital voter registration lists have been universally adopted and Election Day registration has become logistically feasible.[28] Despite the changing technological and administrative realities of election administration, federal courts have continued to uphold state registration deadlines under *Anderson-Burdick*'s permissive lens.

Numerous federal district courts have upheld state voter registration deadlines under *Anderson-Burdick*. In *ACORN v. Bysiewicz*, the District Court for the District of Connecticut heard a constitutional challenge to Connecticut's requirement that voters register seven days before Election Day.[29] The court upheld the law under the *Anderson-Burdick* test, concluding that it "d[id] not constitute a severe burden."[30] In *Diaz v. Cobb*, the District Court for the Southern District of Florida heard a constitutional challenge to Florida's requirement that voters register twenty-nine days before Election Day.[31] This court also applied the *Anderson-Burdick* test and found the deadline constitutional since it "d[id] not impose severe burdens."[32] Under *Anderson-Burdick*'s permissive balancing, the court found the registration deadline "a reasonable, non-discriminatory restriction that advances an important state interest in the conduct of an honest, fair and orderly election."[33] In both cases, since strict scrutiny did not apply, the courts declined to examine whether a registration deadline was really necessary to effectuate the state's interest in orderly election administration. Thus, they did not engage with the compelling evidence that elections can be adequately administered using

26 *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 348 n.19 (1972) (citing Oregon v. Mitchell, 400 U.S. 112, 238 (1970)).

27 *See* Ho, *supra* note 4, at 196–97 (acknowledging the pre-digital age administrative burden of compiling paper registration forms into a statewide voter-registration lists).

28 *See supra* note 5 and accompanying text.

29 ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 146 (D. Conn. 2005).

30 *Id.* at 143 n.6, 145–46.

31 Diaz v. Cobb, 541 F. Supp. 2d 1319, 1333 (S.D. Fla. 2008).

32 *See id.* at 1329–30, 1333.

33 *See id.* at 1330, 1340.

Election Day registration.[34]

Absent significant change to Supreme Court election law jurisprudence, challenges to voter registration deadlines on federal constitutional grounds are unlikely to prevail. Instead, advocates should look to the states as state constitutional law provides a more promising avenue to challenge voter registration deadlines and expand voter access.

34 *See id.* at 1329–41; *ACORN*, 413 F. Supp. 3d at 122–55; Young, *supra* note 5, at 296.

II. THE RIGHT TO VOTE FOUND IN STATE CONSTITUTIONS IS AN INDIVIDUAL, POSITIVE RIGHT

An individual, affirmative state right to vote demands more robust protection than federal constitutional law presently affords. Section II.A discusses the affirmative right to vote provided by forty-nine state constitutions, a right different in kind from the negative protections afforded by the Federal Constitution.[35] These state constitutional clauses provide a compelling textual basis for a more protective standard of judicial review. Section II.B explores state court interpretations of the state right to vote. Some state courts have adopted the federal *Anderson-Burdick* test, "lockstepping" their analysis with that of the Supreme Court, while others have taken a more independent approach.[36] Lockstepping review of state election administration regulations is a mistake because it leaves the most fundamental right under-protected and is illogical given the text of state constitutions and the considerations that underlie the deferential federal test.

Section II.C argues that state courts should eschew the *Anderson-Burdick* test and adopt their own more searching test of state election administration laws. Uncritical adoption of federal constitutional standards does a disservice to the important independent role state constitutions and state courts play in the protection of individual rights. When viewed independently, it is clear that affirmative state constitutional voting rights are different in nature from the negative, amorphous federal right that led to *Anderson-Burdick*'s deferential standard.[37] Further, a key justification for *Anderson-Burdick*'s deference to state election laws is the Federal Constitution's delegation of the electoral process to the states—a concern inapplicable to state court review of state election law.[38] These considerations all point state courts towards adopting a more protective standard of review than federal

35 Douglas, *supra* note 7, at 130, 144–49 (providing a table of voting rights clauses in all state constitutions); *see also, e.g.*, KY. CONST. § 145 (providing that every prospective voter who meets certain conditions "shall be a voter in said precinct"); R.I. CONST. art. II, § 1 (providing that every prospective voter who meets certain conditions "shall have the right to vote").

36 Lockstepping describes the practice of "state courts . . . diminish[ing] their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018). "[S]tate courts frequently handle [cases with similar state and federal constitutional claims] by considering the federal constitutional claim first, after which they summarily announce that the state provision means the same thing . . . ." *Id.* at 174. *See also* Douglas, *supra* note 7, at 106–10; *infra* Section II.B.

37 *Infra* Section II.C.ii.

38 *Infra* Section II.C.iii.

courts currently provide.

A. *State Constitutions Confer a Positive Right to Vote*

Forty-nine state constitutions explicitly confer the right to vote upon some group of people.[39] They include phrases like "shall be entitled to vote,"[40] "any person may vote,"[41] "shall be deemed a qualified voter,"[42] or "shall be deemed a qualified elector."[43] These clauses vary somewhat in their construction, but all convey the right to vote on some class of people. Many of these constitutions condition the right upon, among other things, citizenship,[44] age,[45] duration of residency,[46] or voter registration status.[47] Many state constitutions also grant state legislatures the power to establish rules for voter registration[48] or to take necessary steps to prevent voter fraud.[49] Ultimately, though, every state constitution but one—Arizona—conveys the right to vote in a positive form.[50] State courts must decide how to apply these positive constitutional protections to election regulations in their state.

39 *See* Douglas, *supra* note 7, at 101. For a complete list of state constitutional voter protection provisions, see *id.* at 144–49.

40 DEL. CONST. art. 5, § 2.

41 ARK. CONST. art. III, § 1(a).

42 TEX. CONST. art. VI, § 2(a).

43 KAN. CONST. art. V, § 1.

44 *See, e.g.*, ARK. CONST. art. III, § 1 ("[A]ny person may vote in an election in this state who is . . . [a] citizen of the United States . . . .").

45 *See, e.g.*, KAN. CONST. art. V, § 1 ("Every citizen of the United States who has attained the age of eighteen years . . . shall be deemed a qualified elector.").

46 *See, e.g.*, KY. CONST. § 145 ("Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct . . . .").

47 *See, e.g.*, PA. CONST. art. VII, § 1 ("Every citizen . . . shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.").

48 *See, e.g.*, KY. CONST. § 147 ("The General Assembly shall provide by law for the registration of all persons entitled to vote . . . .").

49 *See, e.g.*, DEL. CONST. art. V, § 1 ("[T]he General Assembly may by law prescribe the means, methods and instruments of voting so as best to . . . prevent fraud, corruption and intimidation thereat.").

50 *See* Douglas, *supra* note 7, at 101 n.73.

B. *State Court Interpretations of the Right to Vote Have Been Mixed*

In the 1832 case of *Capen v. Foster*, the Massachusetts Supreme Judicial Court considered the constitutionality of a voter registration system.[51] In a decision that set the foundation for future state voter registration laws, the Supreme Judicial Court upheld the law as a set of "reasonable and uniform regulations, in regard to the time and mode of exercising [the right to vote], which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner."[52] However, the Supreme Judicial Court recognized that "[s]uch a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself."[53] The *Capen* court articulated the same balancing of interests that the Supreme Court would grapple with in *Anderson-Burdick* over a century later.

Some state courts have adopted the federal *Anderson-Burdick* test, lockstepping their analysis of state election administration schemes with the Supreme Court. These courts "narrowly analyze the state protection to be merely co-extensive with the U.S. Supreme Court's rulings under federal law."[54] Other courts have interpreted their state's positive right to vote more expansively, affording independent protection beyond what is provided by the Federal Constitution.[55] For example, state supreme courts in Missouri and Arkansas have struck down voter identification laws that would have survived under *Anderson-Burdick*, expressly recognizing that their state constitutions provide broader protections of the right to vote.[56]

Where state constitutional challenges to voter registration deadlines have been considered, deference to state election administration has won out. In New Jersey, a state court upheld the state's twenty-one-day voter registration deadline as "reasonable" under the *Anderson-Burdick* test.[57] The

51 Capen v. Foster, 29 Mass. (12 Pick.) 485 (1832). For a discussion of the seminal importance of this case, see KEYSSAR, *supra* note 3, at 65, and Litt, *supra* note 3.

52 *Capen*, 29 Mass. (12 Pick.) at 494.

53 *Id.*

54 Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 14 (2016) (finding that some courts "broadly construe state constitutions as going beyond the federal constitution").

55 *Id.* at 17–18.

56 Weinschenk v. State, 203 S.W.3d 201, 205, 211 (Mo. 2006) ("The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart."); Martin v. Kohls, 444 S.W.3d 844, 846, 850, 853 (Ark. 2014) (rejecting Supreme Court analysis of voter ID laws under *Anderson-Burdick* and stating that "we address the present issue solely under the Arkansas Constitution"); *see also* Douglas, *supra* note 54, at 19–21 (discussing state constitutional challenges to voter identification laws).

57 Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections, 141 A.3d 335, 343

Massachusetts Supreme Judicial Court took a more independent approach in *Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*, eschewing the *Anderson-Burdick* test for a purportedly more protective standard, but finding the registration deadline constitutional nonetheless.[58] The Supreme Judicial Court held that if the law "significantly interferes with the fundamental right to vote," it is subjected to the most stringent review, "strict scrutiny."[59] Anything less, and the law is only subjected to "rational basis review," giving significant deference to the legislature's decision to enact the deadline.[60] Under this standard, the court concluded that "at least for the time being, an impartial lawmaker could logically believe that the voter registration deadline imposed twenty days prior to election day still serves legitimate public purposes that transcend the harm to those who may not vote."[61] Importantly, the court recognized that the Massachusetts Constitution is more protective of the right to vote than the Federal Constitution, requiring only "a significant interference with the fundamental right to vote" before it would impose strict scrutiny instead of the "severe burden" required under *Anderson-Burdick*.[62]

Since the *Capen* decision, courts have accepted that registration systems can be constitutionally permissible if they are reasonable for the orderly administration of elections. But what is reasonable, and how closely courts should scrutinize legislative justifications for these laws, remains an important question. The cases above illustrate the importance of this standard of review adopted by state courts; it is often the dispositive question for litigation challenging voter registration deadlines. As this Note will argue, the texts of many state constitutions, if given their evident force, demand heightened scrutiny of voter registration deadlines beyond what is applied under the federal *Anderson-Burdick* test.

Federal case law suggests that lockstepping state constitutional voter protections with the *Anderson-Burdick* standard is likely to be fatal for plaintiffs challenging registration deadlines. As the Supreme Judicial Court's decision in *Chelsea Collaborative* shows, independent interpretation of the state constitutional right to vote does not necessarily guarantee

(N.J. Super. Ct. App. Div. 2016) ("After fully considering the appropriate legal principles, we conclude that New Jersey's twenty-one-day advance registration requirement is the type of 'reasonable, non-discriminatory restriction[ ]' which warrants the application of the *Burdick* balancing test." (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992))).

58 *See* Chelsea Collaborative, Inc. v. Sec'y of Commonwealth, 100 N.E.3d 326, 333, 340–41 (Mass. 2018).

59 *Id.* at 333.

60 *Id.*

61 *Id.* at 341.

62 *See id.* at 333–36.

success for registration deadline challengers. However, under heightened judicial scrutiny, such as strict scrutiny or a less deferential balancing of the interests test, challenges to voter registration deadlines are far more likely to succeed.[63] Thus, determining whether state courts will lockstep their analysis or apply a heightened level of scrutiny is a critical question in determining the constitutional viability of voter registration deadlines and the likelihood of mounting successful legal challenges against them.

C. *State Courts Should View Their Constitutional Protections Independently Instead of Lockstepping Their Analysis with the Federal* Anderson-Burdick *Test*

A state court's reflexive adoption of a federal standard as identical to their own state guarantee should be viewed critically. Nonetheless, it is a common interpretive approach utilized by state courts. "[M]ost state courts adopt federal constitutional law as their own. Bowing to the nationalization of constitutional discourse, they 'tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in the law reviews, and taught in the law schools.'"[64] The widespread use of lockstepping represents "[a] grave threat to independent state constitutions, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law."[65] As Justice Brennan famously argued, state constitutions are independent sources of rights that require state courts to "marshal[] the distinct state texts and histories and draw[] their own conclusions from them."[66] Without such independent thought, he argued, "the full realization of our liberties cannot be guaranteed."[67]

At times, state and federal rights may be equivalent. But state courts should judiciously examine the nature of their state constitutional rights to determine whether the Supreme Court's interpretation is adequate in light of the source and nature of the state guarantee. This is true when the constitutional text of the state and federal right is identical, but it is even more imperative when state constitutions are textually distinct from the

63 *See* Young, *supra* note 5, at 299 ("For states whose constitutions do not explicitly provide a voter registration deadline, unnecessary deadlines essentially impose an additional qualification to voter eligibility in violation of that constitution.").

64 Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 n.80 (2011) (quoting Hans A. Lind, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984)).

65 SUTTON, *supra* note 36, at 174–75.

66 *Id.* at 177.

67 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

federal right at hand.

Lockstepping is particularly inappropriate in the case of state constitutional voter protections. Section II.C.i frames this argument, discussing the promises and limitations of state constitutions as independent sources of rights. Sections II.C.ii–iv argue that the positive nature of the state right, the place state constitutions occupy in our federalist structure, and the varying textual language used by state constitutions suggest a right different in kind from the limited federal right underlying the *Anderson-Burdick* test. These differences indicate that state constitutions provide far more stringent protection of the right to vote than the Federal Constitution.

i. State Constitutions Provide an Independent Source of Rights

State constitutions have always played an important role in our constitutional system. All of the individual rights enumerated in the Federal Constitution—free speech, free exercise of religion, separation of church and state, jury trial, the right to bear arms, prohibitions on unreasonable searches and seizures, prohibitions on the governmental taking of property, due process, no cruel and unusual punishment, equal protection, among others—originated in state constitutions.[68] Before the Federal Bill of Rights was incorporated against the states by the Fourteenth Amendment, it did not apply to the states.[69] Therefore, for the first 150 years of American constitutional law, the majority of individual rights claims were litigated in state courts under state constitutional law.[70]

As the Bill of Rights was incorporated against the states, particularly from the 1940s through the 1960s, litigants began to shift their focus to federal individual rights claims.[71] However, state law claims remain an important distinct source of rights.[72] As Justice Brennan stated in his seminal article on the topic, "the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart

68 *See* SUTTON, *supra* note 36, at 8; Brennan, *supra* note 67, at 501 ("[E]ach of the rights eventually recognized in the Federal Bill of Rights had previously been protected in one or more state constitutions.").

69 *See* Barron v. City of Baltimore, 32 U.S. 243 (1833) (holding that the Bill of Rights applied only to the federal government, not the states); *see also* SUTTON, *supra* note 36, at 12.

70 SUTTON, *supra* note 36, at 12–13.

71 The failure of the states to meaningfully enforce individual rights—most notably, but not exclusively, in the South—and the Warren Court's willingness to step into that void and provide federal protection of individual rights made federal claims more advantageous for litigants at the time. *See id.* at 14–15.

72 *Id.*

provisions of state law."[73] Some litigants heeded Justice Brennan's call to bring claims in state courts, but often lawyers and courts have continued to focus on federal claims, at times to the detriment of independent state constitutional jurisprudence.[74]

State constitutions are not a panacea for all shortcomings of federal rights protection, but they can be an important tool when federal protections prove inadequate. State constitutional litigation cannot directly establish a nationwide right. This piecemeal approach can be costly for litigants, and success is sometimes reversed by state constitutional amendment.[75] As will become clear *infra* in Part III, challenges to voter registration deadlines are unlikely to succeed in some states. The most expedient path to national Election Day registration may be through Congress, however politically challenging such an approach would be.[76] But the protective treatment of voting rights by state constitutions suggests that, in many states, a powerful right lies dormant and under-litigated, even if it is not a solution in every state. Focusing solely on federal litigation leaves the right to vote under-protected by an inappropriately lenient federal test and ignores the rich and diverse tapestry of state constitutional protections.

State courts should look closely at their own constitutional texts to determine the nature and extent of the rights found therein. To quote Justice Brennan again,

> state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[77]

When one looks to those state constitutions, one sees how different the right to vote is from the one found in the Federal Constitution.

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73 Brennan, *supra* note 67, at 502.

74 SUTTON, *supra* note 36, at 8 ("[M]ost lawyers take one shot rather than two, and usually raise the federal claim rather than the state one.").

75 *See* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1699–1702 (2010).

76 Ho, *supra* note 4, at 186.

77 Brennan, *supra* note 67, at 491.

ii. The Positive Right to Vote in State Constitutions Is Different in Kind from the Federal Right

The distinct nature of these rights makes the *Anderson-Burdick* test an inadequate protection of the state right to vote. A positive right to vote is unambiguously enumerated in forty-nine state constitutional texts,[78] while the federal right underlying the *Anderson-Burdick* test is one of negative implication. This difference should give state courts pause before adopting a federal standard derived from a completely distinct text. As discussed *supra* in Section I.A, the *Anderson-Burdick* test arose from rights of negative implication, resulting in a right to "electoral systems manifest[ing] certain properties in the aggregate."[79] The Supreme Court has avowedly stated that "the right to vote, per se, is not a constitutionally protected right."[80] In contrast, the affirmative state constitutional language creates an unambiguous individual right to vote conferred to every citizen who meets certain qualifications.[81] That distinction should not be rendered meaningless. This substantively different right deserves distinct consideration and should require state courts to apply more exacting scrutiny of election administration laws than is required by the federal test.[82]

iii. The Federalism Discount Is Inapplicable in State Court

Respect for federalism was central to *Anderson-Burdick*'s deference to state election administration,[83] making that test inappropriately lenient when applied in state court. Article I, Section 2 is the only provision in the Federal Constitution that "actually tells us who may participate in our democracy."[84] And, as discussed *supra* in Section II.A, it delegates that authority to the states. This express delegation of authority results in a hesitance to insert the federal judiciary into the states' exercise of this constitutionally delegated

78 *Supra* Section II.A.

79 Elmendorf, *supra* note 22, at 336.

80 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 n.78 (1973).

81 *See* Douglas, *supra* note 7, at 104–05 ("Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens who meet simple qualification rules.").

82 *See id.* at 135 (concluding "*Burdick*'s severe burden formation [is] too deferential to state regulation of elections, as that test fails to recognize the explicit right of suffrage within state constitutions").

83 *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) ("[T]he Court . . . has recognized that States retain the power to regulate their own elections.").

84 Douglas, *supra* note 7, at 101.

power.[85] Justifying deference to state administration of elections, Justice Scalia asserted that "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States."[86] It is illogically circular for state courts to refer back to a standard based on deference to their own authority. The "federalism discount" informing *Anderson-Burdick* has no applicability in a state court.[87]

Anderson-Burdick's concern with the delicate balancing between protecting the right to the franchise and allowing for the orderly facilitation of elections is equally relevant in state court. But state courts should look to their own constitutions to determine the appropriate level of deference. Reflexively adopting the Supreme Court's measured application of the Federal Constitution makes little sense given the federalism considerations motivating that standard.

iv. Unenumerated Conditions on the Right to Vote Deserve Heightened Judicial Scrutiny

The right to vote provided by state constitutions is not absolute. Some limited conditions are placed on that right.[88] Since state constitutions establish an affirmative right to vote and expressly articulate conditions on that right, they should be read to require heightened judicial scrutiny of unenumerated conditions imposed on the right to vote. "A contrary reading—that the legislature can override the explicit, mandatory nature of the right to vote—would make the constitutional grant of voting rights a nullity because it would be subject to unlimited legislative curtailment."[89] Such a reading would render the positive right hollow and the enumerated conditions meaningless.

State constitutions strike a careful balance, giving state legislatures the freedom to impose some conditions on the right to vote, but not others. In some states, that includes conditioning the right to vote upon preregistration,

85 *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

86 *Id.*

87 *See* SUTTON, *supra* note 36, at 175 ("No state supreme court . . . has any reason to apply a 'federalism discount' to its decisions, making it odd for state courts to lean so heavily on the meaning of the Federal Constitution in construing their own." (footnote omitted) (quoting Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1978–79 (2008))).

88 *See, e.g.*, FLA. CONST. art. VI, § 2 ("Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.").

89 Douglas, *supra* note 7, at 141.

as discussed *infra* in Part III. These conditions give state legislatures some leeway to intrude on the right to vote in order to carry out orderly elections. As discussed *infra* in Part III, state constitutions vary significantly in the nature and scope of conditions they permit, providing unique contours to the right to vote in each state.

Flattening this constitutional diversity by applying the same deferential federal standard would be a disservice to these unique texts. When a state legislature strays outside constitutionally enumerated bounds and encroaches on the positive right to vote, courts should apply a heightened level of scrutiny. Others have wrestled with the precise nature of that test, and thorough examination of the topic is beyond the scope of this Note.[90] However, the texts of state constitutions and the importance of the right at hand suggest a stringent standard of review akin to strict scrutiny.[91] Setting the exact test aside, the critical question for state courts is whether to look beyond the permissive *Anderson-Burdick* test. When one considers voter registration deadlines specifically, the test of many state constitutions compel state courts to look beyond the federal test and apply heightened judicial scrutiny of registration schemes.

90 Joshua Douglas compellingly argues that, as a result of the positive right to vote found in state constitutions, state courts should apply a two-step burden-shifting standard that would create a rebuttable presumption of invalidity for laws that impose unenumerated conditions on the right to vote. Douglas, *supra* note 7, at 137. This standard would require the plaintiff to demonstrate that the election law in question imposes an "additional qualification" on the right to vote. *Id.* If the plaintiff succeeds in showing that the law imposes a condition on voting, the burden shifts to the government to justify the imposition by "demonstrating how it is tied specifically to the legislature's power" or "us[ing] specific evidence to justify [adding] a voting qualification beyond what the state constitution allows." *Id.* at 141. "This formulation does not require widespread judicial oversight of elections, however, as states should be able to overcome the presumption of invalidity in most instances for run-of-the-mill election-administration laws." *Id.* Douglas suggests "[t]his mode of analysis . . . adheres most closely to state constitutional text and structure." *Id.* at 142.

Under Douglas's model, a state would be required to justify the imposition of voter registration deadlines by pointing to their state constitutional text or providing specific evidence to support the practice. Given the strong evidence that voter registration deadlines are not necessary, *see* Young, *supra* note 5, at 299, this burden would be difficult for states to meet unless they could point to constitutional text providing the authority for a state legislature to impose such a qualification.

91 *See* Douglas, *supra* note 7, at 141. *But see* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 Vand. L. Rev. En Banc 189, 190 (2014) (arguing that the history of state constitutional interpretation of the right to vote supports application of *Anderson-Burdick*'s deferential standard, allowing "legislatures to impose reasonable regulations on the voting process").

III. STATE CONSTITUTIONS ADDRESS VOTER REGISTRATION DEADLINES IN DIFFERENT WAYS

The state constitutional provisions governing voter registration deadlines can be divided into three major categories that can help inform how state courts treat such policies in their respective states. Of the twenty-nine states that continue to employ voter registration deadlines,[92] nine allow the legislature to impose conditions or require a registration deadline, nine condition the right to vote on registration, and eleven grant a right unconditioned by registration. When one looks closely at state constitutional treatment of voter registration deadlines, a diverse quilt of constitutional federalism can be observed, with various nuanced approaches to protecting the right to vote. Flattening this constitutional variation under one federalized standard obliterates individual state approaches to the balancing of these important interests. In doing so, it eliminates the robust protection of the right to vote that many state constitutions clearly provide.

A. *Required Registration*

Nine state constitutions expressly require or provide the legislature the authority to enact a registration deadline.[93] For example, the Ohio Constitution establishes a thirty-day registration deadline, stating that citizens "registered to vote for thirty days" are "entitled to vote at all elections."[94] The Missouri Constitution provides that "[a]ll citizens of the United States . . . [meeting certain conditions] are entitled to vote at all elections by the people, . . . if they are registered within the time prescribed by law."[95] The New York Constitution reads, "registration shall be completed at least ten days before each election."[96] The Oklahoma Constitution makes its positive right to vote "[s]ubject to such exceptions as the Legislature may prescribe."[97] The scope of these provisions varies, with some granting the legislature broad authority to impose conditions on the right to vote, others expressly providing the legislature authority to impose a registration

92 See *Voter Registration Deadlines*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx (last updated Oct. 2, 2020), for a complete list of state voter registration deadline statutes. *See also infra* the Appendix.

93 *See infra* the Appendix (listing the relevant provisions in all nine state constitutions that expressly contemplate or require a registration deadline).

94 OHIO CONST. art. V, § 1.

95 MO. CONST. art. VIII, § 2.

96 N.Y. CONST. art. II, § 5.

97 OKLA. CONST. art. III, § 1.

deadline, and some setting out a specific timeframe for registration. All of these constitutions impose or provide legislatures with colorable grounds to impose a registration deadline as a condition upon the right to vote.

In many cases, this express constitutional authority forecloses the ability to seek abolition of the registration deadline on state constitutional grounds. Depending on the specific constitutional text, litigants may still be able to challenge the length of registration deadlines in some of these states. For example, there is pending litigation challenging the length of New York's twenty-five-day voter registration deadline despite the express constitutional requirement that voters register "at least ten days before each election."[98] However, outright challenges to registration deadlines in these states are unlikely to succeed given the strong textual basis for at least some form of registration deadline.

B. *A Right Conditioned on Registration*

Nine states condition their positive right to vote on registration.[99] For example, the Alabama Constitution provides that "[e]very citizen . . . if registered as provided by law, shall have the right to vote."[100] In South Carolina, citizens are entitled to vote if they are "properly registered."[101] The Arkansas Constitution gives any person who is "[l]awfully registered to vote in the election" the right to do so.[102] These texts do not speak directly to the constitutionality of registration deadlines. However, because the right to vote is conditioned on registration, that right does not accrue until the voter is duly registered. This could lead courts to apply a less stringent test to laws infringing on the right to vote before registration occurs.

The challenge for litigants is persuading a court to apply a

98 N.Y. Const. art. II, § 5; *see* League of Women Voters of N.Y. v. N.Y. Bd. of Elections, No. 160342/2018, at *1 (N.Y. Sup. Ct. Oct. 4, 2019) (order denying the state's motion to dismiss a challenge to the length of New York's twenty-five-day voter registration deadline); League of Women Voters of N.Y. v. N.Y. Bd. of Elections, No. 160342/2018, at *1–2 (N.Y. Sup. Ct. Sept. 25, 2020) (order denying plaintiff's motion for preliminary injunction).

99 *See, e.g.*, Fla. Const. art. VI, § 2 ("Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, *if registered as provided by law*, shall be an elector of the county where registered." (emphasis added)); S.C. Const. art. II, § 4 ("Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law."); *see also infra* the Appendix (listing the relevant provisions in all nine state constitutions that condition the right to vote on registration).

100 Ala. Const. art. VIII, § 177(a).

101 S.C. Const. art. II, § 4.

102 Ark. Const. art. III, § 1.

heightened level of scrutiny on a registration deadline in these states. Since the positive right is conditioned on registration, an otherwise eligible unregistered person turned away from the polls would not benefit from this positive right to vote conferred by the state constitution. Using Alabama's constitution to illustrate the point, a prospective voter not "registered as provided by law" would not be guaranteed "the right to vote" under the Alabama Constitution.[103] Without the expressly granted positive right to vote, a litigant's case for heightened scrutiny of the election law is weakened. The door is not completely shut on litigants in these states, but the argument is much weaker than it would be if the positive right to vote was conferred upon all regardless of registration status.

C. *A Right Unconditioned by Registration*

Eleven states grant a positive right to vote unconditioned by voter registration.[104] In these states, the right to vote is conferred on all citizens who meet certain conditions irrespective of whether they are registered to vote. For example, in Kentucky, a citizen meeting certain conditions is entitled to "be a voter."[105] The West Virginia Constitution provides that "[t]he citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside."[106] In Indiana, citizens meeting certain requirements "may vote."[107] Many of these state constitutions grant the state legislature the power to provide for a voter registration process.[108] However, the positive right to vote is not conditioned on the completion of that registration process.

These state constitutions provide the strongest justification for heightened judicial scrutiny of registration deadlines. In these states, otherwise qualified voters are denied the right to vote for failing to preregister before Election Day. The imposition of this condition infringes upon their constitutionally protected right to vote. Given the infringement

103 ALA. CONST. art. VIII, § 177(a).

104 *See, e.g.*, KAN. CONST. art. V, § 1 ("Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."); *see also infra* the Appendix (listing the relevant provisions in all eleven state constitutions that provide a positive right to vote unconditioned on registration).

105 KY. CONST. § 145.

106 W. VA. CONST. art. IV, § 1.

107 IND. CONST. art. II, § 2.

108 *See, e.g.*, W. VA. CONST. art. IV, § 12 ("The Legislature shall enact proper laws for the registration of all qualified voters in this state."); IND. CONST. art. II, § 14(c) ("The General Assembly shall provide for the registration of all persons entitled to vote.").

upon the most fundamental of rights, courts should judiciously review the necessity of these requirements. Even where state constitutions provide for legislatively enacted registration processes, the process should not be permitted to unnecessarily inhibit access to the ballot. For example, West Virginia's constitution provides that "[t]he Legislature shall enact proper laws for the registration of all qualified voters in this state."[109] Yet the state's highest court held that "this authority to require registration of voters[] does not empower the Legislature to nullify or modify the constitutional right of a citizen to vote. Hence, registration laws must be framed with great caution, and construed liberally and favorably toward the right to vote."[110] Failure to provide this searching judicial review would render the positive right to vote an empty promise.

This range of approaches is an illustration of constitutional federalism in practice. Each constitution demonstrates a nuanced attempt to balance the protection of democracy's most fundamental right with the practical needs of election administration. Some states chose to require or grant their legislatures the authority to enact registration deadlines. Others chose to condition the right to vote on registration, providing legislators more leeway to burden voters before granting them an expansive right. But eleven states take a textually distinct approach in their constitutions. These states grant a positive right unconditioned by registration.

This textual difference suggests a recognition that the right to vote is fundamental and deserves rigorous constitutional protection from unnecessary burdens that the voter registration process might impose. If these states wanted to constitutionally require registration deadlines or give their legislatures wide discretion to do so, they could have adopted the first or second constitutional approach. Instead, these states provided an expansive, positive right to vote. The presence of some conditions makes the conspicuous absence of a condition of registration all the more telling. The texts of these constitutions provide a positive right to vote that applies to registration requirements. State courts should apply their constitutional texts as such and carefully examine voter registration requirements to ensure their legislatures do not unconstitutionally burden the right to vote.

Examination of these constitutional texts further illustrates the inapplicability of the deferential *Anderson-Burdick* test. As discussed *supra* in Part I, the nature of the federal right to vote and the Federal Constitution's delegation of the electoral process to the states leave little reason to apply that test in state court. The states' positive right to vote suggests *Anderson-*

109 W. Va. Const. art. IV, § 12.

110 Funkhouser v. Landfried, 22 S.E.2d 353, 356 (W. Va. 1942).

Burdick's inadequacy generally, but it would be particularly inadequate as applied to voter registration deadlines in these eleven states. As the Court reasoned in *Anderson*,

> [w]e have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." . . . [T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.[111]

These state constitutions recognize this same practical consideration, but they strike a different balance. States have built many of these practical election administration considerations into their constitutional structure, and registration deadlines are no exception. These eleven states chose a textual construction of the right to vote that should—if they are to have meaning at all—limit the burdens that voter registration schemes can impose on that right. Courts in these states should recognize this distinction and employ heightened judicial scrutiny of voter registration schemes that impede this fundamental right.

111 Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

Conclusion

The right to vote is fundamental to a democratic society and deserves robust protection. The protection afforded by the Federal Constitution is limited, reflecting the negative nature of the right and the delegation of the electoral process to the states. When one looks to state constitutions, they provide robust affirmative protection of the right to vote. State courts should recognize this positive right and employ more stringent judicial scrutiny of election administration schemes that limit access to the ballot. State constitutions take a range of approaches when contemplating voter registration systems, balancing the protection of the right to vote with the need for the orderly administration of elections. Some state constitutions require or give legislatures significant freedom to implement registration deadlines. Others are more protective of the right to vote. This exercise of constitutional balancing should not amount to a distinction without a difference. Where the text of state constitutions takes a more protective bent, state courts should honor this choice and employ heightened scrutiny of voter registration schemes to provide this fundamental right its deserved protection.

APPENDIX: STATE CONSTITUTIONAL PROVISIONS ADDRESSING VOTER REGISTRATION DEADLINES

STATES THAT ALLOW LEGISLATIVE CONDITIONS OR REQUIRE VOTER REGISTRATION DEADLINES	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
DELAWARE	"There shall be at least two registration days in a period . . . ending not . . . less than ten days before, each General Election, on which registration days persons whose names are not on the list of registered voters established by law for such election, may apply for registration . . . ."[112]
MISSOURI	"All citizens of the United States . . . over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, . . . if they are registered within the time prescribed by law . . . ."[113]
NEW YORK	"Every citizen shall be entitled to vote . . . provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election."[114] "Laws shall be made for . . . the registration of voters; which registration shall be completed at least ten days before each election."[115]
OHIO	"Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections."[116]
OKLAHOMA	"Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state."[117]

112 DEL. CONST. art. 5, § 4.
113 MO. CONST. art. VIII, § 2.
114 N.Y. CONST. art. II, § 1.
115 *Id.* § 5.
116 OHIO CONST. art. V, § 1.
117 OKLA. CONST. art. III, § 1.

Pennsylvania	"Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact."[118]
Rhode Island	"Every citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote . . . ."[119]
Tennessee	"Every person, being eighteen years of age, being a citizen of the United States, being a resident of the State for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides."[120]
Virginia	"That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage . . . ."[121] "The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. . . . The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used."[122]

118 Pa. Const. art. VII, § 1.
119 R.I. Const. art. II, § 1.
120 Tenn. Const. art. IV, § 1.
121 Va. Const. art. I, § 6.
122 *Id.* art. II, § 2.

STATES CONDITIONING THE RIGHT TO VOTE ON REGISTRATION	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
ALABAMA	"Every citizen . . . if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting."[123]
ARKANSAS	"Except as otherwise provided by this Constitution, any person may vote in an election in this state who is . . . [l]awfully registered to vote in the election."[124]
FLORIDA	"Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered."[125]
LOUISIANA	"Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote . . . ."[126]
MISSISSIPPI	"Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, . . . is declared to be a qualified elector . . . ."[127] "The Legislature shall have the power to prescribe and enforce by appropriate legislation qualifications to be required of persons to vote and to register to vote in addition to those set forth in this Constitution."[128]

123 ALA. CONST. art. VIII, § 177(a).
124 ARK. CONST. art. III, § 1(a).
125 FLA. CONST. art. VI, § 2.
126 LA. CONST. art. I, § 10(A).
127 MISS. CONST. art. XII, § 241.
128 *Id.* § 244A.

North Carolina	"Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided."[129] "Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters."[130]
Oregon	"Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen . . . [i]s registered not less than 20 calendar days immediately preceding any election in the manner provided by law."[131]
South Carolina	"All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office."[132] "Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law."[133] "The General Assembly shall provide for the registration of voters for periods not less than ten years in duration."[134]
South Dakota	"Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote . . . . The Legislature may by law establish reasonable requirements to insure the integrity of the vote."[135]

129 N.C. Const. art. VI, § 1.
130 *Id.* § 3(1).
131 Or. Const. art. II, § 2(1)(c).
132 S.C. Const. art. I, § 5.
133 *Id.* art. II, § 4.
134 *Id.* § 8.
135 S.D. Const. art. VII, § 2.

STATES GRANTING A POSITIVE RIGHT TO VOTE UNCONDITIONED BY REGISTRATION	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
ALASKA	"Every citizen of the United States . . . who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election."[136]
ARIZONA[137]	"There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."[138] "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[139]
GEORGIA	"Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors."[140]
INDIANA	"A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election."[141] "The General Assembly shall provide for the registration of all persons entitled to vote."[142]

136 ALASKA CONST. art. V, § 1.

137 Arizona is the one state that does not provide an explicit positive right to vote, therefore it does not fit neatly into this categorization. Since a positive right to vote could arguably be derived from the "free and equal" clause, it fits most appropriately into this category. *See* Douglas, *supra* note 7, at 102–03.

138 ARIZ. CONST. art. VII, § 12.

139 *Id.* art. II, § 21.

140 GA. CONST. art. II, § 1, para. II.

141 IND. CONST. art. II, § 2(a).

142 *Id.* § 14(c).

Kansas	"Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."[143] "The legislature shall provide by law for proper proofs of the right of suffrage."[144]
Kentucky	"All elections shall be free and equal."[145] "Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere . . . ."[146]
Massachusetts	"All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."[147]
Nebraska	"All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."[148] "Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and voting precinct for the terms provided by law shall, except as provided in section 2 of this article, be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years."[149]
New Jersey	"Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote . . . ."[150]

143 Kan. Const. art. V, § 1.
144 *Id.* § 4.
145 Ky. Const. § 6.
146 *Id.* § 145.
147 Mass. Const. pt. 1, art. IX.
148 Neb. Const. art. I, § 22.
149 *Id.* art. VI, § 1.
150 N.J. Const. art. II, § 1, para. 3(a).

TEXAS	"Every person subject to none of the disqualifications provided by Section 1 of this article or by a law enacted under that section who is a citizen of the United States and who is a resident of this state shall be deemed a qualified voter; provided, however, that before offering to vote at an election a voter shall have registered, but such requirement for registration shall not be considered a qualification of a voter within the meaning of the term 'qualified voter' as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election."[151]
WEST VIRGINIA	"The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside."[152] "The Legislature shall enact proper laws for the registration of all qualified voters in this state."[153]

151 TEX. CONST. art. VI, § 2(a).
152 W. VA. CONST. art. IV, § 1.
153 *Id.* § 12.

THE WAR POWERS RESOLUTION AND THE CONCEPT OF HOSTILITIES

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ABSTRACT

In early 2020, in response to airstrikes that killed Iranian general Qassem Soleimani, the U.S. House and Senate passed a resolution calling for President Trump to end escalating military hostilities against Iran. Although ultimately vetoed, this resolution marked only the second time in history that measures invoking the War Powers Resolution of 1973 to limit the President's authority to use force have passed both legislative houses, demonstrating Congress's increasing willingness to assert its constitutional role in matters of war powers. Although questions of when the nation can go to war are deeply contested, this Article argues that the steady accretion of the President's war powers should not remain unconstrained.

The War Powers Resolution (WPR), which imposes a withdrawal mandate on unauthorized introductions of armed forces into "hostilities," remains the best framework for checking presidential unilateralism. This Article presents a systematic investigation of the executive branch's practice of circumventing the WPR's requirements, highlighting two examples of how the executive branch has narrowly interpreted "hostilities" in recent years. In analyzing whether and how legal processes constrain the President, this Article proposes two ways of reconceptualizing "hostilities" to prevent future circumvention of the WPR. First, it argues that a state of "hostilities" can exist even when the U.S. plays a supporting role in a partner mission and that "hostilities" must be reframed to encompass situations in which U.S. troops use or are subject to lethal force. Second, this Article proposes considering the following criteria to determine whether U.S. armed forces face ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments.

Introduction

In February 2020, the Senate passed a resolution calling for an end to escalating military hostilities against Iran without congressional authorization.[1] A month later, the House of Representatives passed the resolution as well,[2] but in May 2020, the resolution landed on President Donald Trump's desk, where it was vetoed.[3] The day after, Congress attempted to override the veto but lacked the necessary two-thirds majority.[4] With only a handful of Republicans breaking ranks in both the House and Senate to vote for the resolution, it amounted to no more than a "legal slap on the wrist"[5] for the Trump Administration.

Congress pushed for this resolution in response to the Trump Administration's series of strikes against Iran in late 2019 and the January 2, 2020, strike that killed Iranian general Qassem Soleimani. House Foreign Affairs Chairman Eliot Engel argued on the House floor that legislation curtailing President Trump's actions against Iran was necessary, and that "Congress's powers are not as narrow as the administration would like us to believe."[6]

These steps that Congress took are significant. A provision of the War Powers Resolution of 1973 (WPR) allows Congress to direct the President to remove U.S. armed forces from "hostilities,"[7] and the Iran resolution marks only the second time in history that measures invoking the WPR to limit the President's authority to use force have passed both the House and Senate. The first instance occurred in April 2019, only a year prior, when the House and Senate passed resolutions calling for an end to U.S. support for the Saudi-led coalition in Yemen's bloody civil war.[8] U.S. involvement at

1 Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. Times (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html.

2 H.R. Res. 891, 116th Cong. (2020); Connor O'Brien, *House Votes to Curtail Trump's Iran War Powers, Setting Up Veto Fight*, Politico (Mar. 11, 2020), https://www.politico.com/news/2020/03/11/house-trump-iran-war-powers-126247.

3 166 Cong. Rec. S2286-87 (daily ed. May 6, 2020) (Presidential Message).

4 Roll Call Vote No. 25, S.J. Res. 68, 116th Cong. (2020); Jordain Carney, *Senate Fails to Override Trump's Iran War Powers Veto*, Hill (May 7, 2020), https://thehill.com/homenews/senate/496616-senate-fails-to-override-trumps-iran-war-powers-veto.

5 *See* O'Brien, *supra* note 2.

6 *U.S. House of Representatives: House Session*, C-SPAN (2:14:18), https://www.c-span.org/video/?470231-2/house-session&start=7991.

7 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548).

8 Robbie Gramer & Amy Mackinnon, *Congress Is Finally Done with the War in Yemen*, Foreign Policy (Apr. 4, 2019), https://foreignpolicy.com/2019/04/04/congress-

the time had included arms sales,[9] military advisers, intelligence, and mid-air refueling of Saudi aircraft.[10] The Trump Administration, maintaining that U.S. troops were not involved in "hostilities" in Yemen, argued that the WPR did not require the withdrawal of troops.[11] Ultimately, Congress was unable to muster two-thirds majority support, and the resolution died after Trump's veto.[12]

Congress's actions over Iran and Yemen represent an attempt to reassert its constitutional authority over U.S. military action. Importantly, these steps demonstrate that Congress "is both able and willing to take on the responsibility of articulating approaches to foreign policy independent of the executive branch."[13] Despite the fact that the Obama Administration initiated U.S. involvement in Yemen without congressional authorization, Congress's recent actions attempt to rebalance constitutional war powers and engage in meaningful oversight over future uses of force.[14] As Stephen Pomper has noted, executive overreach "does not mean Congress has to throw in the towel on its rights and responsibilities."[15]

Questions of when and how the President can go to war or send U.S. armed forces abroad are deeply contested, and considerations of the balance of war powers are especially relevant now at a time when U.S. involvement in overseas conflicts is once again at the forefront of the national conversation. Political scientist Edward Corwin once famously observed that the Constitution is "an invitation to struggle for the privilege of directing American foreign policy."[16] Under the Constitution, war powers are divided between the President and Congress. The President is Commander in

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makes-history-war-yemen-powers-bill.

9 *Id.*

10 Lawrence Friedman & Victor Hansen, *The Senate Strikes Back: Checking Trump's Foreign Policy*, JUST SECURITY (Dec. 14, 2018), https://www.justsecurity.org/61867/senate-strikes-back-checking-trumps-foreign-policy.

11 *See* Gramer & Mackinnon, *supra* note 8.

12 *See* Roll Call Vote No. 25, S.J. Res. 68, 116th Cong. (2020); Mark Landler & Peter Baker, *Trump Vetoes Measure to Force End to U.S. Involvement in Yemen War*, N.Y. TIMES (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/us/politics/trump-veto-yemen.html.

13 *See* Friedman & Hansen, *supra* note 10.

14 *See id.* ("[T]he Senate vote represents the kind of congressional involvement that may lead to greater accountability for American foreign policy decisions that typically escape the attention of many citizens.").

15 Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SECURITY (Mar. 11, 2020), https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform.

16 EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 171 (4th ed. 1957).

Chief of the armed forces,[17] and Congress has the power to declare war, among other related powers.[18] The Founders believed that Congress was primarily responsible for authorizing uses of force, with narrow exceptions permitting the President to repel sudden armed attacks or rescue American nationals abroad.[19] Over the course of U.S. history, there have been formal declarations of war across five wars, in addition to statutory authorizations for the use of force.[20] However, since the time of the founding, the executive branch has steadily interpreted its war powers expansively, and with courts reluctant to adjudicate any sort of tug-of-war-powers between the President and Congress, the law in this area has been heavily based on historical practice.[21] With a history of "under-motivated Congresses and over-reaching presidents,"[22] the conventional adage is that the President's war powers have become essentially unconstrained.

This Article joins the ranks of scholarly work arguing that presidential unilateralism, which risks "miscalculation and aggrandizement,"[23] is not normatively appealing and should not remain unconstrained. It argues that Congress should seek to reassert its role in regulating war powers in order to produce better military policy and to act as a check on the President's ever-expanding powers. Generally, views on war powers have favored either pro-Congress or pro-executive stances. The pro-Congress school believes that pursuant to the Article I power to declare war (among other Article I powers), war powers should primarily reside with Congress, with the President's unilateral ability to use force limited to narrow circumstances.[24]

17 U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

18 U.S. Const. art. I, § 8, cl. 11 (describing authority to declare war, grant letters of marque and reprisal, and make rules governing capture on land and water); *id.* cl. 12 (describing authority to fund military operations); *id.* cl. 13 (describing authority to provide and maintain a navy); *id.* cl. 14 (describing authority to make rules regulating land and naval forces); *id.* cl. 15, 16 (describing authority relating to raising and providing for militias); *id*. cl. 18 (describing authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

19 Pomper, *supra* note 15.

20 Jennifer K. Elsea & Matthew C. Weed, Cong. Rsch. Serv., RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications 1 (2014) (these five wars are the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II).

21 *See infra* Section I.B.

22 Pomper, *supra* note 15.

23 Louis Fisher, Presidential War Power 185–86 (1995).

24 These include defending the United States against sudden attack and rescuing

This school includes members of Congress; scholars such as John Hart Ely, Louis Henkin, and Michael Glennon; and, most notably, President Joseph Biden.[25] In contrast, the pro-executive school, populated by scholars like John Yoo, believes that pursuant to the Article II Commander in Chief Clause and Vesting Clause, the Constitution places war powers squarely with the President.[26]

This Article contends that the law in this area, informed by historical practice and the statutory language of the WPR, is not fully without content and can in fact constrain the President. However, the ability of the law to constrain has been threatened by the executive branch's existing practice of creating self-imposed limits that do not meaningfully limit presidential discretion.[27] But based on Congress's recent resolutions invoking the WPR, there seems to be a way forward. After four years of the Trump Administration's eager exercise of executive branch unilateralism, and with a new administration helmed by President Biden, who has historically supported pro-Congress war powers reform,[28] there may be political will within Congress to reexamine its ability to check the President. In particular, Congress may be motivated to strengthen an existing constraint on the President: the War Powers Resolution.

Today, as the President's war powers fall under renewed public scrutiny, the WPR has become a focal point of any discussion on the use of force.[29] Passed in 1973 over President Nixon's veto,[30] the WPR represents Congress's attempt to assert its authority to limit and oversee the President's engagement of U.S. forces in military operations abroad. Despite the expansion of presidential war powers since its enactment, and despite executive branch interpretations limiting its statutory reach, the WPR "remains the key statutory framework for regulating the relationship

American nationals abroad. *See* NATIONAL WAR POWERS COMMISSION, APPENDIX ONE: AN OVERVIEW OF PROPOSALS TO REFORM THE WAR POWERS RESOLUTION OF 1973, at 3, 6 (2008).

25 *Id.*

26 *See id.*

27 *See infra* Section II.B (describing how the executive branch's current test of whether a military operation rises to the level of war in the constitutional sense does not meaningfully constrain the President).

28 *Infra* note 241 and accompanying text (describing then-Senator Biden's proposed WPR reforms).

29 *See, e.g.*, TESS BRIDGEMAN, REISS CENTER ON LAW AND SECURITY, WAR POWERS RESOLUTION REPORTING: PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD, 1973–2019 (2020), https://warpowers.lawandsecurity.org/wpr-reporting-1973-2019.pdf (tracking and analyzing every military activity report submitted by the President to Congress pursuant to the WPR).

30 *See* H.R. DOC. NO. 93-171 (1973); H.R.J. Res. 542, 93d Cong. (1973).

between the political branches with respect to the use of U.S. armed forces abroad."[31] For purposes of this Article, the WPR's most important provision for congressional control is Section 5(b), which creates a sixty-day termination clock. If the President introduces armed forces into hostilities or imminent hostilities, then unless Congress declares war, otherwise authorizes military action to continue, or extends the period by law, the President must withdraw the forces within sixty days.[32] However, since the enactment of the WPR, the executive branch has worked to limit the sixty-day clock's applicability to the President's use of force by narrowly interpreting the meaning of "hostilities." The current executive branch standard for what constitutes "hostilities" originated from State Department Legal Adviser Harold Koh's 2011 testimony on airstrikes in Libya, in which he concluded that a military operation limited in mission, exposure of armed forces, risk of escalation, and military means does not engage in hostilities as envisioned by the WPR.[33]

This Article argues that although the WPR still serves as the best framework through which Congress can check presidential unilateralism, one flaw in the resolution is the elasticity of the term "hostilities," which has allowed the executive branch to raise colorable arguments that the WPR's withdrawal mandate does not apply to a wide range of military activities abroad. This Article proposes to clarify and reconceptualize the term "hostilities" under the WPR. It aims to provide clearer standards of what constitute engagements in "hostilities," so that Congress can raise the political costs of presenting weak legal justifications for deploying U.S. armed forces, as well as shape public opinion when the President's actions are inconsistent with the WPR, which may ultimately constrain presidential decision-making.

This Article makes two proposals: First, it argues that "hostilities" can still exist when the United States plays a supporting role in a "partner

31 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 10.

32 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.").

33 *See Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 7–11 (2011) (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State) [hereinafter *Koh Hearing*] (describing how the executive branch's historical practice informed this interpretation of "hostilities").

mission"—a mission at the express invitation of another state, pursuant to UN authorization, or with a coalition like NATO—and must be reframed to encompass not only situations where U.S. forces participate in active exchanges of fire, but in which they use or are subject to lethal force. In support of this argument, this Article clarifies that while U.S. participation in partner missions is an indicator that the mission is narrow in scope, such participation is not on its own sufficient to show that U.S. forces have avoided engagements in "hostilities."

Second, this Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing (rather than intermittent) hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments. This proposed reconceptualization of "hostilities" is motivated by the desire to create statutory guidance that would limit implausible executive branch interpretations that circumvent congressional oversight, and to provide clarity in order to allow Congress ways of channeling political sanctions and public opinion to constrain presidential overreach.

This Article is informed by and expands upon a rich literature proposing reforms to the WPR, including to the definition of "hostilities."[34] Past reform proposals have aimed to strike a balance between providing the President flexibility in responding to a range of combat situations and providing guidance on when the President can use force without prior congressional authorization. This Article offers a novel contribution by proposing a reconceptualization of "hostilities" informed in part by executive branch practices that have in past instances acted as some limitation on presidential decision-making.[35] Moreover, building off the balancing act in the literature, this Article aims to tip the balance away from presidential discretion and towards clearer standards on situations that constitute "hostilities" and trigger the sixty-day withdrawal requirement—standards that are required to curb unauthorized U.S. involvement in consequential military operations.

This Article proceeds in three parts. Part I provides the history of the division of war powers between Congress and the President and discusses how the WPR operates. This Part describes how the war power

34 *See infra* Section III.B (reviewing past WPR reform proposals).

35 *See infra* Section III.C.ii (proposing standards incorporating executive branch criteria for determining whether the WPR has been triggered to start running the sixty-day countdown clock).

was initially envisioned and presents the problem of the executive branch's steady accretion of power. Part II argues that the law in this area, and not solely politics, can serve as a constraint on the President. It suggests that self-imposed constraints by the executive branch offer no meaningful limits, and that congressional checks like the WPR must be fortified. This Part explores the executive branch's erosion of the term "hostilities" in the WPR through two examples: the 2011 Libya operation and the 2020 Soleimani strike. Part III presents two proposals for reconceptualizing "hostilities" within the WPR, demonstrating that Congress can strike the right balance in curtailing presidential power while avoiding the pitfall of imposing a "'one size fits all' straitjacket"[36] on the President's decisions to commit armed forces abroad.

36 *Koh Hearing*, *supra* note 33, at 5.

I. THE HISTORY AND PRACTICE OF WAR POWERS

This Part provides the history of the division of war powers between Congress and the President and discusses how the WPR operates. Section I.A provides historical background on war powers, Section I.B traces the steady expansion of the President's claims of unilateral authority to use force abroad, and Section I.C describes the WPR, Congress's attempt to check the President's expanding war powers.

A. *The Constitutional Framework and Historical Developments*

Under the constitutional framework, the President is Commander in Chief of the armed forces, and Congress has the power to declare war, among other related powers.[37] The first occasion to raise constitutional questions about the President's and Congress's respective war powers under this framework came soon after the founding. In 1793, the Founders faced an early constitutional foreign relations crisis, precipitated by the possibility of U.S. involvement in a war between France and Great Britain.[38] During this neutrality controversy, the Founders confronted the question of whether U.S.-French treaties of alliance compelled the United States to join France in the war or whether the United States could remain neutral.[39] At this early stage of the country's history, "[n]either law nor policy dictated an obvious answer" as to how the government should proceed.[40] On April 22, 1793, George Washington issued the Proclamation of Neutrality, declaring that the United States and its citizens should be impartial toward France and Great Britain.[41] The Proclamation, however, faced criticism, and opponents questioned whether the President had the authority to issue the Proclamation or whether Congress's power to declare war meant that only Congress could declare neutrality.[42]

In the aftermath of the Proclamation, Alexander Hamilton, under the name Pacificus, penned a series of essays defending the President's power to issue the Proclamation, and James Madison, under the name Helvidius,

37 *See* U.S. CONST. art. II, § 2, cl. 1; *id.* art. I, § 8, cl. 11–16, 18.

38 Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 328–32 (2001).

39 *Id.* at 332–34.

40 *Id.* at 332.

41 GEORGE WASHINGTON, NEUTRALITY PROCLAMATION, *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472–74 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

42 *See* Prakash & Ramsey, *supra* note 38, at 328–29 n.424 (discussing how opponents of the Proclamation publicly questioned the President's authority to declare neutrality).

responded with his own essays rebutting Hamilton's arguments.[43] This famous Pacificus-Helvidius debate provides insight into early arguments about the scope of the presidential war power. Hamilton believed that the war power by its nature was an executive power, and that Congress's constitutionally enumerated power to declare war was a carveout from this natural framework.[44] In contrast, Madison believed that the power to declare war was a legislative power and properly belonged to Congress.[45] This early debate provides us with a few insights. The first is that one reading of the Constitution gives the President "residual" power over U.S. foreign policy, arising from the general grant of executive power and separate from Article II's enumerated powers regarding the military and receiving foreign ambassadors.[46] The second is that in the early days of the United States, the Founders understood that the President could not unilaterally enter into war. Despite Hamilton and Madison's disagreement about how broadly to construe Congress's enumerated power to declare war, they reached common ground on the fact that the President cannot wage a war without authorization from Congress.[47] There was an understanding that the power to declare war and the power to conduct war should not be held by the same branch of government.

However, since Hamilton and Madison first debated these issues, the executive branch's understanding of the scope of unilateral presidential power to engage in military activity abroad has expanded dramatically,

43 *See* Alexander Hamilton, Pacificus No. 1 (1793), *reprinted in* 4 The Works of Alexander Hamilton 432, 439 (Henry Cabot Lodge ed., 1904); James Madison, Helvidius No. 1 (1793), *reprinted in* 1 Letters and Other Writings of James Madison: Fourth President of the United States 611 (1865).

44 *See* Hamilton, *supra* note 43 (arguing that this was an "*exception*[] and *qualification*[]" to the general grant of executive power in Article II).

45 Madison, *supra* note 43, at 615–16.

46 *See* Prakash & Ramsey, *supra* note 38, at 346–50 ("War was one of the principal executive powers of foreign affairs in the taxonomy of the great eighteenth-century writers.").

47 Scholars generally agree that a congressional authorization for use of force is functionally the same as a declaration of war. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2059 (2005) ("[A]lmost no one argues today that Congress's authorization must take the form of a declaration of war."). A declaration of war needs only to "constitutionally manifest its understanding and approval for a presidential determination to make war," and an authorization for use of force achieves this goal. *See* Harold Hongju Koh, *The Coase Theorem and the War Power: A Response,* 41 Duke L.J. 122, 126 (1991). For instance, the 2001 Authorization for Use of Military Force (AUMF), passed on September 18, 2001, in response to the September 11 terrorist attacks, is considered to "confer[] full congressional authorization for the president to prosecute a war." Bradley & Goldsmith, *supra*, at 2078, 2083.

especially as the nature of war has changed. In the nineteenth century, the early story of U.S. foreign engagements was one of a country "blessed by a dearth of powerful enemies."[48] With the retreat of European nations from the western hemisphere, the United States was free to conduct foreign policy without interference from established military powers.[49] During this era, two major military engagements stand out: In 1846, Congress declared war on Mexico, and in 1898, Congress declared war on Spain.[50] But in the twentieth century, the United States assumed a greater role in the international community and became involved in larger wars that required more resources.[51] After World Wars I and II, the United States followed this "new model" of international engagement, entering the Korean conflict without a formal congressional declaration of war and engaging in proxy wars around the world.[52] In the post-Cold War era, U.S. military engagements veered toward missions authorized by the UN Security Council.[53] Most recently, since 9/11, the use of force abroad has shifted from responding to state actors to responding to terrorist organizations.[54]

This expansion of U.S. military interventions has "created a permanent imbalance between the different branches of government,"[55] with the President's powers growing relative to the powers of Congress. In recent times, the system for regulating presidential use of military force abroad "inhabits a grey zone between law and lore."[56] The Constitution lacks clarity on the division of war powers between the President and Congress, leading to gaps that "must be filled by reference to extratextual sources: practice, convenience, necessity, national security, international relations law and theory, [and] inherent rights of sovereignty."[57] Most notably, the law in this area has been informed by historical practice and the legal opinions of the Justice Department's Office of Legal Counsel (OLC), as discussed in

48 Christopher A. Preble, *The Founders, Executive Power, and Military Intervention*, 30 PACE L. REV. 688, 694 (2010).

49 *Id.* at 695.

50 *Id.*

51 *See id.* at 697.

52 *See id.* (describing U.S. involvement in Southeast Asia, Iran, and Guatemala).

53 *See* Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RSRV. L. REV. 1237 (1997).

54 *See* BRIDGEMAN, WAR POWERS RESOLUTION REPORTING, *supra* note 29, at 20 (observing a trend in WPR reports that indicated a "dramatic swing toward operations involving non-state actors in the post-9/11 era").

55 Preble, *supra* note 48, at 701.

56 Tess Bridgeman & Stephen Pomper, *Introduction: The War Powers Resolution*, TEX. NAT'L SECURITY REV.: POL'Y ROUNDTABLE (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#intro.

57 Prakash & Ramsey, *supra* note 38, at 233.

Section II.A.

B. *The President's Expanding War Powers*

As the nature of military activity has changed, the executive branch's understanding of the scope of the President's war powers has expanded. The conventional understanding is that the President has the power pursuant to Article II's Vesting Clause and Commander in Chief Clause to conduct limited types of military activity without congressional authorization.[58] The "core" historical cases of unilateral presidential action include repelling attacks on the United States and rescuing U.S. citizens abroad.[59] Indeed, members of Congress have generally agreed that "the President as Commander in Chief ha[s] power to lead the U.S. forces once the decision to wage war ha[s] been made, to defend the nation against attack, and perhaps in some instances to take other action such as rescuing American citizens."[60] However, the executive branch has adopted a more expansive interpretation of the kinds of military activity the President may unilaterally conduct based solely on Article II authority. These activities include "[e]ngaging in hot pursuit of aggressors," like President Monroe's involvement in Spanish Florida in 1818; "conducting punitive reprisals," like President Reagan's bombing of Libya in 1986; "preemptively attacking enemies," like President Nixon's bombing of Cambodia in 1970; and "enforcing treaties, international agreements, international law, and acting pursuant to membership in international organizations," like President Truman's involvement in Korea pursuant to UN authorization in the early 1950s.[61]

In recent times, there have been three schools of thought on the scope of the President's war powers. The first view, articulated by scholars like John Hart Ely, is that for any military activity outside of core Article II powers, the President must obtain prior congressional authorization before engaging U.S. armed forces.[62] This view, perhaps due to its extreme limits

58 *See* Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 8–9.

59 *Id.*

60 Matthew C. Weed, Cong. Rsch. Serv., R42699, The War Powers Resolution: Concepts and Practice 7 (2019).

61 *See* National War Powers Commission, Appendix Four: A War Powers Primer 5 (2008). Other examples include authority to "rescue foreign nationals where such action facilitates the rescue of U.S. citizens . . . suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties." *See* Weed, Cong. Rsch. Serv., *supra* note 60, at 7.

62 *See* Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I–The Constitution,*

on the President's actions, "has not carried the day for many decades in terms of U.S. practice."[63] The second view is a maximalist theory espoused by John Yoo and Jay Bybee, among others, who argue that "[t]he President can take the Nation into full-fledged, extended war without congressional approval, as President Truman did in Korea, as long as he does so in order to advance the 'national security interests of the United States.'"[64] This view also has not appeared in executive branch practice, with the possible exception, as Yoo and Bybee noted, of U.S. involvement in Korea.[65] The third view, articulated by OLC in a 2011 opinion, most accurately reflects the executive branch's interpretation of the scope of the President's war powers. But even this theory suggests an understanding of expansive presidential powers. The OLC opinion provides a two-pronged test of when the President may unilaterally use force abroad: (1) if the use of force serves a "significant national interest," and (2) if the activity is not extensive enough in "nature, scope, and duration" as to constitute a "war" in the constitutional sense, a standard that is generally satisfied "only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."[66] As Section II.B discusses, this test presents no meaningful limit to the President's unilateral uses of force, and is used to justify actions in situations such as the 2011 Libya intervention, where operations far exceeded the traditionally-understood Article II powers of repelling attacks and rescuing citizens.

C. *The War Powers Resolution as a Congressional Check*

In the mid-20th century, Congress's concerns about the President's expansive view of war powers intensified following the Korean conflict. By the 1970s, after U.S. involvement in Vietnam began with President Nixon's unilateral deployment of military advisors and ordering of a secret bombing campaign in Cambodia a few years later, Congress believed that "the constitutional balance of war powers had swung too far toward the President and needed to be corrected."[67]

In response to this expansion of presidential power, Congress passed

the Charter, and Their Intersection, OPINIO JURIS, (Jan. 9, 2013) http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection.

63 *Id.*

64 *Id.*

65 *Id.*

66 Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 27–31 (2011).

67 WEED, CONG. RSCH. SERV., *supra* note 60, at 7.

the War Powers Resolution (WPR)[68] in 1973 with the objective of reasserting Congress's role in authorizing uses of force. The joint resolution, passed over President Nixon's veto,[69] purported to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces."[70] However, beginning with President Nixon, successive Presidents have challenged the constitutionality of the resolution.[71] In his veto message, Nixon warned that the resolution would "attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[72]

The WPR and the executive branch differ in their conceptualizations of the scope of the President's war powers. Section 2(c) of the WPR recognizes the power of the President to authorize the use of force in situations of hostilities or imminent hostilities only pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[73] In contrast, the executive branch has stated that pursuant to Article II, the President has authority to use force for a broader range of purposes, including "to rescue American citizens abroad, rescue foreign nationals where such action facilitates the rescue of U.S. citizens, protect U.S. Embassies and legations, suppress civil insurrection, implement the terms of an armistice or cease-fire involving the United States, and carry out the terms of security commitments contained in treaties."[74]

Section 4(a), the "triggering provision" of the WPR, requires the President, "in the absence of a declaration of war,"[75] to submit a report to Congress within 48 hours of introducing U.S. forces under one or more of three circumstances: (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"[76]; (2) "into the territory, airspace or waters of a foreign nation, while equipped for

68 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).
69 *See* H.R. Doc. No. 93-171 (1973).
70 War Powers Resolution § 2(a).
71 *See generally* National War Powers Commission, *supra* note 24.
72 *See* H.R. Doc. No. 93-171.
73 War Powers Resolution § 2(c).
74 Weed, Cong. Rsch. Serv., *supra* note 60, at 7; *see also War Powers: A Test of Compliance: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affairs of the House Comm. on Int'l Relations*, 94th Cong. 69 (1975).
75 War Powers Resolution § 4(a).
76 *Id.* § 4(a)(1).

combat . . ."[77]; or (3) "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[78] From the first forty-eight-hour report submitted by President Ford in 1975[79] through December 2019, there have been 105 such reports, ranging from "notification of the use of U.S. forces to transport refugees in South Vietnam to safer areas in the country, to the November 11, 2019, report in which President Trump notified Congress of the deployment of additional forces to the Kingdom of Saudi Arabia."[80]

For the purposes of this Article, the most important WPR provision is Section 5(b), which creates a sixty-day termination clock. Section 5(b), which was meant to "provide teeth" to the resolution,[81] requires that for reports submitted pursuant to Section 4(a)(1) (the hostilities/imminent hostilities prong), unless Congress declares war or otherwise authorizes the military action to continue or extends the period by law, the President must terminate the action within sixty days.[82] The President may extend this sixty-day period by thirty days if required by "unavoidable military necessity respecting the safety of United States Armed Forces."[83] If Congress declares war or authorizes the use of force during this period, the sixty-day withdrawal countdown is tolled. For instance, one "classic example" of such congressional authorization envisioned by the WPR[84] is the 2002 Authorization for Use of Military Force against Iraq.[85] The language of

77 *Id.* § 4(a)(2).

78 *Id.* § 4(a)(3).

79 *See* Letter from Gerald Ford, President of the U.S., to Congressional Leaders on the Transport of Refugees from Danang (Apr. 4, 1975) (describing deployment of U.S. troops for a humanitarian effort to transport refugees in South Vietnam).

80 BRIDGEMAN, WAR POWERS RESOLUTION REPORTING, *supra* note 29, at 11, 16. Military activities covered by these reports include response to state and non-state threats, protection of U.S. citizens and/or property, evacuations, humanitarian missions, stabilization missions, assistance to other states, and rescue missions/hostage recovery. *See id.* at 12.

81 WEED, CONG. RSCH. SERV., *supra* note 60, at 4.

82 War Powers Resolution § 5(b) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.").

83 *Id.* This Article refers to this period as the "sixty-day countdown clock," but recognizes that it may be extended up to ninety days.

84 WEED, CONG. RSCH. SERV., *supra* note 60, at 42.

85 Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1500–01 (2002).

the authorization noted that it was intended to "constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[86]

In line with the purpose of the resolution, the Senate report of the WPR noted that Section 5(b) is the "heart and core" of the resolution and "represents, in an historic sense, a restoration of the constitution[al] balance which has been distorted by practice in our history."[87] Executive branch officials, however, have challenged this provision in particular as an "unconstitutional infringement on the President's authority as Commander in Chief."[88] Moreover, the executive branch has argued that this provision "interferes with successful action, signals a divided nation and lack of resolve, gives the enemy a basis for hoping that the President will be forced by domestic opponents to stop an action, and increases risk to U.S. forces in the field."[89] While Section 5(c) of the WPR allows Congress, through a concurrent resolution, to direct the President to remove U.S. armed forces from situations of hostilities, the Supreme Court's 1983 decision *INS v. Chadha*, which struck down one-house legislative vetoes not presented to the President for signature, has cast doubt on the constitutionality of Section 5(c).[90]

Because of the dispute over the constitutionality of Section 5(b), the meaning of "hostilities" under the WPR has become contested through the years, as the sixty-day termination clock is only triggered when U.S. armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[91] At the time of the WPR's passage, a report of the House Foreign Affairs Committee defined "hostilities" broadly: It noted that "hostilities" is "broader in scope" than an "armed conflict" (a term with legal meaning under international law), and that "hostilities" can include a "state of confrontation in which no shots have been fired."[92] However, as Section II.C elaborates, subsequent presidential administrations—including the Ford Administration, the first

86 *Id.* at 1501.

87 S. Rep. No. 93-220, 93d Cong. 220, at 28 (1973).

88 Weed, Cong. Rsch. Serv., *supra* note 60, at 6.

89 *Id.* at 9.

90 INS v. Chadha, 462 U.S. 919 (1983); *see* Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 10, 31 n.16 (describing how *Chadha* "by invalidating the 'legislative veto,' casts essentially fatal doubt on Congress' ability to order the withdrawal of U.S. forces by concurrent resolution" and how, post-*Chadha*, "Congress can only enforce withdrawal if it commands a veto-proof supermajority" (internal citations omitted)).

91 War Powers Resolution, Pub. L. No. 93-148, § 4(a)(1), 87 Stat. 555, 555–56 (1973).

92 H.R. Rep. No. 93-287, at 7 (1973).

to submit a forty-eight-hour report pursuant to the hostilities/imminent hostilities prong of the WPR—interpreted "hostilities" narrowly to encompass only situations where "units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[93] This narrow interpretation of "hostilities" has allowed Presidents through the years to claim that there is a greater range of situations into which he can send U.S. armed forces without triggering the WPR's withdrawal mandate.

Other provisions of the WPR include the Section 3 consultation provision, which requires the President to consult with Congress in "every possible instance"[94] before introducing U.S. armed forces into hostilities or imminent hostilities unless there has been a congressional declaration of war or authorization of use of force. Presidential administrations have not contended that this particular requirement is unconstitutional.[95] However, researchers have found "very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice *prior* to a decision to introduce troops."[96] Rather, Presidents have generally consulted with Congress "after the decision to deploy was made but before commencement of operations."[97]

The WPR has a mixed record. No President has accepted the WPR as fully constitutional.[98] Some members of Congress believe that

93 Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, and Martin R. Hoffman, Gen. Counsel, U.S. Dep't of Def., to Hon. Clement J. Zablocki, Chairman, Subcomm. on Int'l Sec. & Sci. Affairs, Comm. on Int'l Relations, U.S. House of Representatives (June 3, 1975), *in War Powers: A Test of Compliance: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affairs of the House Comm. on Int'l Relations*, 94th Cong. 38–40 (1975).

94 War Powers Resolution § 3 ("The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.").

95 *See* Supplementary Discussion of the President's Powers Relating to the Seizure of the American Embassy in Iran, 4A Op. O.L.C. 123, 128 (1979) ("When President Nixon vetoed the Resolution he did not suggest that either the reporting or consultation requirements were unconstitutional. Neither the Ford nor Carter administrations have taken the position that these requirements are unconstitutional on their face." (internal citation omitted)).

96 RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 23 (2012) (emphasis added).

97 *Id.*

98 RICHARD F. GRIMMETT, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 6 (2012) ("Every President since the enactment of the War Powers Resolution has taken the position that it is an unconstitutional infringement on the President's authority as Commander-in-Chief.").

the resolution serves as a constraint because it forces transparency and communication between the President and Congress, and "Presidents have, for the most part, adhered to the requirements to report use of our military abroad to Congress as the statute requires," providing Congress a "vehicle for asserting its war powers."[99] Other members of Congress believe that the resolution does not go far enough to regulate the President's unilateral uses of force, and yet others believe that the sixty-day countdown clock goes too far in limiting the President's conduct of foreign policy.[100] Even so, generally "none of the President, Congress, or the courts has been willing to initiate the procedures of or enforce the directives in the War Powers Resolution."[101] Indeed, there have been calls for WPR reform for nearly as long as the WPR has existed.

However, as the next Part argues, the WPR remains a key statutory framework for regulating presidential war powers and serves as a constraint on the President. While the term "hostilities" under the WPR has suffered decades of erosion by executive branch interpretations, reconceptualizing the meaning of the term can allow Congress to strengthen its ability to check ever-expanding presidential war powers.

99 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 8.; Weed, Cong. Rsch.Serv., *supra* note 60, at 1.

100 Weed, Cong. Rsch. Serv., *supra* note 60, at 1 (describing the argument of some members of Congress and executive branch officials that "the President needs more flexibility in the conduct of foreign policy and that the time limitation in the War Powers Resolution is unconstitutional and impractical").

101 *Id.* at ii. For a summary of alleged WPR violations dismissed in court on standing grounds, see Oona Hathaway & Geoffrey Block, *How to Recover a Role for Congress and the Courts in Decisions to Wage War*, Just Security (Jan. 10, 2020), https://www.justsecurity.org/68001/how-to-recover-a-role-for-congress-and-the-courts-in-decisions-to-wage-war.

II. CONSTRAINTS ON PRESIDENTIAL WAR POWERS

This Part describes how the law, and not solely politics, serves as a constraint on presidential powers. Section II.A discusses the theoretical foundation for this view and argues that certain mechanisms of legal constraint work better than others. Section II.B uses OLC's expansive views of presidential war powers to illustrate how relying on the executive branch to internalize norms is ineffective as a mechanism of legal constraint. Section II.C explains that the WPR, as the existing legal framework for regulating war powers, has been subjected to executive branch interpretations of "hostilities" that circumvent statutory requirements. Section II.D illustrates how the executive branch has narrowly interpreted "hostilities" through two examples: the 2011 Libya operation and the 2020 airstrikes that killed Iranian general Qassem Soleimani.

A. *How the Law Constrains*

This Section argues that law can constrain the President's discretion in authorizing uses of force, a view supported by Curtis Bradley and Trevor Morrison, among others.[102] With limited guidance on the scope of the President's and Congress's war powers in the text of the Constitution, the development of the law in this area has been dictated by the push and pull of historical practice. This kind of law, informed by historical practice, can serve as a constraint on presidential powers. Justice Frankfurter famously observed in *Youngstown* that historical practice is part of the interpretation of presidential powers,[103] and other scholars have similarly noted that it is "the 'court of history,' an accretion of interactions among the branches, that gives rise to basic norms governing the branches' behavior in the area."[104]

102 *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 979 (2009) ("[T]he thought that officials holding constitutionally constituted offices might be wholly unconstrained by the Constitution proves incoherent . . . . The most important question is not whether the Constitution constrains, but how."); Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1097 (2013).

103 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

104 Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1355 (1993) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)); *see also* Henry P. Monaghan, *Presidential War-*

However, the historical practice has been one-sided: Congress has often been reluctant to push back on the President's expanding powers,[105] and courts have been reluctant to resolve war powers disputes between the political branches, meaning that it is the historical practice of the executive that has predominantly shaped the law of war powers.

One perhaps cynical view is that the President's war powers have been shaped solely by the political process.[106] Scholars often lament the lack of genuine legal limits on the President and the fact that even supposedly politically-insulated offices like OLC offer no meaningful checks on presidential policymaking, as evidenced by the Bush-era OLC's torture memos.[107] The absence of judicial review in this area certainly makes it easier to throw our hands up and say that the law fails to constrain. In fact, Bruce Ackerman warns that "politics and communications," "bureaucratic and military organization," and "executive constitutionalism" risk turning the role of Commander in Chief into "a vehicle for demagogic populism and lawlessness."[108] Other scholars like Eric Posner and Adrian Vermeule argue that whatever constraints the President faces are purely non-legal, and that it is "politics and public opinion," rather than law, that check

Making, 50 B.U. L. Rev. 19, 25–27 (1970) (observing that Presidents have used force as necessary to achieve their foreign policy objectives, and that Congress has rarely objected on legal grounds); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale L.J. 845, 873–76 (1996) (reviewing Louis Fisher, Presidential War Power (1995)).

105 *See* Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1112 (2013) ("Part of the concern here is that Congress by itself often seems either unable or unwilling to provide adequate checks on executive power.").

106 *See id.* at 1099 ("[A]ny apparent consistency between presidential behavior and purported legal norms might simply be the result of political and policy considerations, not any constraint imposed by law." (citing Bruce Ackerman, The Decline and Fall of the American Republic (2010))).

107 *See id.* at 1097–99, 1101, 1112 ("It is often easier—or at least more familiar—to talk meaningfully about law if there is a reasonable prospect that the actions in question will face judicial review."). The torture memos were a controversial series of opinions issued by OLC in 2002 and 2005 advising the executive branch on the permissibility of the CIA's use of "enhanced interrogation techniques" against detained members of al-Qaeda. Allen S. Weiner, *The Torture Memos and Accountability*, ASIL Insights (May 15, 2009), https://www.asil.org/insights/volume/13/issue/6/torture-memos-and-accountability. The memos provided expansive interpretations of executive authority and found that these techniques, including the use of waterboarding, did not violate the Convention Against Torture or the federal criminal statute implementing the Convention. *Id.* The memos were effectively rescinded by President Obama via executive order shortly after he took office in 2009. *Id.*

108 Ackerman, *supra* note 106, at 4, 68.

the President.[109] They contend that any factors that ostensibly constrain presidential action lack status as norms, resulting in weak "normative justification for [their] continued existence if political or other extralegal factors pull in a different direction."[110] In part, this kind of skepticism of "practice-based" law originates from "post-Watergate cynicism about the behavior of government officials, including the extent to which they are likely to act based on internalized norms"[111]—a cynicism exacerbated in the last few years by the Trump Administration's disregard for such norms.[112]

In contrast, Bradley and Morrison note that "the interrelationship of law and politics does not by itself negate the importance of law" and term the historical gloss in this area "practice-based constitutional law."[113] Practice-based law may constrain the President's actions simply through a recognition that law is necessary to justify policy decisions and through public discourse on presidential power framed in legal terms.[114] As Bradley and Morrison argue, the law acts as a constraint "when it exerts some force on decisionmaking because of its status as law."[115] Moreover, the executive branch's justification of policy decisions in legal terms "might be puzzling if

109 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010).

110 *See* Bradley & Morrison, *supra* note 105, at 1112. Some scholars argue that a certain institutional arrangement may simply be the result of successful coordination that benefits the interests of both the executive and Congress. *See* Fallon, *supra* note 102, at 993; Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1002 (2008) ("Precedents may just be patterns of behavior that parties recognize as providing focal points that permit cooperation or coordination."). This kind of "coordination game theory" model is commonly seen in international law, where neither true judicial review nor enforcement exists. *See, e.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1793, 1827 (2009) (analyzing the lack of judicial review and enforcement in international law).

111 Bradley & Morrison, *supra* note 105, at 1113.

112 *See, e.g.*, Tom McCarthy, *Donald Trump and the Erosion of Democratic Norms in America*, GUARDIAN (June 2, 2018), https://www.theguardian.com/us-news/2018/jun/02/trump-department-of-justice-robert-mueller-crisis (describing situations in which "norms governing justice department independence are being tested"); *see also* Josh Chafetz & David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018).

113 Bradley & Morrison, *supra* note 105, at 1128.

114 *See id.* at 1130, 1140 (arguing that "debates about alleged breaches of legally normative conventions will be surrounded by analysis couched in legal terms, whereas debates about potential breaches of other conventions will not").

115 *Id.* at 1122 ("By contrast, if the legal status of a rule can never be the deciding factor in motivating presidential action—if, for example, the rule is always subordinated to policy or political considerations when it conflicts with them—then the rule does not operate as a constraint.").

the law were not playing any constraining role."[116] Specifically, Bradley and Morrison describe three mechanisms of legal constraint: *norm internalization* by executive branch actors, *external sanctions* for violations of norms, and the existence of *public dialogue* on the President's authority, framed in legal terms.[117] While it is possible to determine instances of genuine, reasonable disagreement about the *content* of the law,[118] any accusations, by Congress or the public, that the President is acting outside of constitutional or statutory bounds on questions of war powers is "virtually always contested" by executive branch actors.[119]

This Article supports the view that the law can constrain the President's war powers and argues that some mechanisms of legal constraint work better than others in limiting these powers. In considering Bradley and Morrison's mechanisms of constraint in reconceptualizing the meaning of "hostilities," this Article argues that the second and third of these mechanisms—external sanctions and public legal dialogue—operate most effectively in limiting presidential discretion on war powers. By proposing a definition to provide clearer standards of what constitutes an introduction of U.S. forces into "hostilities," this Article posits that Congress can raise the political costs of the President's precarious legal arguments, as well as more clearly identify potential violations of the WPR to temper executive branch discretion.

As the weakest mechanism for constraining the President on matters of war powers, norm internalization is the process by which an actor internalizes the normative force of a legal rule.[120] Bradley and Morrison argue that OLC is able to internalize legal norms due to its tradition of adhering to its own precedents across administrations, which "give[s] it some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch."[121] OLC may not

116 *Id.* at 1100.

117 *See id.* at 1132–45 (describing these mechanisms).

118 *See id.* at 1116 ("[I]t is at least sometimes possible to distinguish between legitimate disagreement about the law and noncompliance with the law, even on issues of presidential power for which the law is heavily influenced by historical practice.").

119 *Id.* at 1114–15.

120 *See id.* at 1132. *See generally* H.L.A. Hart, The Concept of Law 1–2 (2d ed. 1994) (describing law as practice that becomes normatively binding).

121 Bradley & Morrison, *supra* note 105, at 1133–34 ("[E]stablished traditions treat OLC's legal conclusions as presumptively binding within the executive branch, unless overruled by the Attorney General or the President . . . ."); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1455–57 (2010) (detailing the process of norm internalization within OLC). *But see* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 728 (2005) (questioning OLC's ability to constrain presidential decision-making

always act as a blank check for the President, as it "does not always say yes [to affirming the President's policies], and the absence of an OLC opinion in the President's favor likely makes it more difficult for him to pursue that course of action."[122] For example, norm internalization may explain the Bush White House's position on a warrantless surveillance program. When the White House pushed to implement the program despite refusal from the Attorney General, Deputy Attorney General, and head of OLC to certify the legality of the program unless certain changes were made, these top officials threatened to resign, resulting in the White House subsequently making the changes.[123] Bradley and Morrison describe this episode as Justice Department officials' internationalization of institutional norms "that not only takes law seriously as a constraint, but that insists on a degree of independence in determining what the law requires."[124]

However, as the next Section details, norm internalization does not truly constrain the President's expanding war powers. This is perhaps due to the confluence of several factors: little textual guidance from the Constitution on the division of war powers and a subject matter (national security) with incentive for the President to overreach and Congress to abdicate decision-making to the President.[125] A dearth of textual guidance on war powers from the Constitution resulted in OLC and other executive branch officials having an outsized role in developing norms in this area in the first instance,[126] and Congress has been reluctant to exert its institutional power to challenge the President on questions fraught with political consequences.[127] While these norms may on the surface seem to constrain presidential decision-making—for example, OLC advises the President to follow the law—the "law" here is the result of the executive branch's own interpretations.[128] Successive presidential administrations have been consistently resolute in their understandings of the meaning of "hostilities" in the WPR, resulting

when there are gaps in the judiciary's doctrine development).

122 Bradley & Morrison, *supra* note 105, at 1126.

123 *See id.* at 1136.

124 *Id.* at 1136–37.

125 For example, Oona Hathaway describes how members of Congress are content to allow the President to bear the brunt of political risk on questions of war, noting how "the lesson many learned from the Democratic primary in 2008, during which Hillary Clinton paid a steep political price for her vote five years earlier to authorize the war in Iraq, was that it is best to avoid taking hard votes on the use of force if at all possible." Oona A. Hathaway, *How to Revive Congress' War Powers*, TEX. NAT'L SECURITY REV.: POL'Y ROUNDTABLE (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#essay4.

126 *See* Bridgeman & Pomper, *supra* note 56, at 6.

127 Hathaway, *supra* note 125.

128 Bradley & Morrison, *supra* note 105, at 1101, 1106.

in the entrenchment of executive branch interpretations of the law.[129] For example, in the 2011 Libya operation, the administration relied on its own interpretation of "hostilities" to argue that it had no obligation to withdraw troops after sixty days.[130] As this episode illustrates, war powers reform cannot rely solely on executive branch norm internalization to produce checks on presidential discretion.

Instead, imposing external sanctions for violations of norms would be more effective for bringing the law to bear on the President. According to Bradley and Morrison, external sanctions that constrain the President's actions do not have to be formal and can even exert pressure through the political process.[131] Accusations of illegal conduct could "enable the President's congressional opponents to impose even greater costs on him through a variety of means, ranging from oversight hearings to, in the extreme case, threats of impeachment."[132] The opposition party in Congress can attempt to impose these political costs by criticizing unilateral presidential authorizations of force in the media. As legal theorists like Fred Schauer have suggested, "law violation increases the political penalty for those official actions that are or turn out to be unacceptable on policy or political grounds."[133] External sanctions work as a legal constraint when the costs of non-compliance with a norm outweigh the benefits. In some instances, partisan politics often exert the most pressure, with Congress's "institutional checks . . . operat[ing] to facilitate the constraining effect of law."[134] External sanctions on norm violations, which can include "[c]riminal trials . . . lawyer scrutiny, reporting requirements, inspector general and congressional investigations, Accountability Board proceedings, prosecutorial and ethics

129 *Id.*; Koh Hearing, *supra* note 33, at 6–7 (noting that the "Executive Branch has repeatedly articulated and applied these foundational understandings" of the meaning of "hostilities" since State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann articulated them in 1975).

130 Koh Hearing, *supra* note 33, at 3–11; Bradley & Morrison, *supra* note 105, at 1148.

131 *Id.* at 1137.

132 *Id.* at 1138; *see also* William G. Howell & Jon C. Pevehouse, While Dangers Gather: Congressional Checks on Presidential War Powers xx, xxiii (2007) ("[T]he partisan composition of Congress regularly, but not uniformly, influences the presidential use of force—impacts appear most pronounced when presidents contemplate larger-scale military initiatives where certain systemic imperatives are not present."); Douglas L. Kriner, After the Rubicon: Congress, Presidents, and the Politics of Waging War 147 (2010).

133 Frederick Schauer, *The Political Risk (If Any) of Breaking the Law*, 4 J. Legal Analysis 83, 85 (2012); *see also* Bradley & Morrison, *supra* note 105, at 1138–39 ("[T]he political cost of pursuing an ultimately unpopular policy initiative (such as engaging in a war) goes up with the perceived illegality of the initiative.").

134 Bradley & Morrison, *supra* note 105, at 1140.

investigations, civil trials, FOIA processing and disclosures, public criticism and calumny, and elections" can all impose "various forms of psychological, professional, reputational, financial, and political costs on those held accountable."[135]

In addition to external sanctions, public legal dialogue can also impose constraints on presidential unilateralism in the area of war powers.[136] In public defenses of its policy decisions, the executive "almost always endeavors to argue that its actions are lawful—and to rebut criticisms to the contrary."[137] Indeed, legality's salience is evident in the executive branch's "decision to devote resources to producing credible legal defenses of executive actions."[138] OLC's perceived insulation and adherence to opinions across administrations reflect the understanding that "OLC's opinions are most valuable if they appear to take the law seriously."[139] Even if legal rules are invoked for political reasons, a President who does so may be incentivized to adhere to those legal principles in the future.[140] As Jack Goldsmith has noted, the public can serve as a powerful constraint on the executive by watching and holding presidential actions accountable.[141] Goldsmith has acknowledged that "[w]ar has become hyper-legalized" and that "[a]s law in war has grown, the Commander in Chief has lost the relative control he used to have over its interpretation and enforcement."[142] Moreover, he has

135 JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 235 (2012).

136 Bradley & Morrison, *supra* note 105, at 1140. Bradley and Morrison note that the boundaries of their three categorized mechanisms are porous and can in some instances operate interdependently—for example, "practices followed out of fear of external sanctions can become internalized as a result of habit" and "the internalization of a norm associated with a practice can plausibly affect the likelihood that actors with an interest in the practice will impose external sanctions for violations." *Id.* Likewise, this Article treats these mechanisms as distinct categories with the possibility of some overlap.

137 *Id.*

138 *Id.* at 1143.

139 *Id.* at 1142.

140 *See* Fallon, *supra* note 102, at 1002 ("[E]xternal constraints not only reinforce, but also help shape, officials' perceptions of their obligations."); Jon Elster, *Strategic Uses of Argument*, *in* BARRIERS TO CONFLICT RESOLUTION 236, 250 (Kenneth Arrow et al. eds., 1995) (calling this phenomenon the "civilizing force of hypocrisy").

141 GOLDSMITH, *supra* note 135, at 207 ("Empowered by legal reform and technological change, the 'many'—in the form of courts, members of Congress and their staff, human rights activists, journalists and their collaborators, and lawyers and watchdogs inside and outside the executive branch—constantly gaze on the 'one,' the presidency.").

142 *Id.* at 224. Goldsmith notes further that activist groups often criticize the President "in the language of law, and [bring] lawsuits in the United States and abroad to challenge his actions." *Id.* at 225.

described how public pressures challenged certain Bush-era counterterrorism policies and "force[d] the government to recalibrate its counterterrorism policies and accountability mechanisms constantly based on ever-changing information and ever-changing legal and political restraints."[143] All of these considerations of legality impose costs on the President, which can limit certain decisions, including decisions to use military force.

As mechanisms of legal constraint, external sanctions and public legal dialogue could act as powerful limits on presidential decision-making by increasing the costs of the President's noncompliance, especially when clear legal guidance exists, and could shape public opinion enough to constrain the President's decisions. Other reform proposals discussed in Section III.B have also gestured at how external sanctions might constrain the President. Matthew Waxman, for example, proposes for Congress to actively shape public opinion on the President's engagement in overseas conflicts.[144] This Article goes beyond past proposals by offering a clarification of "hostilities" designed to allow Congress and the public to channel these mechanisms of constraint and identify instances of presidential unilateralism inconsistent with the WPR. As the next Section explains, the weak self-imposed executive branch constraints illustrate how norm internalization by executive branch actors has minimal effect on the law's constraining force.

B. *Empty Executive Branch Constraints*

Congressional action to reform the WPR is necessary because current self-imposed executive branch limits on war powers have not resulted in actual, meaningful limits on the President. When the President commits U.S. armed forces abroad, the initial inquiry of whether the President can do so pursuant to his Article II authority alone without congressional authorization stems from an Obama Administration OLC opinion on the March 2011 Libyan airstrikes. The opinion describes a two-part framework for analyzing whether a military intervention rises to the level of "'war' in the constitutional sense" that would require congressional authorization: (1) whether the military action is in "the national interest" and (2) what the "nature, scope and duration" of the conflict is like.[145]

143 *See id.* at 232.

144 *See* Matthew C. Waxman, *War Powers Oversight, Not Reform*, Tex. Nat'l Security Rev.: Pol'y Roundtable (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#essay2.

145 Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 33, 37–39 (2011) ("[T]he President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national

As scholars have noted, neither part of this test meaningfully constrains the President. The first part of the test is an inquiry into whether the President could "reasonably determine that such use of force was in the national interest."[146] If so, then it is more likely that the military activity was within the President's constitutional powers. This reasoning echoes the rationale supplied in the first mention of a national interest test in a 1941 OLC opinion by Attorney General Robert Jackson. Jackson noted that pursuant to his constitutional authority, the President "has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States."[147] Moreover, the President may extend his authority "to the dispatch of armed forces outside of the United States . . . for the purpose of protecting American lives or property or American interests."[148] Subsequent executive branch practice adopted this standard.[149] According to OLC, the national interest is relevant because the President has "independent authority" and "unique responsibility" as Commander in Chief to take military action "'for the purpose of protecting important national interests,' even without specific prior authorization from Congress."[150] In the case of the Libyan airstrikes, OLC found at least two national interests at stake: "preserving regional stability and supporting the UNSC's credibility and effectiveness."[151]

interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause."). Assuming the President has the underlying Article II authority to use force under this test, the WPR countdown clock then restricts the period in which the President can use such force without congressional authorization. *See* War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555 (1973).

146 Authority to Use Military Force in Libya, 35 Op. O.L.C. at 20.

147 Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58 (1941).

148 *Id.*

149 *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 5, 6 (2018) (arguing that this historical practice "points strongly in one direction" as there have been "well over 100 instances of military deployments without prior congressional authorization").

150 Authority to Use Military Force in Libya, 35 Op. O.L.C. at 27–28.

151 *Id.* at 34. In a 2018 Trump Administration opinion, OLC found that the following interests identified by the President satisfied the national interest test: "the promotion of regional stability, the prevention of a worsening of the region's humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons." April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. at 11.

As Curtis Bradley and Jack Goldsmith argue, this national interest test does not constrain presidential action in any meaningful way.[152] In a 1992 opinion asserting the President's authority to provide humanitarian assistance in Somalia, OLC refers to historical practice and the "American interests" mentioned in Jackson's 1941 opinion to identify two national interests in Somalia: "protecting the lives of Americans overseas and upholding the recent United Nations resolutions regarding Somalia."[153] However, OLC fails to provide in this opinion—or any subsequent opinion—criteria to determine *which* interests qualify as national interests sufficient to support presidential use of force. The national interest test, then, is no test at all. Any interest suggested by the President could satisfy the test, as "there is nothing at all in OLC's analysis that would permit it to reject an asserted interest by the president in using force."[154]

The second prong of OLC's framework—the "anticipated nature, scope and duration" test—is also a weak constraint on the President. This test asks whether a use of force constitutes a "war" within the meaning of the Constitution, as judged by the mission's anticipated nature, scope, and duration.[155] If a use of force does not rise to the level of "war," then the President may dispatch armed forces without prior congressional authorization. However, Bradley and Goldsmith note that the nature of modern war, conducted through airstrikes and drones, means that military engagements abroad will generally not rise to the level of war in the constitutional sense that requires prior authorization by Congress.[156] For instance, OLC concluded that due to their natures, scopes, and durations, neither the Libyan nor Syrian airstrikes were "wars" that required congressional authorizations, and that in fact the Syrian operation fell "far short of the kinds of engagements approved by prior Presidents under Article II."[157] This is despite the fact that both operations had significant

152 *See* Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, Lawfare (June 5, 2018), https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force.

153 *Id.*

154 *Id.* (" . . . at least absent overwhelming and unambiguous evidence that the interest was pretextual, and probably not even then.").

155 *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. at 33 (posing the question of "whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause").

156 *See* Bradley & Goldsmith, *supra* note 152 ("Modern presidents . . . rely heavily on drones, manned airstrikes, and other short-term or relatively limited 'fire from a distance' as their principal mechanisms for using force abroad.").

157 April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 19–20 (2018); Authority to Use Military Force in Libya, 35 Op. O.L.C. at 37.

consequences: The Libyan airstrikes "cost more than $1 billion, involved thousands of air sorties, and drove a foreign leader from power" and the Syrian airstrikes "threatened greater escalation" due to the presence of both U.S. and Russian troops in Syria.[158] It certainly would have been more faithful to the Founders' conception of Congress's role in declaring war had Congress been involved in authorizing both operations.

As the next Sections illustrate, although an existing congressional check on the President—the WPR—allows Congress to regulate use of force decisions, this too has been subject to executive branch interpretations that have eroded its requirements.

C. *The War Powers Resolution Framework and the Narrowing of "Hostilities"*

While the WPR, as a congressional check on executive war powers, remains an important limit on the President, one particular flaw of the resolution is the elasticity of the term "hostilities." Under the resolution, only the introduction of U.S. armed forces into hostilities or imminent hostilities triggers the resolution's sixty-day termination clock.[159] But "hostilities" lacks hard definitions, which means that Presidents have interpreted the term to avoid triggering any congressional oversight under the resolution. The consequence is that unless Congress can muster the votes to override a presidential veto of a resolution directing the President to terminate the use of force abroad, Congress "may be unable to stop military engagement abroad once it has begun using the mechanism of the WPR alone, so long as the president believes that the military engagement in question does not constitute 'hostilities.'"[160]

The legislative history of the WPR reveals that the ambiguity in the meaning of "hostilities" was intentional. Senator Jacob Javits, one of the resolution's principal sponsors, noted that the drafters intended the resolution "to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it."[161] But the term was still intended to be broad. The accompanying House report used the term "hostilities" instead of "armed conflict" because the former was considered broader in scope, as "hostilities" encompassed situations of

158 Bradley & Goldsmith, *supra* note 152.

159 War Powers Resolution, Pub. L. No. 93-148, §§ 4(a), 5(b), 87 Stat. 555, 555–56 (1973).

160 Brian Egan & Tess Bridgeman, *Top Experts' Backgrounder: Military Action Against Iran and US Domestic Law*, JUST SECURITY (Jan. 3, 2020), https://www.justsecurity.org/64645/top-experts-backgrounder-military-action-against-iran-and-us-domestic-law.

161 *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971).

"clear and present danger of armed conflict."[162]

However, the meaning of "hostilities" under the WPR has been contested over the years.[163] Harold Koh, as Legal Adviser to the State Department in the Obama Administration, argued that "the question whether a particular set of facts constitutes 'hostilities' for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions."[164] This interbranch practice, however, like in other areas of war powers, has consisted primarily of the executive branch's assertions of its interpretation of "hostilities." Since the passage of the WPR, successive administrations have deviated from and narrowed Congress's conception of "hostilities." In 1975, the Ford Administration defined "hostilities" as situations "in which units of the U.S. armed forces are *actively engaged in exchanges of fire* with opposing units of hostile forces."[165] A 1980 OLC opinion noted that the term "should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces."[166] In August of 1981, following an attack by two Libyan jet fighters on U.S. naval forces in the Gulf of Sidra, U.S. forces fired back and downed the Libyan aircraft.[167] The Reagan Administration determined that this situation did not rise to the level of "hostilities" under the WPR—and thus did not trigger the resolution's countdown clock—because no further action by Libya was expected.[168] Similarly, in June 1984, U.S. aircraft operating in Saudi airspace assisted Saudi aircraft in shooting down two Iranian aircraft in the Persian Gulf.[169] The extent of U.S. involvement included providing the Saudis with target location and assisting with aircraft refueling.[170] The Reagan Administration determined that this was a "one-time, unanticipated incident"[171] and again argued that this did not rise to the level of "hostilities"

162 H.R. Rep. No. 93-287, at 7 (1973).

163 *See Koh Hearing*, *supra* note 33, at 4 ("[A]s virtually every lawyer recognizes, the operative term, 'hostilities,' is an ambiguous standard, which is nowhere defined in the [WPR].").

164 *Id.* at 5.

165 *See* Letter from Monroe Leigh, *supra* note 93, at 38–39 (emphasis added). The Ford Administration also defined "imminent hostilities" as situations of "serious risk from hostile fire." *Id.* at 39.

166 Presidential Power to Use Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 194 (1980).

167 *See* Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 279 (1984).

168 *Id.* ("The Administration expected no repetition of the incident and anticipated no further action by Libya to violate the rights of the vessels and aircraft of this Nation to travel in international waters and airspace.").

169 *Id.* at 280.

170 *Id.*

171 *Id.* ("It was determined subsequently that this one-time, unanticipated incident did not trigger the WPR because of the absence of hostilities.").

within the meaning of the WPR.

Even when members of Congress have disagreed with executive branch characterizations of the meaning of "hostilities," Congress has had little incentive to maintain sustained pushback against the President when the term retains such flexibility, and eventually Congress acquiesces to the executive branch's interpretation. Political theorist John Rourke notes that "[s]ometimes the urge to achieve unity is so strong that any degree of dissent comes under suspicion,"[172] and Congress is especially sensitive to any public perception of hampering American military activity. For example, on August 24, 1982, with the United States participating in a multinational peacekeeping force in Lebanon, President Reagan transmitted a forty-eight-hour report detailing this activity to Congress.[173] The report did not specify whether Section 4(a)(1) of the WPR (introduction of armed forces into "hostilities" or "imminent hostilities") or another prong had triggered the reporting requirement.[174] By September 1983, with the situation in Lebanon intensifying, members of Congress publicly announced that they believed U.S. armed forces were engaged in hostilities and that the sixty-day clock had begun to run.[175] At the time, there were "1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those attacks."[176] But any further debate on the meaning of "hostilities" was forestalled when Congress began to consider a resolution authorizing retention of U.S. armed forces in Lebanon,[177] ultimately granting authority for the mission in Lebanon to continue.[178] As the next Section explains through two examples, the term

172 JOHN T. ROURKE, PRESIDENTIAL WARS AND AMERICAN DEMOCRACY: RALLY 'ROUND THE CHIEF 8 (1993).

173 Overview of the War Powers Resolution, 8 Op. O.L.C. at 279.

174 *Id.*

175 *Id.*

176 *Koh Hearing*, *supra* note 33, at 9 n.15; *see also* Richard Bernstein, *2 Marines Killed in Lebanon and 14 Others Are Wounded as Beirut Fighting Spreads*, N.Y. TIMES (Aug. 30, 1983), https://www.nytimes.com/1983/08/30/world/2-marines-killed-in-lebanon-and-14-others-are-wounded-as-beirut-fighting-spreads.html?_r=0.

177 Overview of the War Powers Resolution, 8 Op. O.L.C. at 279–80 ("Debate over whether § 5(b) had been triggered by those events became academic, however, because Congress moved to consider and enact a resolution specifically authorizing the retention of United States Armed Forces in Lebanon.").

178 Charlie Savage, *Iran and Presidential War Powers, Explained*, N.Y. TIMES (Jan. 6, 2020), https://www.nytimes.com/2020/01/06/us/politics/war-powers-resolution-iran.html ("[L]awmakers granted authority for that mission to continue for 18 months."). In his signing statement, Reagan stated that his approval of the bill "should not be interpreted as a concession that the War Powers Resolution could constrain his

"hostilities" has been narrowly interpreted by the executive branch in order to use unauthorized force in situations in which the drafters of the WPR would have intended the President to seek congressional authorization.

D. *Case Studies*

Two incidents illustrate how the executive branch has narrowed the meaning of "hostilities" in order to avoid triggering the WPR's sixty-day countdown clock: the 2011 Libya operation and the 2020 strike that killed Iranian general Soleimani.

i. Libya and the Executive Branch Interpretation of "Hostilities"

In March 2011, the United States, along with a NATO coalition, began enforcing a no-fly zone over Libya in order to end the Gaddafi regime's attacks on Libyan civilians.[179] Over the next several months, these forces launched a series of airstrikes over Libya.[180] State Department Legal Adviser Harold Koh, testifying before Congress as to the legality of the Libyan operation, cited OLC precedent and presented a theory of limited engagement, which he argued barred the applicability of the "hostilities" trigger of the WPR's sixty-day clock.[181] Despite internal disagreements within the Obama Administration about the legal arguments justifying the strikes,[182] Koh claimed that situations in which the nature of a mission, exposure of U.S. armed forces, risk of escalation, and military means are limited do not constitute engagements in "hostilities."[183] In a June 2011 report justifying the President's authority to use force in Libya, the Administration

authority as commander in chief." *Id.*

179 Dan Bilefsky & Mark Landler, *As U.N. Backs Military Action in Libya, U.S. Role Is Unclear*, N.Y. Times (Mar. 17, 2011), https://www.nytimes.com/2011/03/18/world/africa/18nations.html.

180 Charlie Savage & Thom Shanker, *Sources of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. Times (Jun. 20, 2011), https://www.nytimes.com/2011/06/21/world/africa/21powers.html.

181 *See Koh Hearing*, *supra* note 33.

182 *See* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. Times (June 17, 2011), https://www.nytimes.com/2011/06/18/world/africa/18powers.html (reporting that contrary to Koh's analysis, Department of Defense General Counsel Jeh Johnson and acting head of OLC Caroline Krass believed that the Libya operations amounted to "hostilities").

183 *See Koh Hearing*, *supra* note 33, at 7–11. Emphasizing the importance of historical practice, Koh noted that "[a]pplication of [WPR] provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad." *Id.* at 5.

again argued that the operations were "distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision" because the "U.S. operations [did] not involve sustained fighting or active exchanges of fire with hostile forces, nor [did] they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by these factors."[184] Further, Koh noted that the nature of the mission in Libya was limited because "U.S. forces [were] playing a constrained and supporting role in a NATO-led multinational civilian protection operation."[185]

However, there were several dissenting voices in Congress that contended "hostilities" had in fact triggered the WPR's sixty-day clock, characterizing the United States's role as anything but limited. House Speaker John Boehner said at the time: "They're spending $10 million a day, part of an effort to drop bombs on Gadhafi's compounds. It just doesn't pass the straight-face test in my view, that we're not in the midst of hostilities."[186] Representative Brad Sherman argued that "when you're flying Air Force bombers over enemy territory, you are engaged in combat."[187] Similarly, Senator Richard Lugar, during a congressional hearing on Libya, resisted Koh's notion that the United States merely played a supporting role in the operations, noting that "the broader range of airstrikes being carried out by other NATO forces depend on the essential support functions provided by the United States."[188] Further, Senator Lugar rejected the argument that U.S. operations were not significant enough to constitute hostilities because NATO flew most of the missions, stating:

> [t]he fact that we are leaving most of the shooting to other countries does not mean the United States is not involved in acts of war . . . . [T]he language of the War Powers Resolution clearly encompasses the kinds of operations U.S. military forces are performing in support of other NATO countries.[189]

184 U.S. DEP'T OF STATE & U.S. DEP'T OF DEF., UNITED STATES ACTIVITIES IN LIBYA 25 (2011).

185 *Koh Hearing*, *supra* note 33, at 7.

186 *See* David Welna, *At 90 Days, Libya Conflict Has Washington Divided*, NPR (June 18, 2011), https://www.npr.org/2011/06/18/137265761/who-has-war-powers-washington-debates.

187 *See* Angie Drobnic Holan & Louis Jacobson, *Are U.S. Actions in Libya Subject to the War Powers Resolution? A Review of the Evidence*, POLITIFACT (June 22, 2011), https://www.politifact.com/article/2011/jun/22/are-us-actions-libya-subject-war-powers-resolution.

188 *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 5 (2011) (statement of Sen. Richard Lugar) [hereinafter *Lugar Statement*].

189 *Id.* at 6.

The situation on the ground supported the conclusions of Lugar and other members of Congress that the U.S.'s involvement meant that there was an engagement in "hostilities." At the time, the Supreme Allied Commander of NATO was Admiral James Stavridis, an American officer who commanded NATO forces from other countries to "engage[] on a much more sustained basis in 'exchanges of fire.'"[190] Moreover, Ivo Daalder, U.S. Permanent Representative to NATO, observed that "the United States led in this operation . . . It led in the planning of the operation, it led in getting the mandate for the operation, and it led in the execution of the operation."[191] Koh's reasoning that "a war without United States boots on the ground can proceed indefinitely without Congressional approval" simply stretched the meaning of "hostilities" too far, leading to the risk that "with drone warfare now expanding . . . national-security decision-making stands to become the sole province of the executive."[192] Journalist Paul Starobin remarked at the time that Koh's interpretation of "hostilities" had him "stretched out on a legal limb so long and so thin that one can almost hear it cracking."[193]

One conclusion we can draw from this episode is that regardless of Koh's thin legal grounding in interpreting "hostilities," this interpretation has become the accepted precedent for subsequent airstrikes. After the Libya operations, Congress did not mount much of an attempt to resist the Obama Administration's interpretation.[194] In areas where practice-based law governs, the law changes based on executive branch practice, and "actions supported by minimally plausible legal defenses might over time be understood to exert a gravitational pull on the best understanding of the law."[195]

The second conclusion is that this episode neatly illustrates Bradley and Morrison's theory of how the law can constrain the President through external sanctions and public legal dialogue. The Obama Administration relied on public justifications of legality, especially its interpretation of "hostilities" in the WPR, in order to defend U.S. involvement in Libya.[196]

190 *See* Holan & Jacobson, *supra* note 187.

191 Ivo Daalder, U.S. Permanent Representative to NATO, Remarks to the Press on Libya and Operation Unified Protector (Sept. 8, 2011), https://web.archive.org/web/20151005093309/http://nato.usmission.gov/libya-oup-90811.html.

192 Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. Times (Aug. 6, 2011), https://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html.

193 *Id.*

194 *See* Bradley & Morrison, *supra* note 105, at 1146 ("[T]here was no serious effort in Congress to force the President to comply with the letter of the Resolution.").

195 *Id.* at 1148.

196 *Id.* at 1147–48 (noting a reliance on legal justifications despite "a low likelihood of

This is significant because if the law had no constraining power on the executive branch, it is unclear why the Administration relied on legal rather than "humanitarian or other policy or political grounds," especially as these legal arguments imposed costs and "exposed the Administration to criticism from those who disagreed with the analysis."[197] With top officials like Koh publicly testifying to the legality of the operation, the Administration in fact went to "considerable lengths" to defend its actions on legal grounds.[198] The law could have been even more significant in constraining the President's actions had "the potential illegality of the operation . . . increased its political costliness to the Obama Administration."[199] If U.S. forces had become mired in Libya instead of executing limited strikes, the politics of publicly justifying the operations could have played an even greater role in the President's decisions. In Part III, this Article follows this thread and argues that redefining "hostilities" under the WPR would allow Congress to channel external sanctions and public legal dialogue in order to raise the political costs of the President's decisions to use force.

ii. The Soleimani Strike and the Intermittence Theory

The January 2, 2020, drone strike at Baghdad International Airport that killed Iranian general Qassem Soleimani[200] illustrates how plainly the expansion of the President's unilateral authority to use force has stretched the definition of "hostilities."[201] Although the Trump Administration's report to Congress on the strike was classified,[202] it is likely the Administration defaulted to arguments that "hostilities," if they occurred, ceased when the strike was completed, stopping the clock on the sixty-day withdrawal requirement.[203]

judicial involvement in the issue").

197 *Id.* at 1148.

198 *See id.*

199 *Id.* at 1147.

200 Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html.

201 *See* Pomper, *supra* note 15 ("[I]t could well be that the administration's unauthorized strike on Iranian General Qassem Soleimani . . . is remembered less for the congressional resistance it has spawned than for the decline in congressional war powers that it so neatly encapsulates.").

202 *See* Press Release, Nancy Pelosi, Speaker of the House of Representatives, Pelosi Statement on White House's War Powers Act Notification of Hostilities Against Iran (Jan. 4, 2020), https://www.speaker.gov/newsroom/1420.

203 *See* Tess Bridgeman, *The Soleimani Strike and War Powers*, JUST SECURITY (Jan. 6, 2020), https://www.justsecurity.org/67921/the-soleimani-strike-and-war-powers/ ("[T]hat argument here would ignore the facts already unfolding in the direction of more

In the past, the executive branch has relied on an "intermittence theory" to deal with situations of potential "hostilities," whereby the executive branch "reports military engagements that could be seen to comprise ongoing hostilities as discrete events."[204] This practice occurred, for example, during the Tanker Wars of the 1980s, during which the United States began protecting Kuwaiti vessels in the Persian Gulf from Iranian attacks.[205] The Reagan Administration reported activity in the Persian Gulf as discrete events rather than one continuous conflict, a practice seen as "an 'end run' around the 60-day termination clock."[206] After the January Soleimani strike, commentators suggested that "the Trump Administration would look to utilize this same type of approach" with regards to the increasing tensions with Iran.[207]

The intermittence theory distorts the meaning of "hostilities" in the WPR by excluding the likelihood of future escalation in its assessment of whether "hostilities" exist. In the case of the Soleimani operation, rather than repelling a sudden attack in self-defense, the unauthorized strike, as part of the escalation against Iran following the death of an American contractor in Iraq in December 2019, instead invited the possibility of further escalation.[208] Indeed, shortly after the strike, U.S. officials "braced for potential Iranian retaliatory attacks, possibly including cyberattacks and terrorism, on American interests and allies."[209] U.S. military personnel had to be relocated outside Iraq,[210] and Iran's counterstrike on January 8th injured a handful of service members.[211] According to Stephen Pomper, this incident reveals how "the executive branch has abandoned the traditional

violence and new troop deployments, as well as any future hostilities that are quite likely to occur over what may be an extended period of time.").

204 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

205 *See* Todd Buchwald, *Anticipating the President's Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars*, Just Security (June 28, 2019), https://www.justsecurity.org/64732/anticipating-the-presidents-way-around-the-war-powers-resolution-on-iran-lessons-of-the-1980s-tanker-wars.

206 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

207 *See* Buchwald, *supra* note 205.

208 Crowley, Hassan & Schmitt, *supra* note 200.

209 *Id.* Following the strikes, Senator Christopher Murphy questioned on Twitter: "[D]id America just assassinate, without any congressional authorization, the second most powerful person in Iran, knowingly setting off a potential massive regional war?" Chris Murphy (@ChrisMurphyCT), Twitter (Jan. 2, 2020), https://twitter.com/ChrisMurphyCT/status/1212913952436445185.

210 *See* Pomper, *supra* note 15.

211 *See* Kevin Baron, *Eleven US Troops Were Injured in Jan. 8 Iran Missile Strike*, Defense One (Jan. 16, 2020), https://www.defenseone.com/threats/2020/01/eleven-us-troops-were-injured-jan-8-iran-missile-strike/162502 (reporting that eleven American service members were injured and sent out of Iraq for treatment).

constitutional rule that such unilateral force can be used only to repel a sudden attack."[212]

This episode is another illustration of how the executive branch's own interpretation of "hostilities" is ineffective as a legal constraint on the President's military decision-making. The Trump Administration could easily have invoked historical interpretations of "hostilities," which have excluded limited strikes,[213] to argue that this strike did not constitute an engagement in "hostilities," thus barring the application of the WPR to tensions with Iran. It is difficult to imagine the current executive branch interpretation of "hostilities" acting as a limit on similar future strikes.

However, this episode is enlightening in that both the House and Senate passed resolutions directing President Trump to seek congressional authorization before further engagement with Iran, based on the premise that the Trump Administration had in fact entered into ongoing "hostilities."[214] The fact that Congress has "resisted presidential action and framed its resistance in explicitly legal terms"[215] indicates that the WPR is not entirely without constraining force, especially when acting upon the President through external sanctions, such as raising political costs, and public legal dialogue. Congress's recent actions certainly indicate that it will not always acquiesce to the executive branch's interpretation of "hostilities." Congress may be increasingly motivated to exercise its ability to check unconstrained presidential war powers, and it can do so by reconsidering the WPR's definition of "hostilities" and creating clearer legal guidance, as the next Part proposes.

212 Pomper, *supra* note 15 (emphasis omitted).

213 *See supra* Section II.C (discussing the executive branch's historic practice of narrowing the meaning of "hostilities"); *supra* Section II.D (discussing the precedent of excluding airstrikes from the definition of "hostilities").

214 Catie Edmondson & Charlie Savage, *House Votes to Restrain Trump's Iran War Powers*, N.Y. TIMES (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html; Edmondson, *supra* note 1.

215 Bradley & Morrison, *supra* note 105, at 1150–51 ("When members of Congress from the President's own party join in a legal objection . . . it might be fair to infer that concern for the law itself provides a greater part of the motivation for the objection.").

III. The Meaning of "Hostilities"

As Part II demonstrated, the executive branch's self-imposed limits on presidential power do not offer meaningful constraints on the President. In arguing that presidential unilateralism should and can be curbed by the law, this Article proposes that it is necessary for Congress to act to strengthen the WPR, an existing check on the President. With the concept of "hostilities" in the WPR facing its own limitations, this Article aims to clarify and reconceptualize the term. The proposed definitions in this Part are motivated by the desire to create guidance that would allow Congress to more clearly identify situations of presidential overreach. These proposals differ from other reform proposals described in Section III.B by incorporating past executive branch practices that have the potential to act as some limitation on presidential decision-making.[216] While the executive branch may continue to push the boundaries of statutory constraints, it would be more difficult to do so when faced with standards that incorporate previous executive branch precedent. A reconceptualization of "hostilities" is especially important at the present moment, as the transition of U.S. leadership to a new President who has in the past supported curtailing presidential war powers may provide Congress with the political will to make these changes.

Section III.A discusses the importance of redefining "hostilities," Section III.B examines past reform proposals, including those that have discussed the meaning of "hostilities," and Section III.C presents two proposals for reconceptualizing "hostilities."

A. *The Importance of New Definitions*

As the key framework for regulating the balance of war powers between Congress and the President, the WPR serves as a source of constraint on the President. Yet the lack of clear parameters of what constitutes "hostilities" under the resolution has allowed the executive branch to put forth its own concept of "hostilities" that impedes Congress's involvement in regulating presidential uses of force. Clarifying and reconceptualizing "hostilities" under the WPR is crucial for "rejuvenat[ing] the resolution as a more effective institutional constraint."[217]

Rethinking "hostilities" is important for several reasons. First, the term's ambiguity remains a key gap in the text of the resolution. A lack

216 *See infra* Section III.C.ii.

217 *See* Hathaway, *supra* note 125.

of clarity has led to several instances of public disagreement between the President and Congress about whether the President introduced U.S. armed forces into situations of active or imminent hostilities.[218] When the WPR was first drafted, the exact meaning of "hostilities" was not contested—Congress intended for the definition of "hostilities" to be flexible in order to allow the President to respond to a range of situations into which U.S. armed forces could be introduced.[219] But the original intent of Congress was not for the term to be interpreted as narrowly as the executive branch currently interprets it, as part of the reason for the original passage of the WPR was the Nixon Administration's bombing of Cambodia.[220] Although those airstrikes did not involve "'sustained fighting or active exchanges of fire with hostile forces,' the presence of U.S. ground troops, or substantial U.S. casualties," the operation still engaged in the kind of hostilities the drafters of the WPR envisioned that Congress would have a role in authorizing.[221]

However, since the passage of the resolution in 1973, Congress and the President have developed opposing definitions of the term "hostilities."[222] Successive Presidents have taken a narrow view of the kinds of activity that constitute hostilities in order to avoid triggering the WPR's sixty-day withdrawal mandate,[223] engaging in a wide range of military activity—often past the sixty (or ninety) day mark—without labeling these activities as "hostilities."[224] These include operations in Lebanon in 1982–83, the 1983 invasion of Grenada, the 1986 Gulf of Sidra incident, the April 1986 bombing of Libya, the 1987–88 Persian Gulf Tanker War, and the 1989 invasion of Panama.[225] More recently, the Obama Administration claimed that the 2011 Libya airstrikes did not constitute "hostilities" under the WPR despite the existence of "a naval force of 11 ships and engage[ment] in an extensive bombing campaign that included striking 100 targets in just 24 hours."[226] In contrast, members of Congress have put forth a broader view of what constitutes "hostilities." For instance, the April 2019 House resolution invoking the WPR to withdraw U.S. participation in Yemen's

218 *See supra* Section II.C.

219 *See supra* notes 160–61 and accompanying text.

220 *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971).

221 *See Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 5 (2011) (statement of Louis Fisher) [hereinafter *Fisher Statement*].

222 *See supra* Section II.C.

223 *Id.*

224 *See supra* Section II.D.

225 *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 49 (1993).

226 Hathaway, *supra* note 125.

civil war defined "hostilities" as the House understood it.[227] The resolution noted that the term "includes in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen," and found that "[s]ince March 2015, members of the United States Armed Forces have been introduced into hostilities between the Saudi-led coalition and the Houthis, including providing to the Saudi-led coalition aerial targeting assistance, intelligence sharing, and mid-flight aerial refueling."[228] If Congress wishes for its conception of "hostilities" to serve as the standard and act as a constraint on the President, it would be worth redefining the term as it exists in the WPR.

Second, redefining "hostilities" is important in order to realign the modern practice of presidential war powers with the original intent of the resolution, which was to ensure that Congress had a role in regulating decisions to commit U.S. armed forces abroad.[229] Placing more oversight power with Congress, a larger deliberative body, would act as a constraint on rash decision-making.[230] Reform of the WPR, with clearer legislative mandates, would "help to constrain military adventurism"—Congress is slower to act, more sensitive to costs, and faces more procedural hurdles.[231] Moreover, congressional oversight may not simply produce *slower* decisions, but better-reasoned decisions. In other areas of law, the conventional wisdom is that interbranch deliberation is an advantage, as the process of consensus-building creates "consistent and sustainable security policy."[232]

Thus, a better definition of "hostilities" would serve as a more robust check on the President's unilateral uses of force. For one, clearer language would allow Congress to more easily identify when the President's actions are inconsistent with the WPR's requirements and raise the political costs of making shaky legal arguments that stretch the meaning of "hostilities" to an unrecognizable degree. Moreover, clearer guidance on "hostilities" would allow Congress to more forcefully shape public dialogue over military policymaking. A more coherent definition of activities that constitute "hostilities"—and trigger the WPR's withdrawal mandate—would mean that in public debates, Congress would no longer have to defer to a meaning defined by decades of executive branch practice.

227 *See* Friedman & Hansen, *supra* note 10.

228 Hathaway, *supra* note 125.

229 *Id.*

230 *Lugar Statement*, *supra* note 188, at 4 ("There is a near uniformity of opinion that the chances for success in a war are enhanced by the unity, clarity of mission, and constitutional certainty that such an authorization and debate provide.").

231 *See* Waxman, *supra* note 144.

232 *Id.*

B. *Past War Powers Resolution Reform Proposals*

With the WPR's long-standing and contested status, there has been a range of reform proposals throughout the years. Past reforms have addressed various aspects of the WPR, including clarification of the term "hostilities" in the resolution.[233] Whether scholars and legislators believe that the WPR has gone too far or not far enough in restricting the President has depended on their constitutional inclinations—whether they believe war powers should reside primarily with the President or Congress.[234] This Section focuses on a cross-section of past proposals that have favored limits on the President. Each of these proposals has aimed to strike a balance between providing the President flexibility in responding to a range of combat situations and guidance on when the President can use force without prior congressional authorization. In the next Section, this Article builds off of this balancing act in the literature and aims to tip this balance toward less presidential discretion and more guidance on which situations constitute "hostilities" that trigger the sixty-day withdrawal requirement.

Some past reform proposals have called for a comprehensive overhaul of the WPR. In 1993, John Hart Ely proposed a "Combat Authorization Act" that would authorize the courts to hear suits from members of Congress who wanted to start the countdown clock (shortened to twenty days in his proposal) if they believed hostilities were imminent.[235] The courts would have the authority to determine whether hostilities were actually imminent, and if so (assuming Congress had not authorized the operation), funds for the operation would automatically be cut off after the clock runs down.[236] More recently, in 2007, the National War Powers Commission, headed by former Secretaries of State James Baker III and Warren Christopher, conducted a comprehensive review of war powers.[237] The Commission ultimately recommended repealing the WPR and replacing it with the War Powers Consultation Act,[238] and in 2014, Senators John McCain and Tim Kaine introduced the War Powers Consultation Act,

233 For a full discussion of past reform proposals, see NATIONAL WAR POWERS COMMISSION, APPENDIX ONE, *supra* note 24, at 11.

234 *Id.* at 2 ("[H]ow an individual resolves the constitutional questions surrounding the allocation of war powers can have a significant impact on the range of options that he or she is willing to consider with respect to reform proposals.").

235 *See* Ely, *supra* note 225, at 65.

236 *Id.*

237 *See How America Goes to War*, MILLER CTR. (Jan. 21, 2021), https://millercenter.org/issues-policy/foreign-policy/national-war-powers-commission.

238 *See id.*

based on the work of the Commission.[239] The Act differed from the existing WPR by requiring the President to consult with Congress before deploying U.S. troops into "significant armed conflict," defined as combat operations lasting, or expecting to last, more than a week.[240] Both of these proposals, however, faced sessions of Congress that lacked the will to overhaul the existing structure of the WPR.

Other proposals have focused on reforming specific language within the WPR. In 1998, then-Senator Biden proposed substituting the definition of "use of force" for "hostilities" in the WPR and requiring a report when force is used.[241] More recently, Oona Hathaway has suggested redefining "hostilities" to align with "armed conflict,"[242] a term that under international law marks conflict between states or between states and non-state actors, because "armed conflict" is better defined under both international and domestic law. Further, Hathaway proposes redefining "hostilities" so that the WPR's countdown clock continues to run as long as there are "active hostilities" as a matter of international law.[243] Using "active hostilities" as the benchmark would count the entire longer conflict as an "introduction into hostilities" under the WPR, thus triggering the withdrawal requirement if Congress does not authorize the use of force within sixty days. This proposal aimed to put an end to the executive branch's use of discrete event reporting to circumvent the WPR's withdrawal requirement by counting individual incidents within a longer conflict as discrete episodes, thus stopping and starting the clock over the life of the longer conflict.[244] Additionally, Hathaway suggests that a new definition of "hostilities" should address allied operations and clarify that defense of partner forces constitutes imminent

239 *Id.*; War Powers Consultation Act, S. Res. 1939, 113th Cong. (2014).

240 *See* National War Powers Commission, Appendix Eight: Text of the War Powers Consultation Act of 2009, at 2 (2008) ("For purposes of this Act, 'significant armed conflict' means (i) any conflict expressly authorized by Congress, or (ii) any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.").

241 *See* S. 2387, 105th Cong. (1998) (sponsored by Sen. Joseph Biden); Joseph R. Biden, Jr. & John B. Ritch III, *The War Powers Resolution at Constitutional Impasse: A 'Joint Decision' Solution*, 77 Geo. L.J. 367, 401–02 (1988).

242 *See* Hathaway, *supra* note 125 ("Hostilities ought to be defined as 'armed conflict' or a 'clear and present danger of armed conflict . . . or perhaps even, 'armed conflict as that term is understood under international law.'").

243 *See id.* at 49 n.125 ("Under the international law of armed conflict, the authority to detain those captured during the conflict continues only as long as 'active hostilities' are ongoing.").

244 *See, e.g.*, *supra* Section II.D.ii (describing how following the Soleimani strikes the Trump Administration claimed that hostilities ended once the strikes on Iran were completed).

involvement in hostilities.[245] This suggestion emerged in response to the Trump Administration's adoption of the view that the 2001 Authorization for the Use of Military Force authorizes the use of military force to defend partner states from attack.[246] In fact, the Administration's position was that it had the authority to "defend the Syrian Democratic Forces in Northern Syria from attack by Syrian forces (and even Russian or Turkish forces)"[247] without prior congressional authorization. While this policy was ultimately reversed, and it's unclear whether subsequent presidential administrations would adopt this line of argument, Hathaway notes that "[t]his is a novel legal position that no prior administration had embraced and it had the potential to embroil the United States in escalating hostilities without any clear congressional intent — or even notification to Congress, because it putatively falls within an existing congressional authorization."[248]

Finally, some proposals have focused on Congress reasserting its institutional power rather than reforming the language of the resolution. Matthew Waxman has proposed that Congress can assume a greater role in regulating the President's uses of force through public appeals and shaping public opinion.[249] These tools, he argues, are particularly effective because they can be "wielded by individual members, especially [those] in key committee positions" rather than mobilizing Congress as a whole.[250]

The lesson of these past WPR reform proposals is that as it currently stands, the elasticity of the term "hostilities" provides the executive branch colorable arguments in avoiding the WPR's requirements. However, this Article argues that it is possible to redefine "hostilities" to provide clearer guidance on what does or does not constitute "hostilities," creating more effective legal constraints on the President. The next Section presents two novel proposals for reconceptualizing "hostilities" that have been missing from previous calls for WPR reform.

245 Hathaway, *supra* note 125.

246 *Id.*

247 *Id.* ("The administration never sought congressional approval for the use of such defensive force, because it claimed that the [sic] it fell within the 2001 authorization for the use of military force.").

248 *Id.*

249 Waxman, *supra* note 144.

250 *Id.* ("In recent years, Congress' foreign policy and defense committees have atrophied, holding fewer oversight hearings than in the past. A first step to boosting influence is ensuring that foreign relations, armed services, and intelligence committee members have adequate experience and resources, as well as a commitment to shaping and auditing security strategy.").

C. *Reconceptualizing "Hostilities"*

This Article proposes reconceptualizing "hostilities" in the following two ways. The first proposal concerns what this Article terms "partner missions"—missions at the express invitation of another state, pursuant to UN authorization, or with a coalition like NATO. This Article clarifies that U.S. participation in partner missions is an indicator that the mission is narrow, but participation in a partner mission is not on its own sufficient to show that U.S. forces have not engaged in "hostilities." This Article then argues that "hostilities" can still exist where the United States plays a supporting role in a partner mission and must be reframed to encompass not only situations where U.S. forces participate in active exchanges of fire, but where they use or are subject to lethal force. The second proposal concerns the question of whether the WPR's sixty-day clock runs for the duration of a conflict. In order to limit the executive branch's practice of reporting military activity as discrete missions in order to toll the WPR clock, this Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the likelihood of sustained violence occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration additional troop deployments.

i. Partner Missions and U.S. Armed Forces in Supporting Roles

Historically, the executive branch has cited participation in partner missions—missions at the express invitation of another state, pursuant to UN authorization, or in a coalition like NATO—as reason to believe that U.S. forces have not been introduced into "hostilities." Political scientists William Howell and Jon Pevehouse note that Presidents often cite obligations to international partners to bolster domestic legal justification for uses of force, as well as to rally public opinion.[251] For instance, Truman cited UN obligations in initiating U.S. involvement in Korea, and Clinton cited NATO obligations in launching airstrikes in Kosovo.[252]

There are two ways of interpreting the meaning of the executive branch's practice of citing to international authority as justification for uses of force. First, this practice could mean that the executive branch believes

251 *See* Howell & Pevehouse, *supra* note 132, at xvii–xviii.
252 *See id.*

that partner missions, which provide international legal authority for uses of force, also provide the President domestic legal authority for engaging U.S. armed forces without congressional involvement. For example, past administrations have claimed that missions at the express invitation of another state do not fall within the "hostilities" contemplated by the WPR. In a 2004 opinion justifying the President's deployment of fifty Marines to protect the U.S. Embassy in Port-au-Prince, Haiti, from political unrest, OLC argued that whether the deployment was at the "express invitation of the government of Haiti" was relevant to the question of whether the situation was one of "involvement in hostilities."[253] Similarly, Presidents have also claimed that missions authorized by the UN do not involve "hostilities." In a March 2011 forty-eight-hour report on Libya, President Obama excluded any mention of the introduction of U.S. forces into "hostilities," and noted that U.S. forces began operations as "authorized by the [UN] Security Council."[254]

Both the "express invitation" and "UN authorization" rationales are exceptions under international law to the UN Charter's near-absolute prohibition against the use of force.[255] This prohibition stems from Article 2(4) of the UN Charter, which bars "the threat or use of force against the territorial integrity or political independence of any state."[256] One exception to this prohibition is the use of force in the territory of a state with the state's

253 Deployment of U.S. Armed Forces to Haiti, 28 Op. O.L.C. 30, 34 (2004). This distinction has also found support outside of the executive branch. In 2011, journalists Charlie Savage and Mark Landler noted that unlike the Libya strikes, prior operations that arguably did not constitute hostilities involved "peacekeeping missions in which the United States had been invited in, and there were only infrequent outbreaks of violence — as in Lebanon, Somalia and Bosnia." Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), https://www.nytimes.com/2011/06/16/us/politics/16powers.html.

254 Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *in* 1 PUB. PAPERS OF PRES. BARACK OBAMA 280–81 (Mar. 21, 2011). Later, in a June 2011 report, the Obama Administration echoed this argument, contending that the Libya operations were consistent with the WPR because "U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution." U.S. DEP'T OF STATE & U.S. DEP'T OF DEF., UNITED STATES ACTIVITIES IN LIBYA, *supra* note 184, at 25.

255 *See generally* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 13–14 (2013); U.N. Charter art. 42.

256 U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

consent;[257] another is the use of force pursuant to UN Security Council authorization.[258] Does having a stronger international legal justification for the use of force affect whether U.S. armed forces are introduced into "hostilities" within the meaning of the WPR? This Article suggests that the answer is no.[259] To be sure, having a stronger international legal justification for uses of force abroad addresses one concern with unilateral presidential action: rash policymaking. Coordination with another state or international organization could result in a consensus-building process that produces sounder missions. But justifications for the use of force under international law do not address the constitutional question that the drafters of the WPR intended to resolve—affirming *Congress's* role in regulating U.S. uses of force.[260] Congress represents a reflection of American public opinion, regardless of what international partners think about policy, and the drafters' belief was that "the President should not engage in ventures that will lead to protracted conflicts that the Congress and the American people will not sufficiently support."[261]

257 *See* Deeks, *supra* note 255, at 35 (describing instances of one state's use of force in another state's territory with consent).

258 U.N. Charter art. 42 ("[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

259 Nor does international legal authority provide justification that the mission falls within the President's Article II authority in the first place. *See* Louis Fisher, *Obama's U.N. Authority?*, Nat'l L.J. (Apr. 18, 2011), http://www.loufisher.org/docs/wplibya/authority.pdf ("Under the U.S. Constitution, there is only one source for authorizing war. It is not the Security Council or NATO. It is Congress.").

260 *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555, (1973) ("It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . .").

261 *See* Buchwald, *supra* note 205; *see also Fisher Statement*, *supra* note 221, at 44 ("As I have explained in earlier studies, it is legally and constitutionally impermissible to transfer the powers of Congress to an international (U.N.) or regional (NATO) body."); Fisher, *Obama's U.N. Authority?*, *supra* note 259; Louis Fisher, *Sidestepping Congress: Presidents Acting Under the U.N. and NATO*, 47 Case W. Rsrv. L. Rev. 1237, 1267, 1271, 1279 (1997). It does not make much sense to peg domestic justification for use of force to the international legal justification, which could mire the United States in conflicts in which Congress and the American public would resist becoming involved. For instance, if humanitarian intervention develops as another exception to the international prohibition on uses of force, humanitarian intervention as a lawful justification for use of force under international law should not necessarily mean that such uses of force are justified under U.S. law. *But see* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 Hous. L. Rev. 971, 1004–28 (2016).

Instead, a better, alternative reading of the executive branch's reliance on international legal authority is that partner missions are proxies for *narrow* missions that the executive branch has traditionally claimed do not constitute "hostilities." During the Libya hearing, Koh argued that the United States played a "constrained and supporting role in a multinational civilian protection mission" in part because the operation was "authorized by a carefully tailored U.N. Security Council Resolution."[262] However, he agreed that international legal justification alone was not sufficient to justify the legality of the Libya strikes, but rather, the "nature and degree of international support might bear on factors that are relevant to the War Powers analysis."[263]

This Article agrees with this interpretation of executive branch practice and makes two contributions expanding on this idea. First, U.S. participation in partner missions does not automatically mean that U.S. armed forces have not been introduced into "hostilities." The President can in fact commit troops to a partner mission that constitutes introduction into hostilities if the mission is not sufficiently narrow. For example, in the Libya conflict, while the Administration extensively cited NATO leading the operation as part of the reason why the situation did not constitute active or imminent hostilities,[264] U.S. involvement was not merely in a supporting role. The United States was in fact "doing most of the heavy lifting in the conflict short of pulling all the triggers."[265] As discussed in Section II.D.i, the Supreme Allied Commander, in command of NATO military operations, was a U.S. Navy Admiral.[266] Additionally, according to a U.S. Department of Defense memo, "[a]lthough it [was] working under NATO, the US [was] by far the largest contributor to [the] operation," supplying nearly a billion dollars in funding and "about 75% of reconnaissance and refueling missions."[267] Moreover, during the Libya congressional hearing, Senator Lugar argued that characterizing the United States as playing a supporting

262 *Koh Hearing*, *supra* note 33, at 3.

263 *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. 60 (2011) (written answers submitted by Harold Koh, Legal Adviser, U.S. Dep't of State).

264 *See Koh Hearing*, *supra* note 33, at 3 (arguing that the operation was consistent with the WPR because "U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command"); *Lugar Statement*, *supra* note 188, at 6 ("The administration's report also implies that because allied nations are flying most of the missions over Libya, the United States operations are not significant enough to require congressional authorization.").

265 Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE (June 16, 2011), https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory.

266 *Supra* Section II.D.i; Holan & Jacobson, *supra* note 187.

267 Goldsmith, *supra* note 265.

role "underplays the centrality of the United States contributions to the NATO operations," noting that "United States war planes have reportedly struck Libya air defenses some 60 times since NATO assumed the lead role in the Libya campaign."[268]

Second, this Article argues that situations in which U.S. armed forces play a noncombat supportive role and are not responsible for "pulling the trigger" can still constitute "hostilities" under the WPR. For example, in supporting Saudi Arabia in its coalition strikes in Yemen, the United States's role included "air-to-air refueling; certain intelligence support; and military advice."[269] The Trump Administration insisted that U.S. forces were present in Saudi Arabia solely for support.[270] Some senators, siding with the Administration, have similarly argued that the President's actions were consistent with the WPR because U.S. troops were not involved in "direct military action" against rebel Houthi forces.[271] Other members of Congress have argued that U.S. activities in Yemen amounted to "hostilities," with one Senate resolution proposing to define "hostilities" to include "refueling of non-United States aircraft" in Yemen.[272]

This Article proposes to reconceptualize "hostilities" to encompass situations not only where U.S. forces are participating in active exchanges of fire, but where they *use or are subject to lethal force*. As discussed in Section II.C, the executive branch has historically defined "hostilities" as "situation[s] in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[273] In Yemen, the Trump Administration contended that U.S. support of the Saudi coalition did not constitute an introduction into "hostilities" because U.S. personnel were not actively engaged in exchanges of fire with hostile forces.[274] However, this strays from

268 *Lugar Statement*, *supra* note 188, at 5–6 ("The fact that we are leaving most of the shooting to other countries does not mean the United States is not involved in acts of war. If the United States encountered persons performing similar activities in support of al-Qaeda or Taliban operations, we certainly would deem them to be participating in hostilities against us.").

269 WEED, CONG. RSCH. SERV., *supra* note 60, at 55.

270 *See id.*

271 *See id.* at 58. Moreover, they argued that the U.S. has many similar support operations overseas, and characterizing the actions in Yemen as "hostilities" would result in the President needing Congress's approval for all of these support activities. *Id.*

272 *Id.* at 58–59.

273 Letter from Monroe Leigh, *supra* note 93, at 38–39.

274 *See* WEED, CONG. RSCH. SERV., *supra* note 60, at 55. The Administration has emphasized the fact that U.S. troops are in a supporting role and do not "command, coordinate, accompany, or participate in the movement of coalition forces in counter-Houthi operations," and do not "accompany[] the KSA-led coalition when its military forces are engaged, or [when] an imminent threat exists that they will become engaged, in

Congress's original intent, which was that the WPR's withdrawal mandate would be triggered by circumstances in which no exchanges of fire have occurred but "where there is a clear and present danger of armed conflict."[275]

This Article's proposed definition is more consistent with the original conception of "hostilities," which was intended to be much broader than how the executive branch has interpreted the term through the years. Situations where U.S. forces use or are subject to lethal force would encompass circumstances in which American soldiers face enemy forces and operate under the danger of exchanges of fire, or in which "U.S. armed forces are equipped for combat in a foreign country where an opposing military might be expected to take an adversarial stance at some point in the near future against such U.S. armed forces" (as in Yemen, for example).[276] This definition envisions that there exist situations where U.S. armed forces serve non-combat support roles and yet are still considered to have been introduced into hostilities, triggering the WPR's countdown clock. Importantly, in clarifying the scope of "hostilities," this definition allows Congress and the public to more clearly identify instances of potential presidential actions inconsistent with the WPR, ultimately serving as a constraint on any attempts to skirt the WPR's requirements.

ii. "Hostilities" and Intermittence

Another method by which the executive branch has circumvented the WPR's requirements is through the practice of categorizing military activity narrowly as discrete events, as explained in Section II.D.ii.[277] Even if these activities were considered "hostilities" within the WPR, each intermittent event throughout the course of a longer continuous conflict would restart the countdown clock, with each instance falling under the sixty-day time limit. By starting and stopping the clock through discrete events, the President never has to face the possibility of withdrawing troops when time is up. Jack Goldsmith suggests that this kind of discrete mission reporting "fits reasonably well with the text of the WPR, though of course not with its spirit."[278]

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hostilities." *Id.* at 63.

275 *See* H.R. REP. NO. 93-287, at 7, 19 (1973).

276 WEED, CONG. RSCH. SERV., *supra* note 60, at 61–62.

277 *See supra* Section II.D.ii (describing how following the Soleimani strikes the Trump Administration claimed that hostilities ended once the strikes on Iran were completed).

278 Jack Goldsmith, *A New Tactic to Avoid War Powers Resolution Time Limits?*, LAWFARE (Sept. 2, 2014), https://www.lawfareblog.com/new-tactic-avoid-war-powers-resolution-time-limits.

The most prominent example of the executive branch's attempt to sidestep the countdown clock occurred during the Reagan Administration's involvement in the Tanker Wars in the 1980s. On May 17, 1987, an Iraqi aircraft fired on the USS Stark in the Persian Gulf, killing 37 U.S. sailors.[279] Subsequently, the United States began providing naval escorts to Kuwaiti oil tankers in the Gulf,[280] raising the question of whether this constituted involvement in hostilities or imminent hostilities. From September 24, 1987, to July 14, 1988, President Reagan submitted six separate forty-eight-hour reports to Congress, but none of these reports explicitly or implicitly acknowledged whether U.S. forces had been introduced into hostilities.[281] Instead, the Administration claimed that these isolated incidents, altogether spanning a period longer than sixty (or ninety) days, did not rise to the level of "hostilities" under the WPR, and even if they were considered "hostilities," no single incident exceeded the sixty-day time limit.[282] The last three reports in the series used the phrase "we regard this incident as closed" in order to indicate intent to stop the clock so that "[a]ny additional hostilities reported would . . . constitute a new incident that would trigger a new 60-day window for military engagement."[283] However, these incidents were never truly isolated events, and during this same period, U.S. naval presence in the Persian Gulf increased to include "11 major warships, 6 minesweepers, and over a dozen small patrol boats."[284]

More recently, commentators have worried that following the Soleimani strike, the Trump Administration would use this segmented approach in the ongoing conflict with Iran in order "to argue that the [WPR] is a dead letter in that it deals with a situation that's already in the past and therefore imposes no meaningful requirements on the executive."[285] But discrete event reporting by the executive branch would plainly ignore facts on the ground. During the Tanker Wars, as the situation unfolded, the number of U.S. troop deployments in the Persian Gulf *increased*, and similarly, in the context of the Soleimani strike and tensions with Iran, facts were "unfolding in the direction of more violence and new troop deployments, as well as . . . future hostilities that are quite likely to occur over what may be

279 *See* Weed, Cong. Rsch. Serv., *supra* note 60, at 16.

280 *Id.* At the time, Kuwait was still exporting oil during the Iran-Iraq War (1980–1988). Lee A. Daniels, *Oil from Persian Gulf: Little Threat Seen Now*, N.Y. Times (May 28, 1987), https://www.nytimes.com/1987/05/28/business/oil-from-persian-gulf-little-threat-seen-now.html.

281 Bridgeman, War Powers Resolution Reporting, *supra* note 29, at 24.

282 *Id.*

283 *Id.*

284 Weed, Cong. Rsch. Serv., *supra* note 60, at 16.

285 Pomper, *supra* note 15.

an extended period of time."[286]

Based on historical practice, Marty Lederman suggests that the executive branch relies on two criteria for determining whether the WPR has been triggered to start running the countdown clock: "(i) the risk of harm to U.S. forces from an exchange of fire and (ii) the regularity of the use of force by or against U.S. forces (that is, whether there are intermittent periods without the use of force . . .)."[287] For purposes of determining the running of the WPR's countdown clock, this Article agrees with the executive branch's use of these criteria. However, by proposing additional elements to refine these criteria, this Article aims to provide a better understanding of "hostilities" and the countdown clock in order to limit future legal arguments justifying the President's circumvention of WPR requirements.

This Article proposes considering the following criteria in determining whether U.S. armed forces have been introduced into ongoing hostilities: (1) whether there is a risk of harm to U.S. forces from exchanges of fire, taking into consideration the *likelihood of sustained violence* occurring over an extended period of time, as indicated by factors like internal rules of engagement; and (2) whether there is regular use of force by or against U.S. forces, taking into consideration *additional troop deployments*. These two proposed elements—the likelihood of sustained violence and additional troop deployments—are indicators that active or imminent hostilities exist, and that there is an ongoing conflict situation (rather than intermittent events).

First, gauging the likelihood of sustained violence should take into account rules of engagement (ROE), internal orders to military personnel that reflect the executive branch's assessment of the risk of danger and violence to U.S. forces.[288] Commentators have mentioned that ROE "represent a key factor in assessing whether the Executive Branch considers hostilities to be 'clearly indicated by the circumstances.'"[289] For example, in 1981, the Reagan Administration conducted freedom of navigation operations in the Gulf of Sidra, off the coast of Libya, in order to contest Libya's claim that the Gulf was within its territorial waters.[290] Presumably to avoid escalation

286 *See* Bridgeman, *The Soleimani Strike and War Powers, supra* note 203.

287 *See* Marty Lederman, *The War Powers Clock(s) in Iraq*, JUST SECURITY (Sept. 8, 2014) (emphasis omitted), https://www.justsecurity.org/14513/war-powers-clocks-iraq. However, the executive branch has not indicated whether these criteria are necessary or sufficient factors. *Id.*

288 *See* J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L.J. 57, 66 (2007) (describing how ROEs are "fashioned to take circumstances into consideration, e.g., the probability of hostilities").

289 *Id.* at 67.

290 *Id.* at 65; Howell Raines, *President Defends Libyan Encounter as 'Impressive' Act*, N.Y. TIMES

with Libya, the Administration maintained that it did not know for certain that the situation would be one of active or imminent hostilities.[291] However, when the Navy requested changes in ROE in order to fire on Libyan planes that targeted American planes, the Administration denied the request on the grounds that changing the ROE would have signified that the United States understood hostilities to be imminent.[292] Here, the ROE was an indicator of the executive branch's understanding of whether "hostilities" existed.

Similarly, following a terrorist attack in Lebanon in October 1983 that killed 241 U.S. Marines, the Long Commission, established to investigate the incident, criticized the military's failure to change the peacetime ROE to prepare for a more hostile environment.[293] The report noted that "for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action which correspond to the realities of the environment in which they are to be implemented,"[294] with commentators observing that "it seems clear that the administration knew that the Marines had been placed in a situation where hostilities were at least imminent, if not ongoing."[295] Certainly, ROE do not have to be the only factor in determining the likelihood of sustained violence occurring over an extended period of time—this kind of analysis will necessarily be fact-dependent. However, ROE are good signifiers of this likelihood, which in turn indicates the risk of harm to U.S. forces. If there is indeed such a risk, even the executive branch, based on its historical use of this criteria, will have a much harder time denying that U.S. forces are facing ongoing hostilities within the meaning of the WPR.

Second, whether the President has ordered additional troop deployments into a situation should inform the determination of the regularity of the use of force by or against U.S. forces (in other words, whether there are intermittent periods without the use of force). According to Lederman, operation-specific airstrikes will often be "interrupted by periods during which there is no clear indication of any further, imminent involvement of U.S. forces in hostilities,"[296] meaning that under the WPR, the clock might indeed toll during those periods. However, the presence

(Aug. 21, 1981), https://www.nytimes.com/1981/08/21/world/president-defends-libyan-encounter-as-impressive-act.html.

291 *See* Atwood, *supra* note 288, at 66.

292 *See id.*

293 *Id.* at 66–67.

294 U.S. Commission on Beirut, Dep't of Def., Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983, at 32–33, 47–48 (1983).

295 Atwood, *supra* note 288, at 67.

296 Lederman, *supra* note 287.

of troops remaining in a situation would indicate ongoing rather than intermittent hostilities, because "[e]ven if that deployment were intended only for a discrete, time-limited operation, if the troops remained in the country thereafter and there is a clear indication that they would have further imminent involvement in hostilities, the clock would continue to run even though their designated operation has ended."[297] This scenario happened during the Reagan Administration's involvement in Lebanon, where the Administration contended that U.S. personnel in Lebanon had not been introduced into "hostilities."[298] However, in late 1983, around the same time that U.S. forces used airstrikes over Lebanon against Syrian forces,[299] *two thousand additional* Marines were sent to Lebanon.[300] While the airstrikes were a discrete event, the additional troop deployments were a strong indicator that there was regular, rather than intermittent, use of force in Lebanon. It satisfied the executive branch's criteria for determining the existence of ongoing hostilities, and the WPR's countdown clock would have covered the entire episode. By clarifying whether discrete events constitute continuous engagements in "hostilities," this standard can limit the executive branch's practice of interpreting intermittent action as separate operations. Ultimately, clearer standards would allow Congress to utilize political pressure and public opinion to constrain presidential actions that circumvent WPR requirements.

297 *Id.*

298 Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 279 (1984).

299 *See* Bernard E. Trainor, *'83 Strike on Lebanon: Hard Lessons for U.S.*, N.Y. TIMES (Aug. 6, 1989), https://www.nytimes.com/1989/08/06/world/83-strike-on-lebanon-hard-lessons-for-us.html.

300 *See War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Sec., & Sci. of the Comm. on Foreign Affs.*, 99th Cong. 64 (1986) (statement of J. Brian Atwood, Dir. of the National Democratic Institute).

Conclusion

This Article's proposals reconceptualize the meaning of "hostilities" under the WPR and provide clearer standards on the types of military activity that trigger the resolution's withdrawal mandate. These proposals operate under the view that presidential unilateralism is not normatively attractive and that Congress should assume a greater role in use of force decisions. Despite the executive branch's existing practice of interpreting its powers broadly and statutory restrictions in the WPR narrowly, law, and not solely politics, can act as a constraint on the President. Accordingly, this Article's proposals aim to strengthen the WPR in order to allow Congress to maximize legal constraints on the President.

These proposals provide Congress with the opportunity to increase the political costs of espousing thin legal justifications for involvement in serious conflicts like Libya or Yemen. With recent resolutions calling for an end to hostilities in Yemen and Iran demonstrating renewed political will, Congress may be more motivated to utilize the WPR framework in order to constrain the President. Louis Fisher's remark twenty-five years ago certainly still holds true today: "Contemporary presidential judgments need more, not less, scrutiny."[301]

301 Fisher, *supra* note 23, at 186.

THE SUPREME COURT REINFORCES BARRIERS TO COURT ACCESS: CASES FROM THE 2019–2020 TERM

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INTRODUCTION

As it did worldwide, the COVID-19 pandemic left its mark on the Supreme Court's 2019–2020 Term. In March and April of 2020, the Court canceled scheduled oral arguments, something it had not done since the influenza pandemic in October of 1919.[1] For the first time in its history, the Court heard cases by telephone conference call, rather than in-person, and allowed live audio broadcasts of those arguments.[2] Already known for deciding relatively few cases under Chief Justice Roberts's leadership, the Court issued only fifty-three signed opinions after briefing and oral argument, the fewest since 1862.[3] The presence of two Justices loomed over the Term—that of the Chief Justice, who voted with the majority in ninety-seven percent of all the decisions and dissented only twice; and that of Justice Ginsburg, whose illness prevented her from participating in some of the arguments during this, her last, Term.[4]

Despite the obstacles, the Court issued a number of consequential decisions, affecting high-profile subjects like immigration,[5] sexual orientation and gender identity,[6] abortion,[7] and President Trump's tax records.[8] The Court also decided cases that will affect individuals' ability to obtain relief from the courts when their rights are violated—which we refer to in this article as access to court.

The Supreme Court has recognized that access to court is "indispensable to a free government."[9] Going to court is "the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[10] Since its inception, the Supreme Court recognized the "invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[11] However, beginning in the late 1980s, under Chief Justice Rehnquist, the

1 *10th Annual Supreme Court Term in Review*, U.C. IRVINE SCH. L. (July 23, 2020) https://www.law.uci.edu/news/videos/supreme-court-review-2020.html.
2 *Id.*
3 *Id.*
4 *Id.*
5 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).
6 *See* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
7 *See* June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020).
8 *See* Trump v. Vance, 140 S. Ct. 2412 (2020).
9 Downes v. Bidwell, 182 U.S. 244, 282–83 (1901).
10 Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).
11 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109 (1765)).

Supreme Court began to make it more and more difficult for individuals to access the courts, particularly when seeking to assert claims against the government.[12] This trend continues today.

The particular subject matter of the Court's access-to-court decisions varies somewhat from year to year, depending on the issues contained in the petitions for certiorari that reach the Court. This article will focus on access-to-court rulings from the 2019–2020 Term, which saw the Court address the following issues: state sovereign immunity, discrimination claims, statutory construction, suits against religious employers, the Administrative Procedure Act, severability, statutes of limitation, and finality. In each of these areas, the Court made decisions that will broadly affect whether and how individuals can obtain relief from a court. The article concludes by previewing potentially significant access-to-court cases of the 2020–2021 Term.

12 *See, e.g.*, Matthew Diller et al., *Decisions on Federal Court Access During the Supreme Court's 1999-2000 Term: Some Social Security, a Little Federalism, and More of the Usual*, 34 Clearinghouse Rev. 405, 408–11 (Nov.–Dec. 2000).

I. STATE SOVEREIGN IMMUNITY

One of the most significant stories in constitutional law over the last thirty years is the Court's ongoing interest in federalism, as illustrated by its decisions recognizing states' immunity from suit by individuals based on violations of federal law. Over the years, the Supreme Court has decided a number of these cases, almost always finding for the state and expanding states' sovereign immunity.[13] This immunity from suit means that the individual plaintiff injured by a state actor is blocked from obtaining any relief in court. The 2019–2020 Term added to the Court's sovereign immunity case sheet with *Allen v. Cooper*.

Blackbeard the Pirate set the stage for the Court to decide *Allen v. Cooper*.[14] Blackbeard commandeered a slave ship and renamed her the *Queen Anne's Revenge* in 1717.[15] A year later, the ship ran aground off the coast of North Carolina.[16] *Queen Anne's Revenge* lay there until 1996 when a marine salvage company discovered it.[17] North Carolina assumed ownership, as the ship was discovered along its coastline, and contracted with the salvage company to recover it.[18] The company hired Frederick Allen, a local of North Carolina, to take photos of the salvage effort.[19] Mr. Allen did his job and registered copyrights of all his work. After North Carolina published some of Allen's photographs, he sued the State, alleging copyright infringement and seeking money damages.[20] North Carolina moved to dismiss based on sovereign immunity.[21] Although the district court allowed the infringement claim to proceed, the United States Court of Appeals for the Fourth Circuit agreed with North Carolina's arguments and reversed.[22] The Supreme Court granted certiorari.[23]

Despite calling copyright infringement "a modern form of piracy,"[24] the Court found North Carolina immune from suit based on the Eleventh

13 *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . ."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas, 491 U.S. 1 (1989)).

14 Allen v. Cooper, 140 S. Ct. 994 (2020).

15 *Id.* at 999.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Allen v. Cooper, 895 F.3d 337, 343 (4th Cir. 2018).

23 Allen v. Cooper, 139 S. Ct. 2664 (2019) (granting certiorari).

24 Allen v. Cooper, 140 S. Ct. at 999 (2020).

Amendment, which states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[25] The Court acknowledged that the text of the Eleventh Amendment generally bars suits against a state by citizens of another state, but noted that, despite this, the Supreme Court has long applied the amendment more broadly to also preclude suits by a state's own citizens.[26] Thus, the Court held that amendment applied in Mr. Allen's case.

There are exceptions to state immunity, but over the last couple of decades, the Court has significantly narrowed them. Mr. Allen could not navigate these narrow straits. One exception allows a state to be sued if Congress has abrogated, or removed, the state's immunity.[27] For this to occur, Congress first has to clearly state its intention to abrogate in a statute, and it must also have the constitutional authority to take that step.[28]

In Mr. Allen's case, there could be no doubt that Congress abrogated the state's immunity. "The Copyright Remedy Clarification Act (CRCA) provides that a state 'shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court' for copyright infringement."[29] However, the case foundered on the shoals of the second requirement—that Congress must have the constitutional authority to abrogate. The Court looked at this requirement in an analogous case and that case controlled, thus leaving the "slate . . . anything but clean."[30]

Mr. Allen argued in defense of congressional authority; first, that Article I of the Constitution empowered Congress to legislate copyright protection and that to abrogate states' immunity from suit was necessarily a valid exercise of that power.[31] However, the Court had rejected that argument twenty years prior in a patent infringement case under the Patent Remedy Act, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[32]

25 U.S. Const. amend. XI; *Allen*, 140 S. Ct. at 999.

26 *Allen*, 140 S. Ct. at 1000.

27 *Id.* at 1000–01.

28 *Id.* at 1000–01 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000)).

29 *Id.* at 999 (quoting Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511(a)).

30 *Id.* at 1001.

31 *Id.* (citing U.S. Const. art. I, § 8, cl. 8) ("Congress has power under Article I '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'").

32 Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding Congress cannot use Article I to circumvent limits that state sovereign immunity places on federal jurisdiction).

It rejected the argument here, too, finding the Patent Remedy Act and the CRCA to be "basically identical statutes."[33] To decide for Allen, the Court would have had to overrule *Florida Prepaid*. It refused, stating that *stare decisis* is "a 'foundation stone rule of law'" and to overturn a decision requires a "'special justification,' over and above the belief 'that the precedent was wrongly decided.'"[34] Justice Thomas disagreed with this discussion of *stare decisis*, stating that the Court has a duty to correct erroneous precedents, and no "special justification" is needed.[35]

Next, Mr. Allen argued that Congress could abrogate the State's immunity under section 5 of the Fourteenth Amendment.[36] This provision unquestionably shifted the balance of power between state and federal governments. However, a couple of decades ago, the Court introduced what amounts to a strict scrutiny test that drastically heightened the requirements for using this power.[37] This test requires Congress to tailor the abrogation to remedy a pattern of intentional or at least reckless infringement by states of individuals' Fourteenth Amendment protections and to ensure "congruence and proportionality" between the injury to be prevented and the remedy Congress uses.[38] The *Florida Prepaid* Court applied this test to reject abrogation in the Patent Remedy Act, and the *Allen* Court found that precedent controlled the CRCA.[39] As occurred in *Florida Prepaid*, the Court found little evidence of systemic statutory infringement by the states: "In this

33 *Allen*, 140 S. Ct. at 998, 1001–02 (citing *Fla. Prepaid*). The Court refused to extend a holding that Article I's bankruptcy clause allows Congress to abrogate state immunity in bankruptcy proceedings, labeling that case a "good-for-one-clause-only holding" due to "bankruptcy exceptionalism." *Id.* at 1002–03 (citing Central Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006)).

34 *Allen*, 140 S. Ct. at 1003 (first quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); then quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

35 *Id.* at 1007–08 (Thomas, J., concurring in part and concurring in the judgment). *See also* Ramos v. Louisiana, 140 S. Ct. 1390, 1421–22 (2020) (overruling, by a "badly fractured majority[,]" two precedent cases and explaining positions on *stare decisis*, with Justice Alito's dissent complaining that the majority gave the doctrine "rough treatment . . . [l]owering the bar for overruling our precedents. . . ." *Id.* at 1425 (Alito, Roberts, JJ., dissenting; Kagan, J., dissenting in part)).

36 *Allen*, 140 S. Ct. at 1001. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation" Section 1 of the Fourteenth Amendment, which prohibits states from depriving "any person of life, liberty, or property, without due process of law." *Id.* at 1003 (quoting U.S. CONST. amend. XIV, §§ 1, 5).

37 *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

38 *Allen*, 140 S. Ct. at 1004 (citing *City of Boerne*, 521 U.S. at 520). The Court has looked to the legislative record leading up to the passage of the law for evidence of infringement. *Id.*

39 *Id.* at 1005.

case as in [*Florida Prepaid*], the statute aims to 'provide a uniform remedy' for statutory infringement, rather than to redress or prevent unconstitutional conduct."[40] As a result, Mr. Allen could not sue the state.

As this case illustrates, in recent times, the Supreme Court has narrowed congressional power to abrogate state sovereign immunity. Its decisions "create an odd discrepancy between Congress' considerable substantive power to enact legislation that imposes requirements on states and its inability to enforce those standards by authorizing private parties to sue states when they breach valid requirements."[41] In other words, individuals who are harmed by state government violations of federal laws are being left without a remedy.

40 *Id.* at 1007 (quoting *Fla. Prepaid*, 527 U.S. 627, 647 (1999)).

41 Gill Deford et al., *The Supreme Court's 1998-1999 Term: Federalism, State Act, and Other Cases Affecting Access to Justice*, 33 Clearinghouse Rev. 375, 375–76 (1999).

II. STATING CLAIMS FOR DISCRIMINATION

The Court issued several opinions addressing discrimination claims. A pair of cases focused on the standard of causation set forth in two anti-discrimination statutes; one aimed at race and the other at age.[42] Anti-discrimination litigants regularly grapple with proof of causation, as it can be difficult to show that discriminatory animus is the primary motivating factor for a challenged action, and courts often require plaintiffs to show that it is. Here, the plaintiff experiencing race discrimination was required to meet this bar, while the plaintiff experiencing age discrimination was not. These contrasting results arise from the Court's interpretation of the relevant anti-discrimination statutes. A third major case considered whether employers' decisions to fire gay men because of their sexual orientation, and a transgender woman because of her gender identity, constituted prohibited sex discrimination under Title VII of the Civil Rights Act.[43]

A. *Comcast Corporation v. National Association of African-American Owned Media*

In this case, the National Association of African-American Owned Media (NAAOM) sued Comcast for refusing to carry their television channels, alleging Comcast violated 42 U.S.C. § 1981, which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[44] The question at hand was whether it was necessary for NAAOM to show that racial animus was the sole reason Comcast did not contract with them or "but-for" causation.[45] The district court found that NAAOM failed to state a claim for relief because it had not made this showing.[46] The United States Court of Appeals for the Ninth Circuit reversed, holding that race need only play "some role" in the decision-making process to state a claim, creating a circuit split.[47] With near unanimity (Justice Ginsburg concurred in part and joined the judgment in part), the Supreme Court reversed.[48] Justice Gorsuch, writing for the majority, cited "'textbook tort law' that a plaintiff seeking redress for

42 Comcast Corp. v. Nat'l Ass'n of African-American Owned Media, 140 S. Ct. 1009 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020).
43 Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
44 *See Comcast Corp.*, 140 S. Ct. at 1013 (2020) (quoting 42 U.S.C. § 1981).
45 *Id.*
46 *Id.* at 1013.
47 *Id.* at 1014.
48 *Id.* at 1019.

a . . . legal wrong typically must prove but-for causation."[49] Thus, the Court agreed with the district court that, under § 1981, plaintiffs must show that their injury would not have occurred if they were white.

Though the plaintiffs argued that § 1981 provided an exception to the but-for causation requirement, the Court disagreed, stating that "taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule."[50] The Court also found that the burden to show such causation exists at the pleading stage and throughout the case.[51] Only Justice Ginsburg broke rank to express disagreement with Comcast's assertion that § 1981 only governs the decision to enter into a contract, writing that § 1981 also prohibits discrimination in the earlier phases of contract formulation:[52]

> An equal 'right . . . to make . . . contracts, is an empty promise without equal opportunities to present or receive offers and negotiate over terms. . . . It is implausible that a law 'intended to . . . secure . . . practical freedom,' would condone discriminatory barriers to contract formation.[53]

This decision resolved a circuit split between the Ninth Circuit and others, such as the Seventh, which imposed the stricter but-for causation standard on § 1981 plaintiffs.[54] While the decision disappointed lawyers fighting race discrimination, it did not adopt the narrowest definition of actionable conduct under § 1981, averting the outcome advocates most feared.[55]

B. *Babb v. Wilkie*

In this case, a pharmacist working at a Veteran's Affairs (VA) hospital alleged discrimination under the Age Discrimination in Employment Act (ADEA).[56] The pharmacist, Babb, claimed that the VA made personnel decisions based on her age that reduced her chances of promotion and

49 *Id.* at 1012, 1014.
50 *Id.* at 1014.
51 *Id.* at 1014–15.
52 *Id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment).
53 *Id.* (citations omitted).
54 *Id.* at 1013–14.
55 *See, e.g.*, Press Release, NAACP Legal Defense and Educational Fund, Supreme Court Increases Burden for Claims of Race Discrimination Under Crucial Civil Rights Statute (Mar. 23, 2020), https://www.naacpldf.org/wp-content/uploads/Comcast-Decision-Statement.pdf.
56 *See* Babb v. Wilkie, 140 S. Ct. 1168 (2020).

reduced her pay.[57] The District Court for the Middle District of Florida held that the VA showed non-discriminatory reasons for the employment decision and therefore did not violate the ADEA.[58] The United States Court of Appeals for the Eleventh Circuit affirmed, citing binding precedent, "but added that it might have agreed with her if it were writing on a clean slate."[59]

The Supreme Court considered whether the lower courts were correct that the ADEA imposed liability only when age was a but-for cause of the employment decision.[60] The VA argued that it should prevail even if Babb showed that age played a part in their decision and that Babb should be required to show that, but for her age, the adverse decision would not have occurred.[61] Babb countered that she should prevail if age played *some* role in the decision.[62] Justice Alito, writing for an eight-member majority, held that the federal-sector employer section of the ADEA (which applies to the VA) does not require a showing of but-for causation.[63] Rather, the statute requires that personnel decisions "shall be made free from any discrimination based on age[;]" therefore, its "plain meaning" is that "personnel actions be untainted by any consideration of age."[64]

On the other hand, once discrimination under the ADEA is shown, the Court held that but-for causation must still be considered when formulating the appropriate remedy. To obtain reinstatement, back pay, compensatory damages, or similar forms of relief, the plaintiff must show that the adverse decision would not have occurred but for age discrimination.[65] If the employee shows that discrimination was a factor, but did not ultimately cause the outcome, they are limited to "injunctive or other forward-looking relief."[66] While this means it is easier to make an initial showing of discrimination under the ADEA than under § 1981, ADEA plaintiffs still must show but-for causation to receive most kinds of relief.

A third discrimination case, *Bostock v. Clayton County, Georgia*, involving discrimination on the basis of sexual orientation and identity, is a blockbuster opinion breaking new ground in sex discrimination law by making clear that discrimination against homosexual and transgender people is a form of

57 *Id.* at 1171.
58 *Id.* at 1172.
59 *Id.* at 1172 (quoting Babb v. Sec'y, Dep't of Veterans Affs., 743 Fed. App'x 280, 287 (11th Cir. 2018)) (internal quotation marks omitted).
60 *Id.* at 1171; 743 F. App'x at 287–88.
61 *Babb*, 140 S. Ct. at 1172.
62 *Id.*
63 *Id.* at 1170–71.
64 *Id.* at 1171 (quoting 29 U.S.C. § 633a(a)).
65 *Id.* at 1177–78.
66 *Id.* at 1178.

illicit sex discrimination.[67] The *Bostock* opinion considers the nature of the prohibited discrimination itself, based on the text of the applicable statute, and has already had an enormous impact on how sex discrimination is understood under federal law.[68] It is an important statutory interpretation case and will be discussed in that section. In contrast, the *Comcast* and *Babb* decisions were relatively narrow, technical opinions in nearly unanimous decisions without major implications for race or age discrimination. But, for court access purposes, they are significant, demonstrating the importance of closely examining the wording of statutes governing causation.

67 Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).

68 *See, e.g.*, Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After* Bostock v. Clayton County, 69 Kan. L. Rev. 409 (2021).

III. STATUTORY INTERPRETATION

Each Supreme Court Term typically includes a number of statutory interpretation cases,[69] and this Term was no exception. While the Court announced no new principles, it did reinforce some classic concepts that are broadly applicable to any case involving the meaning of a statute. Most of these decisions show the Court adhering closely to the explicit statutory text and demonstrate a reluctance to go beyond the text of the statute to account for other considerations that might favor relief.

In this vein, several statutory construction cases emphasized the importance of relying on the plain language of the statute at issue. For example, in *Intel Corporation Investment Policy Committee v. Sulyma*, the Court unanimously emphasized that: "'[w]e must enforce plain and unambiguous statutory language' in . . . any statute, 'according to its terms.'"[70] And in *Rotkiske v. Klemm*, Justice Thomas wrote, "We must presume that Congress 'says in a statute what it means and means in a statute what it says there.'"[71] The majority in *Bostock v. Clayton County, Georgia* stated this proposition even more forcefully: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[72]

A. *Bostock v. Clayton County, Georgia*

Bostock was a significant statutory interpretation case as well as perhaps the most important discrimination case of the Term. The consolidated case involved gay men who were fired because of their sexual orientation and a transgender woman who was fired because of her gender identity.[73] Writing for a five-member majority, Justice Gorsuch held that the fact that Congress did not specify whether the phrase "discrimination because of sex" included discrimination based on homosexual or transgender identity meant that Title VII did include such discrimination, since "homosexuality and transgender status are inextricably bound up with a person's sex."[74] The Court explained

69 *See, e.g.*, Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) (reviewing a number of such cases); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018).

70 Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 776 (2020) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

71 Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019) (internal citation omitted).

72 *Bostock*, 140 S. Ct. at 1737.

73 *Id.* at 1738–39.

74 *Id.* at 1742, 1744.

that where the statutory language is clear, Congress's intent in drafting that statute is not dispositive to its interpretation.

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands.[75]

Thus, the Court found that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[76]

This case demonstrated that even a conservative Court would hold that anti-discrimination laws protect homosexual and transgender people when it found that the statutory language was clear. Other plaintiffs seeking to redress discrimination should therefore look closely at the statutory language to argue that it sets out clear protections against the discrimination at issue.

B. *County of Maui v. Hawai'i Wildlife Fund*

Another notable statutory interpretation case, *County of Maui v. Hawai'i Wildlife Fund*, reviewed a provision of the Clean Water Act (CWA).[77] The CWA forbids the addition of any pollutant from a "point source" into "navigable waters" without the appropriate permit.[78] Several environmental groups sued the County of Maui, claiming that it was discharging pollutants from its wastewater reclamation facility into the Pacific Ocean.[79] The Ninth Circuit held that a permit was required when "pollutants are *fairly traceable* from the point source to navigable waters such that the discharge is the functional equivalent" of a direct discharge.[80] Granting certiorari, the Supreme Court considered whether the CWA required the county to obtain a permit for pollutants that originate from a specific point source, the wastewater treatment facility, but are conveyed through another source (here,

75 *Id.* at 1737.
76 *Id.* at 1742.
77 *See* Cnty. of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462 (2020).
78 *Id.* at 1468 (citing 33 U.S.C. §§ 1311(a), 1362(12)(A)).
79 *Id.*
80 *Id.* at 1469 (quoting 886 F.3d 737, 749 (2018)).

groundwater) into navigable waters.[81] More broadly, the Court considered when a pollutant could reasonably be said to have come "from" a point source.[82]

The county of Maui, joined by the solicitor general as amicus curiae, argued that any travel through groundwater means that a pollutant is no longer fairly traceable to the point source and thus the discharge must be excluded from the permitting program.[83] The Court largely upheld the Ninth Circuit's decision, citing the statute's language, structure, and purpose as well as legislative history and congressional intent.[84] Justice Breyer's 6-3 majority opinion, joined by all but Justices Thomas, Gorsuch, and Alito, found the Ninth Circuit's holding too broad because requiring only that a pollutant be "fairly traceable" to a source could allow the EPA "to assert permitting authority over the release of pollutants that reach navigable waters many years after their release . . . and in highly diluted forms."[85] The majority suggested factors courts can use to determine when a discharge through groundwater is the functional equivalent of a direct discharge, such as:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.[86]

The Court remanded the case to the Ninth Circuit to apply these factors.[87] Justice Alito, in his separate dissent, accused the court of "devis[ing] its own legal rules" that cannot "be applied with a modicum of consistency."[88]Justice Thomas chastised the majority for failing to closely adhere to the text of the statute in order to effectuate its apparent purpose.[89]

This case is notable because a six-member majority relies as much on the statute's purpose as it does the text and structure.[90] The majority

81 *Id.* at 1468–69.
82 *Id.* at 1470.
83 *Id.*
84 *Id.* at 1470–72.
85 *Id.* at 1470.
86 *Id.* at 1476–77.
87 *Id.* at 1477–78.
88 *Id.* at 1482 (Alito, J., dissenting).
89 *Id.* at 1479.
90 *See id.* at 1471–72.

even cites the legislative history of the statute for support.[91] Thus, it is an exception to the prevalence of textualism in federal statutory interpretation cases.[92]

C. *United States Forest Service v. Cowpasture River Preservation Association*

In another notable statutory construction case, *United States Forest Service v. Cowpasture River Preservation Association*, the Court was asked to interpret congressional silence.[93] This case involved a challenge to the issuance of a permit by the U.S. Forest Service to allow the Atlantic Coast Pipeline to run beneath the Appalachian Trail.[94] Environmental groups opposed the project, arguing that this stretch of land was a national park under the Act for Administration.[95] The nature of the land was central to the question considered by the Court: whether the land at issue is considered a national park, through which no pipeline permit may issue, or other federal lands, though which a permit is allowed. Neither relevant statute—the Mineral Leasing Act or the National Trails System Act—addressed this question explicitly.[96]

A seven-member majority, led by Justice Thomas, concluded that where Congress failed to be specific in writing a statute, interpretation required a narrow reading.[97] The majority held that because Congress did not specify that the Department of the Interior's assignment of responsibility for the Appalachian Trail to the National Park Service converted the land through which the trail passes into national park land, there was no such conversion.[98]

The Court emphasized that the case involved private property rights, noting that "[o]ur precedents require Congress to enact exceedingly

91 *Id.*

92 *See* Tara Leigh Grove, Note, *Which Textualism?* 134 Harv. L. Rev. 265, 265 n.1 (Nov. 2020) (noting textualism "has in recent decades gained considerable prominence within the federal judiciary") (citing Elena Kagan, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan in the Reading of Statutes*, YouTube (Nov. 15, 2015), https://youtu.be/dpEtszFToTg (at 8:28, noting "w[e are] all textualists now.")). Scholars have also observed "a discernable decline in the rate at which the Court invokes legislative history." *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275, 1277 n.1 (Mar. 2020) (citing additional scholarship).

93 *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1843 (2020).

94 *Id.* at 1841–42.

95 *Id.* at 1842, 1848 (citing Mineral Leasing Act, 30 U.S.C. §§ 181–287, and National Trails System Act, 16 U.S.C. § 1244(a)(1)).

96 *U.S. Forest Serv.*, 140 S. Ct. at 1843–44.

97 *Id.* at 1847–48.

98 *Id.*

clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[99] While the respondents argued that the delegation of authority over the trail changed the character of the adjoining land, the Court disagreed, noting that:

> Congress has used express language in other statutes when it wished to transfer lands between agencies. Congress not only failed to enact similar language in the Trails Act, but . . . [t]he entire Trails Act must be read against the backdrop of the Weeks Act, which states that lands acquired for the National Forest System—including the George Washington National Forest—"shall be permanently reserved, held, and administered as national forest lands."[100]

Since, in the Trails Act, Congress failed to use "unequivocal and direct language . . . to transfer land from one agency to another, just as one would expect if a property owner conveyed land in fee simple to another private property owner[,]" the Court concluded there was no transfer of land, and the Department of the Interior retained authority to grant pipeline rights-of-way through the land.[101] This decision suggests that the Court is inclined to read statutes to protect private property interests, even when those interests run up against significant environmental concerns. Moreover, it illustrates that the Court is unwilling to read an intent to protect the environment, as opposed to private property, into a statute unless the statute provides for such protection with exacting specificity—especially against a government actor.

D. *Maine Community Health Options v. United States*

The final statutory interpretation case that we discuss resulted in a significant Affordable Care Act[102] (ACA) ruling and a victory for health insurers in *Maine Community Health Options v. United States*.[103] The decision contained an extended discussion of statutory interpretation rules and held that the plaintiffs could obtain relief through the Tucker Act, a federal law that allows plaintiffs to pursue money claims against the federal government in certain situations.[104]

99 *Id.* at 1849–50.
100 *Id.* at 1850 (quoting 16 U.S.C. § 521).
101 *Id.* at 1847.
102 Patient Protection and Affordable Care Act, 42 U.S.C. 18001 (2010).
103 *See* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020).
104 *Id.*; 28 U.S.C. § 1491(a)(1).

The ACA expanded health care coverage for millions who did not have it.[105] Among other things, the law established online exchanges where health insurers sell plans, provided tax credits to help people buy those plans, and prohibited insurers from discrimination based on health conditions.[106] At issue in this lawsuit was a provision of the ACA that provided protection to insurers that covered patients with higher needs that may incur significant losses.[107] Section 1342 of the ACA created a "Risk Corridors" program that limited insurer profits and losses during the first three years of the exchanges.[108] This provision required insurers to pay the U.S. Department of Health and Human Services (HHS) if plan profits exceeded a certain limit and provided for HHS to pay insurers that had losses over certain limits.[109] The ACA did not appropriate funds for the program, nor did it place a ceiling on the amount that HHS might have to pay.[110]

At the end of each year of the program, the federal government owed billions more to insurers with unprofitable plans than profitable insurers owed the government.[111] Each year, however, a hostile Congress attached a rider to the appropriations bill preventing the use of funds for risk corridor payments.[112] Four health insurers sued the federal government to recoup damages for their losses.[113] The United States Court of Appeals for the Federal Circuit ruled against them, holding that the appropriations riders had implicitly "repealed or suspended" § 1342's requirement that the government cover losses.[114]

The Supreme Court granted certiorari and reversed in a decision by Justice Sotomayor, joined in full by the Chief Justice and Justices Ginsburg,

105 *See* Rachel Garfield et al., Henry J. Kaiser Fam. Found., The Uninsured and the ACA: A Primer – Key Facts About Health Insurance and the Uninsured Amidst Changes to the Affordable Care Act (2019), http://files.kff.org/attachment/The-Uninsured-and-the-ACA-A-Primer-Key-Facts-about-Health-Insurance-and-the-Uninsured-amidst-Changes-to-the-Affordable-Care-Act (describing health insurance coverage gains resulting from the ACA).

106 *Me. Cmty. Health Options*, 140 S. Ct. at 1315. *See* 26 U.S.C. § 36B (providing for tax credits as premium assistance); 42 U.S.C. §§ 300gg-3, -11 (imposing consumer protections including prohibiting lifetime or annual limits and guaranteeing coverage for individuals with pre-existing conditions); 42 U.S.C. §§ 18031–18044, 18071 (establishing exchanges and imposing limits on cost sharing).

107 *Me. Cmty. Health Options*, 140 S. Ct. at 1315–16.

108 *Id.* at 1316 (citing § 1342, 124 Stat. 211 (codified at 42 U.S.C. § 18062)).

109 *Id.* at 1316.

110 *Id.*

111 *Id.* at 1317.

112 *Id.*

113 *Id.* at 1318.

114 *Id.*

Breyer, Kagan, and Kavanaugh, and in part by Justices Thomas and Gorsuch.[115] It held that § 1342 obligated the federal government to pay insurers in full, and neither Congress's failure to provide details about how the obligation must be satisfied nor the subsequent riders negated the obligation.[116] The statute created an obligation, the Court held, citing the plain language that stated that the federal government "shall pay" an amount determined by formula to plans that lose money.[117] The mandatory nature of the term "shall" was underscored by adjacent provisions, which differentiate between when HHS "shall" take certain actions and when it "may" exercise discretion.[118] "Thus, without 'any indication' that [the statute] allows the Government to lessen its obligation, we must 'give effect to [its] plain command.' That is, the statute meant what it said: The Government 'shall pay' the sum that § 1342 prescribes."[119]

Next, the Court held that Congress did not repeal by implication the obligation to pay the insurers when it refused to fund the risk corridors program in its appropriations riders.[120] It cited the long-standing principle that "repeals by implication" are rare and disfavored, particularly in the appropriations context.[121] The Court also pointed out that other sections of the ACA indicate that they are "subject to the availability of appropriations," while § 1342 does not.[122] "This Court generally presumes that 'when Congress includes particular language in one section of a statute but omits it in another,' Congress 'intended a difference of meaning.'"[123] The majority refused to find persuasive the legislative history offered by the United States, which consisted of a congressional floor statement and unpublished Government Accountability Office statement "doubt[ing] that either source could ever evince the kind of clear congressional intent required to repeal a statutory obligation through an appropriations rider."[124]

Finally, the Court found that the Tucker Act authorized the plaintiffs' suit for damages. The Tucker Act provides jurisdiction to the Court of Claims to hear non-tort claims for damages against the United States based on the

115 *Id.* at 1314.
116 *Id.* at 1319–20.
117 *Id.* at 1320–21 (citing 42 U.S.C. § 18062(a), (b)(1)).
118 *Id.* at 1321 (citing §§ 1341(b)(2), 1343(b)).
119 *Id.* at 1321 (quoting Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach et al., 523 U.S. 26, 35 (1998)).
120 *Id.* at 1323.
121 *Id.*
122 *Id.* at 1322.
123 *Id.* at 1323 (citations omitted).
124 *Id.* at 1326 (citations omitted).

Constitution, statutes, regulations, or contract.[125] While acknowledging that it is rare to find a law that implicitly authorizes a damages suit under the Tucker Act, the Court concluded that § 1342 does.[126] Though it contains no substantive rights, the Tucker Act provides a means to enforce a statute that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," even if that statute does not explicitly provide for damages.[127] The statute's plain language says the government "shall pay," and that language "often reflects a congressional intent 'to create both a right and a remedy' under the Tucker Act."[128] Moreover, the statutory provision focuses on the compensation of insurers for past injuries, further indicating that it imposes an enforceable obligation.[129] Section 1342 contains no judicial remedies of its own nor any comprehensive remedial scheme supplanting a remedy through the Tucker Act. [130]

Justice Alito disagreed with the majority's decision to find an implied right of action to enforce the risk corridor provision. His dissent highlights recent Supreme Court precedent making it more difficult for individuals to obtain relief in federal court, specifically Court decisions limiting individual enforcement of statutory rights.[131] He notes that "[t]wice this Term, we have made the point that we have basically gotten out of the business of recognizing private rights of action not expressly created by Congress."[132] He refers disparagingly to the "period when the Court often 'assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose.'"[133] Now, he asserts, quoting recent concurrences by himself and Justices Thomas and Gorsuch, "we have come to appreciate that, '[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress[.]'"[134] Justice Alito overstates the

125 28 U.S.C. § 1491.

126 *Me. Cmty. Health Options*, 140 S. Ct. at 1329.

127 *Id.* at 1327–28 (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) and discussing Tucker Act, 20 U.S.C. § 1491).

128 *Id.* at 1329.

129 *Id.*

130 *Id.* at 1329–30.

131 *Id.* at 1331–32 (Alito, J., dissenting); *see* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis J. Health L. & Pol'y 207 (2016) (discussing history of cutbacks to individual enforcement of the Medicaid Act and other laws).

132 *Me. Cmty. Health Options*, 140 S. Ct. at 1331–32 (Alito, J., dissenting) (citing dicta in Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1015–16 (2020) and Hernandez v. Mesa, 140 S. Ct. 735 (2020)).

133 *Id.*

134 *Id.* at 1332 (quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)) (alteration in original).

case, as federal courts continue to regularly allow individuals to enforce statutes through 42 U.S.C. § 1983, for example.[135] He is correct, however, that the Court has steadily moved away from the remedial imperative over the past twenty years as it has become more conservative.[136] Now that the Court tilts strongly to the right, it appears this trend is likely to continue.

This Term's statutory interpretation holdings broke little new ground, and there were no blockbusters among them. The Court largely followed the textualist path that it has taken in recent decades. These decisions are more notable for their substantive holdings on the meaning of the statutes rather than the means the Court employed to reach those conclusions.

135 *See* Perkins, *supra* note 131, at 208–09.

136 *See id.*; Diller et al., *supra* note 12 (reviewing the Supreme Court's 1999–2000 Term access-to-courts decisions).

IV. Suits Against Religious Employers

Another case this Term involved employer discrimination, in which the Court considered when the First Amendment might trump those obligations. *Our Lady of Guadalupe School v. Morrissey-Berru* focused on the conflict between statutory anti-discrimination obligations and the rights of religious employers. This case advanced the rights of religious employers to avoid the requirements of discrimination statutes.

The Court considered whether two former religious school teachers could pursue employment discrimination claims under the ADEA and the Americans with Disabilities Act.[137] One employee alleged she was fired because of her age; the other, because she had breast cancer.[138] The majority, led by Justice Alito, held that the First Amendment's Religion Clauses barred their claims.[139] The Court expanded upon a 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, which established that the Religion Clauses bar courts from hearing employment discrimination claims against a religious school based on a "ministerial exception," where claims could not be brought by a staff member who acted in a ministerial capacity.[140] While declining to "adopt a rigid formula for [who] qualifies as a minister," the *Hosanna-Tabor* Court identified four factors in deciding that the exception applied to that teacher: (1) her title of "minister," (2) her significant degree of religious training, (3) the fact that she "held herself out as a minister[,]" and (4) her role carrying out the Church's mission and message.[141]

In two separate cases, the Ninth Circuit held that the religious employers could not take advantage of the ministerial exception under the *Hosanna-Tabor* factors, noting that, among other things, the teachers were not given the title of minister and did not have extensive religious training.[142] The majority acknowledged these facts but held that the Ninth Circuit had not given appropriate deference to the school's determination that the teachers' duties were ministerial.[143] Here, the majority reasoned, the ministerial exception applied to bar their suit because the teachers participated in the religious education and formation of students, which is the essential mission

137 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
138 *Id.* at 2058–59.
139 *Id.* at 2055.
140 *Id.* at 2055 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)).
141 *Id.* at 2062.
142 *Id.* at 2058–60 (citing Our Lady of Guadalupe Sch. v. Morrissey-Berru, 769 Fed. App'x 460, 461 (9th Cir. 2019), and Biel v. St. James Sch., 911 F.3d 603, 608 (9th Cir. 2018)).
143 *Id.* at 2066–67.

of a private religious school.[144] The Court held that "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate."[145]

Justices Sotomayor and Ginsburg dissented, arguing that the majority opinion "collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role."[146] They criticized this as a "simplistic approach" that "has no basis in law and strips thousands of schoolteachers of their legal protections."[147] Justice Sotomayor cautioned that this decision could extend to a wide variety of laypeople who happen to work for religious institutions, with dire consequences. She argued that, in an attempt to combat "a perceived 'discrimination against religion' . . . [the Court] swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs."[148] While this decision applies to a relatively narrow group of employees, as Justice Sotomayor cautions, it has the potential to sweep in a wide variety of employees with only a tenuous connection to the essential religious function of the employer.

144 *Id.*
145 *Id.* at 2055.
146 *Id.* at 2072 (Sotomayor & Ginsburg, JJ., dissenting).
147 *Id.*
148 *Id.* at 2082 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020)).

V. The Administrative Procedure Act

The Administrative Procedure Act (APA) provides relief for individuals when federal agencies take action that is illegal.[149] This occurs when, for example, the action exceeded the agency's legal authority, was arbitrary and capricious, or did not allow for public notice and comment.[150] Two notable APA cases were decided during the 2019–2020 Term, one considering actions by the Department of Homeland Security (DHS) and the other by HHS. Both cases involved challenges against the Trump Administration's attempts to overturn Obama-era policies through the administrative process. APA claims were a main vehicle for challenging these efforts, resulting in several APA cases over the last four years.[151] The two APA cases decided during the 2019–2020 Term not only took on major political issues—immigration relief for certain undocumented immigrants and the availability of religious and moral exceptions to the obligation to provide contraceptive coverage in employer-based health insurance—but they also demonstrated the tension in the Court's APA jurisprudence. On the one hand, in the DHS case, on a substantive challenge to agency policy, the Court emphasized the importance of following formal APA procedure. On the other hand, in the HHS case, the Court found a rule valid despite the agency's failure to fully follow the procedural steps.

A. *Department of Homeland Security v. Regents of the University of California*

Chief Justice Roberts wrote the opinion for the five-member majority in *Department of Homeland Security v. Regents of the University of California*.[152] The case arose after the Trump Administration terminated the Deferred Action for Childhood Arrivals (DACA) program, which was created by the Obama Administration's DHS.[153]

In 2012, DHS issued a memorandum that established the DACA program to provide immigration relief for young immigrants and then expanded this program in 2014.[154] Soon after the Trump Administration

149 *See* 5 U.S.C. § 706.

150 *Id.* § 706(2)(A)–(D).

151 *See, e.g.*, Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (citizenship question on census); Weyerhaeuser Co. v. U.S. Fish & Wildlife, 139 S. Ct. 361 (2018) (endangered species).

152 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Justice Sotomayor did not join Part IV of the opinion on Equal Protection, which is not discussed here.).

153 *Id.* at 1901.

154 *Id.* at 1901–02.

took office, the Attorney General recommended rescinding the program, claiming it was illegal, and, in September 2017, DHS did so through a memorandum (2017 Memorandum).[155] Several groups sued, and the Supreme Court took up the question of whether DHS's termination of the DACA program violated the APA.[156]

The United States District Court for the District of Columbia vacated the 2017 rescission and instructed DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."[157] In response, DHS issued a second memorandum in 2018 (2018 Memorandum) that provided additional reasons for the rescission.[158]

When the issue reached the Supreme Court, DHS first argued that its decision to terminate DACA was "unreviewable under the APA and outside th[e] Court's jurisdiction[,]" by analogy to the statute's ruling on the enforceability of individual decisions.[159] DHS emphasized that the DACA policy was a nonenforcement policy, rather than a new program, and under the APA, 5 U.S.C. § 701(a)(2), individual decisions about whether to enforce a particular law against a particular individual are within an agency's discretion and not subject to judicial review.[160] DHS contended that, similarly, a general policy of non-enforcement, and by corollary, the termination of such policy, was not subject to review because it is just like an individual non-enforcement decision.[161] The Court disagreed, finding that "the [2012] DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an 'action [subject to review under the APA].'"[162]

Next, the Court considered whether DHS "adequately explained" its 2017 policy change.[163] The APA instructs courts to hold unlawful and set aside agency actions that are arbitrary and capricious.[164] The Court has determined whether an agency's action is arbitrary and capricious by evaluating whether the agency provided an adequate explanation for its

155 *Id.* at 1903.
156 *Id.*
157 NAACP v. Trump, 298 F. Supp. 3d 209, 245 (D.D.C. 2018).
158 *Regents of the Univ. of Cal.*, 140 S. Ct. at 1904.
159 *Id.* at 1905.
160 *Id.* at 1905–06 (quoting Heckler v. Chaney, 470 U.S. 821, 831–832 (1985)).
161 *Id.* at 1906.
162 *Id.* (quoting *Heckler*).
163 *Id.* at 1907.
164 5 U.S.C. § 706(2)(A).

action, demonstrating that it engaged in reasoned decision-making.[165] The Court considered whether DHS could refer to the 2018 Memorandum as part of the agency's explanation for the change, but emphasized the familiar APA principle "that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'"[166] Thus, the Court reasoned, in the 2018 Memorandum, DHS "was limited to the agency's original reasons, and [its] explanation 'must be viewed critically' to ensure that the rescission is not upheld on the basis of impermissible '*post hoc* rationalization.'"[167] Because the reasons set forth in the 2018 Memorandum were "nowhere to be found" in the 2017 Memorandum, the Court could not consider them.[168] This portion of the decision reaffirms long-standing APA precedent, which makes clear that an arbitrary and capricious inquiry only considers the agency's rationale as stated when a policy is adopted, not later justifications.

DHS protested that it should not have to revisit the question again to provide a justification for the policy in advance of rescinding the program; it claimed that requiring it to go back to provide its reasons before the rescission before it could finally terminate the program would be "an idle and useless formality."[169] The Court majority rejected this argument and also disputed Justice Kavanaugh's dissenting opinion suggesting that the prohibition on post hoc rationalizations only barred courts from considering later policy justifications offered by attorneys in the course of litigation, not later explanations from the agency.

> While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.[170]

The majority thus emphasized that "[t]his is not the case for cutting corners

165 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mut. Ins. Co., 463 U.S. 29, 52 (1983).

166 *Regents of the Univ. of Cal.*, 140 S. Ct. at 1907 (quoting Michigan v. EPA, 576 U.S. 743, 758 (2015)).

167 *Id.* at 1908 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

168 *Id.* at 1908–09.

169 *Id.* at 1909 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).

170 *Id.* (citations omitted).

to allow DHS to rely upon reasons absent from its original decision."[171]

Finally, the Court considered whether the 2017 Memorandum could stand alone as having "adequately explained" agency policy and gave two reasons why it had not.[172] First, the 2017 Memorandum "failed to consider . . . important aspect[s] of the problem" by only considering whether the DACA program improperly made undocumented immigrants eligible for certain public benefits but not whether deferred immigration action was appropriate.[173] Second, the policy failed to consider whether DACA recipients and others legitimately relied on the 2012 and 2014 policies that established and expanded the DACA program.[174]

It is now well-settled that an agency has the discretion to change its policy, even to do a complete reversal, so long as it provides a reasonable justification for the change.[175] This decision makes clear, however, that in considering such a policy change, an agency must consider whether the prior policy created reliance interests, such as people's decisions about work, school, and family, and if so, consider whether and how to accommodate those interests.[176] Moreover, the case makes clear that these considerations must take place before the agency changes the policy, and the agency may not announce its reasons for the change later after the new policy is in effect.[177]

B. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*

In the other notable APA case, the Court declined to apply the procedural requirements of the APA rigidly. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the Court considered the validity of religious and moral exemptions to the preventive services requirements of the ACA.[178] Obama-era regulations implemented these requirements to require coverage of contraception.[179] The requirements were challenged,

171 *Id.* at 1909–10.

172 *Id.* at 1907.

173 *Id.* at 1910–12 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (alterations in original).

174 *Id.* at 1913–14.

175 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

176 140 S. Ct. at 1914–15 (noting that, when changing policy, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns").

177 *Id.* at 1909.

178 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

179 *See id.* at 2372–73.

resulting in six years of litigation, after which the Departments of HHS, Labor, and Treasury (Departments), which jointly administer the law, issued interim final rules that exempted certain employers with religious and moral objections from the coverage requirements.[180] Several lawsuits challenged those rules.[181] While litigation was pending, the Departments published final rules that were substantially the same as the interim final rules.[182] The Supreme Court took up a set of consolidated cases challenging the validity of the final rules' religious and moral exemptions.

The Court first considered whether the statute authorized the departments to enact final rules interpreting the statute.[183] Justice Thomas's majority opinion held that it did, noting that "a plain reading of the statute [shows] that the ACA gives [the Health Resources and Services Administration] broad discretion to [issue regulations defining] preventive care and screenings and to create the religious and moral exemptions" to the ACA's mandate to cover contraception.[184]

Next, the Court considered whether the APA allows agencies to issue interim final rules that request notice and comment at the same time the rule takes effect, rather than promulgating a "General Notice of Proposed Rulemaking" followed later by a final rule, as is more common.[185] Justice Thomas again determined that it does—as long as the agency provides adequate notice and an opportunity to comment before adopting the ultimate final rules.[186] While the Court agreed that the "APA requires agencies to publish a notice of proposed rulemaking in the Federal Register

180 *Id.* at 2373. The ACA's contraceptive coverage provision first came to the Court in *Burwell v. Hobby Lobby Stores*, where the Court held that the Obama Administration implementing regulation's failure to provide an exception to the provision's compliance for closely held corporations with sincere religious objections to providing employees with contraception substantially burdened their free exercise. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). The provision came before the Court again in *Zubik v. Burwell*, where the Court remanded consolidated cases challenging the Obama Administration's revised regulation implementing the contraceptive coverage provision that included a self-certification accommodation and instructed the agency to develop an approach that would accommodate employers' concerns while providing women full and equal coverage. Zubik v. Burwell, 136 S. Ct. 1557 (2016). The regulation at issue in this case resulted from the Court's direction in *Zubik*. *Little Sisters of the Poor*, 140 S. Ct. at 2377; *see also* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (interim final rule).

181 *Little Sisters of the Poor*, 140 S. Ct. at 2376.

182 *Id.* at 2378.

183 *Id.* at 2379.

184 *Id.* at 2381.

185 *Id.* at 2384.

186 *Id.* at 2385.

before promulgating a rule that has legal force," the fact that the final rules were preceded by interim final rules (which had immediate full legal force) rather than a notice of proposed rulemaking did not violate the procedural requirements of the APA, since ultimately the agency adopted a final rule after an adequate notice and comment period.[187] Thus, *Little Sisters of the Poor* showed that, to the extent that the agency failed to perfectly follow the procedural requirements of the APA, that error was harmless and not prejudicial, concluding, "[f]ormal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA."[188]

The Court next addressed respondents' argument that the agency had not adequately considered the comments it received, given that it made almost no changes between the interim final rules and the final rules.[189] The Court rejected the respondents' argument and concluded that the agency met the requirements of the APA.[190] The United States Court of Appeals for the Third Circuit invalidated the rule because "[t]he notice and comment exercise surrounding the Final Rules [does] not reflect any real open-mindedness" toward the position set forth in the interim final rules, emphasizing the fact that the final rules were "virtually identical" to the interim final rules.[191] The Court rejected this "open-mindedness" test, holding that "the text of the APA provides the 'maximum procedural requirements' that an agency must follow in order to promulgate a rule" and that the agency comported with those requirements in this case.[192] The majority also noted that "the Third Circuit did not identify any specific public comments to which the agency did not appropriately respond[,]" [193] insinuating that such a finding might have led to a different result. Thus, where an agency generally follows the appropriate administrative procedures, a mere showing that an agency's final rule is identical to the version published to solicit comments will not by itself establish that the agency failed to adequately consider the comments.

In both of these APA cases, the Trump Administration reversed course on prior Obama-era policies. But the results were quite different. It is worth noting that the question presented to the Court in *Little Sisters of the Poor* was procedural, not whether the rule was arbitrary and capricious. The

187 *Id.* at 2384–85 (citing 5 U.S.C. § 553(b)).

188 *Id.* at 2384–85.

189 *Id.* at 2385.

190 *Id.* at 2385–86.

191 Pennsylvania v. President of the U.S., 930 F.3d 543, 568–69 (3d Cir. 2019), *as amended* (July 18, 2019), *cert. granted sub nom*. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020) (first alteration in original).

192 *Little Sisters of the Poor*, 140 S. Ct. at 2385–86 (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015)).

193 *Id.* at 2379.

Court upheld the final rule because it found that the agency complied with the basic procedural requirements of the APA, even if it did so imperfectly.[194] In the DACA case, the fact that the agency changed its policy so completely, and with inadequate reasoning, informed the Court's decision that the policy change was arbitrary and capricious. The agency's failure to fully justify the change and to consider potential reliance interests on the prior policy meant that it failed to consider an important aspect of the problem and that the new policy was arbitrary and capricious.[195] As these cases suggest, future litigants considering whether to challenge a change to an administrative rule should look closely at the process by which administrative rules were adopted to determine whether they are susceptible to a legal challenge and also at the reasoning the agency put forth to justify that change.

194 *Id.* at 2385–86.

195 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912–13 (2020).

VI. SEVERABILITY

Two opinions from the Court's 2019–2020 Term discuss severability. Severability allows the remaining parts of a multi-purpose statute to remain in effect when only part of the statute has been found unlawful and thus unenforceable. Over the years, the Supreme Court has preferred courts to sever the unlawful provisions, thus allowing the remainder of the statute to live on. Both of the 2019–2020 severability opinions reflect this preference.

In *Barr v. American Association of Political Consultants*, the Court decided the constitutionality of a provision in the Telephone Consumer Protection Act of 1991 (TCPA), a statute that prohibits most robocalls to cell phones and home phones.[196] The challenged provision was an amendment to the TCPA added in 2015 to allow an exception for calls made to collect debts owed to the United States.[197] The American Association of Political Consultants (AAPC) wanted to make robocalls to solicit donations, conduct polls, and weigh in on candidates and issues, but these types of calls were not included in the 2015 amendment and thus were barred under the TCPA.[198] Citing the First Amendment, AAPC challenged the 2015 amendment as unconstitutionally favoring debt collection over political speech and asked the Court to invalidate the TCPA in its entirety.[199] Finding the amendment unconstitutional, the Court turned to the question of severability—whether to invalidate the TCPA in its entirety or to invalidate and sever only the government-debt exception.[200]

As Justice Kavanaugh's opinion for the Court points out, the TCPA is itself an amendment to the Communications Act, and the Communications Act contains an express severability clause.[201] That decided the matter. When Congress includes a severability clause in a statute, "absent extraordinary circumstances the Court should adhere to the text" of that clause for all provisions within the statute, including amendments.[202] Such extraordinary circumstances did not exist here, and Justice Kavanaugh discounted any thought of ignoring the text of the clause, noting "[t]hat kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will."[203] The opinion could have

196 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2344–45 (2020) (discussing 47 U.S.C. § 227(b)(1)(A)(iii)).
197 *Id.* at 2343.
198 *Id.* at 2345.
199 *Id.* at 2343.
200 *Id.* at 2348.
201 *Id.* at 2352 (citing 47 U.S.C. § 608).
202 *Id.* at 2349, 2352–53.
203 *Id.* at 2349.

stopped at upholding the express severability clause, but Justice Kavanaugh spends significant time discussing the general "presumption of severability" even in the absence of a severability clause.[204] He notes that "[t]he Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause[,]" and as a result, "it is fairly unusual for the remainder of a law not to be operative."[205]

Chief Justice Roberts authored the other severability case, *Seila Law LLC v. Consumer Financial Protection Bureau*.[206] After the recession of 2008, Congress amended the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to establish the Consumer Financial Protection Bureau (CFPB), "an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent."[207] In an effort to ensure the independence of the CFPB, Congress determined that a single director would lead the Bureau, serve a term longer than that of the President, and be removable by the President only for "inefficiency, neglect, or malfeasance."[208]

Seila Law offers legal services to clients who are experiencing problems with debt. In 2017, the CFPB issued an investigative demand letter to Seila Law.[209] Seila Law objected to the demand, arguing that the CFPB's single-director set-up violated the separation of powers.[210] This case resulted, and the Supreme Court ultimately held that with "no boss, peers, or voters to report to . . . [y]et . . . wield[ing] vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy[,]" the structure of the CFPB violated the requisite separation of powers.[211]

The Court then decided whether the provision establishing the director's authority was severable from the other provisions of Dodd-Frank establishing the CFPB.[212] Citing precedent, Chief Justice Roberts's plurality opinion severed the unconstitutional provision from the remainder of the law.[213] He determined that the provision was severable because the surviving provisions were capable of "functioning independently" and "nothing

204 *Id.* at 2350–51.

205 *Id.* at 2350–52. *Cf. id.* at 2352 n.9 ("On occasion, of course, it may be [necessary to sever] a particular surrounding or connected provision . . . even though the rest of the law would be operative . . . . [C]ourts address that scenario as it arises.").

206 *See* Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

207 *Seila Law*, 140 S. Ct. at 2191.

208 *Id.*

209 *Id.* at 2194.

210 *Id.*

211 *Id.* at 2191–92.

212 *Id.* at 2207–11.

213 *Id.* at 2209–11.

in the statute's text or historical context [made] it evident that Congress . . . would have preferred a dependent CFPB to *no agency at all*."[214] The Chief Justice concluded by rejecting Justice Thomas's suggestion in his partial dissent to "junk our settled severability doctrine and start afresh," finding it clear that "Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today."[215]

To sum up, the 2019–2020 severability cases maintained the Court's settled severability doctrine. When there is "a constitutional flaw in a statute, [the Court will] try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[216] This "presumption of severability . . . allows courts to avoid [the] judicial policymaking" that will arise as a court decides how much of the statute to invalidate.[217] It "recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other* provisions of that law."[218] The approach also avoids, whenever possible, the major disruption that wholesale destruction of the law would cause for individuals and entities whose actions are affected by it.[219]

214 *Id.* at 2209–10 (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010)) (first alteration in original).

215 *Id.* at 2210, 2222–24 (Thomas & Gorsuch, JJ., concurring in part and dissenting in part).

216 *Id.* at 2209 (quoting *Free Enter. Fund*, 561 U.S. at 508).

217 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 (2020).

218 *Id.*

219 *See Seila Law*, 140 S. Ct. at 2210.

VII. Statutes of Limitation

In civil law, statutes of limitation set time frames in which a party may bring suit to take action to enforce rights or seek redress from an injury.[220] They may run from a date an action or injury occurs or the date it is discovered or should reasonably have been discovered.[221] It is perhaps the most common barrier to individuals bringing their claims before a court.

In an opinion with lessons for all plaintiffs' attorneys, the Court dealt consumers and their advocates a defeat in *Rotkiske v. Klemm*.[222] The Court considered when a statute of limitations begins to run in Fair Debt Collection Practices Act (FDCPA) cases.[223] The FDCPA imposes requirements on debt collectors and prohibits certain activities in an attempt to eliminate abusive debt collection practices.[224] Klemm, a collection agency, sued Rotkiske to collect an unpaid credit card debt.[225] Klemm attempted to serve Rotkiske at an address where he no longer lived, leading to Rotkiske failing to receive notice or respond and, thus, allowing Klemm to obtain a default judgment.[226] Rotkiske later brought suit under the FDCPA, alleging that the attempt to collect was unlawful.[227] Moreover, he argued, the statute of limitations under the FDCPA should be equitably tolled because Klemm purposely served the complaint at the wrong address.[228]

Rotkiske argued that the statute of limitations should run from the date that the FDCPA violation is discovered, not the day it occurs.[229] He cited Ninth Circuit law, which held that "under the 'discovery rule,' limitations periods in federal litigation generally begin to run when plaintiffs know or have reason to know of their injury."[230] The Third Circuit disagreed, however, ruling against Rotkiske and holding that the one-year limitations period runs from the date on which the violation occurred.[231] The Court granted certiorari to resolve this split among the circuits and, in a majority opinion from Justice Thomas joined by all but Justice Ginsberg, held for the

220 *Statute of Limitations*, Black's Law Dictionary (11th ed. 2019).
221 *Id.*; *see also, e.g.*, Rotkiske v. Klemm, 140 S. Ct. 355, 359 (2019).
222 *Rotkiske*, 140 S. Ct. 355.
223 *Id.* at 358.
224 *Id.*
225 *Id.* at 358–59.
226 *Id.* at 359.
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.* (citing Mangum v. Action Collection Serv., Inc., 575 F.3d 935, 940–41 (9th Cir. 2009)).
231 *Id.*

defendant.[232]

The majority held that the statute, which provides that an FDCPA action "'may be brought . . . within one year from the date on which a violation occurs' . . . unambiguously sets the date of the violation as the event that starts the one-year limitations period."[233] The Court rejected Rotkiske's argument that the statute should be read to include a general "discovery rule," because "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'"[234] It acknowledged Rotkiske's allegation that he did not discover the violation because the creditor served notice of its debt collection suit in a way that intentionally ensured he did not actually receive notice but refused to consider whether an "equitable tolling" exception for fraud should apply, upholding the Third Circuit's finding that this issue was not preserved for appeal.[235]

Justice Ginsburg dissented. While agreeing that the "discovery rule" does not apply to the statute of limitations in the FDCPA, she would have held that the conventional "time trigger" would not apply when creditor fraud accounts for the debtor's failure to file a timely suit.[236] Here, the debtor alleged that the creditor purposely arranged for service at an address where the debtor no longer lived, then filed a false affidavit of service.[237] Thus, fraud prevented Rotkiske from complying with the one-year statute of limitation and, under these narrow circumstances, she argued, the typical rule that a claim accrues when an injury occurs should not apply.[238]

This is a frustrating outcome for Rotkiske, as the machinations of the creditor prevented him from filing within the statutory period, and a disappointment for consumer advocates. However, it is likely that the impact of this opinion will be limited if future litigants more carefully plead equitable tolling.

232 *Id.* at 358.
233 *Id.* at 360.
234 *Id.* at 360–61 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 94 (2012) (second alteration in original).
235 *Id.* at 361.
236 *Id.* at 363.
237 *Id.* at 362.
238 *Id.* at 362–63.

VIII. Finality

Under general rules of procedure, individuals can only appeal a final decision of the district court. Moreover, the rules allow only a limited period of time for the individual to appeal a final decision, and the appellate courthouse doors are generally closed to those who miss the deadline.[239] Thus, rules governing final decisions are important considerations for plaintiffs seeking to maintain their access to court—as illustrated this past Term in the bankruptcy context in *Ritzen Group, Inc. v. Jackson Masonry, LLC*.[240]

The case arose when Mr. Ritzen sued Jackson Masonry in state court for breach of a contract to sell land.[241] Just before the trial was to begin, Jackson filed for Chapter 11 bankruptcy in federal bankruptcy court.[242] The Bankruptcy Code's automatic stay provision put the state court case on hold during the pendency of the federal bankruptcy case.[243] Mr. Ritzen filed a motion seeking relief from the stay so that he could pursue his state court case, arguing that the relief "would promote judicial economy and that Jackson had filed [the] bankruptcy [action] in bad faith."[244] The bankruptcy court denied the stay-relief motion.[245] Ritzen did not appeal within the prescribed period; rather, he pursued his breach of contract claim against the bankruptcy estate.[246] Unfortunately, he, not Jackson, was held in breach of contract, and his claims against the bankruptcy estate were rejected.[247] Ritzen then appealed the denial of his stay-relief motion and the decision rejecting his breach of contract claim.[248] The Supreme Court granted certiorari and focused on the appeal of the stay-relief motion.[249]

As noted above, under general rules of civil litigation, a party can only appeal "final decisions" of district courts.[250] A decision is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[251] The rules of finality differ for bankruptcy

239 *See, e.g.*, 28 U.S.C. § 1291 (authorizing appeals from "final decisions" in general district court litigation); 28 U.S.C. § 158 (authorizing appeals from "final judgments, orders, and decrees" in bankruptcy litigation).

240 Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020).

241 *Ritzen Grp.*, 140 S. Ct. at 587.

242 *Id.*

243 *Id.* (citing 11 U.S.C. § 362(a)).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.* at 588.

249 *Id.* (citing Ritzen Grp., Inc. v. Jackson Masonry, LLC, 139 S. Ct. 2614 (2019) (mem.)).

250 28 U.S.C. § 1291.

251 140 S. Ct. at 586 (quoting Gelboim v. Bank of Am. Corp., 574 U.S. 405, 409 (2015)).

cases because these cases typically bring numerous, distinct individual claims against a debtor together under one umbrella.[252] As a result, orders in bankruptcy cases become "final" when they definitively resolve "discrete disputes" within the case.[253] The issue in *Ritzen Group* was whether the stay-relief motion was a discrete proceeding that resulted in a final, appealable order when the bankruptcy court conclusively decided it.[254] Writing for a unanimous Court, Justice Ginsburg held that it was and that Mr. Ritzen's appeal was correctly dismissed as untimely.[255]

The Court found the text of the governing statute clear on the matter of finality.[256] Unlike 28 U.S.C. § 1291, which governs civil litigation generally and allows appeals from "final decisions," the bankruptcy code authorizes appeals from "final judgments, orders, and decrees" "in cases and proceedings."[257] A neighboring provision lists motions to terminate or modify the automatic stay as "core proceedings."[258] The Court found this drafting provided a strong "textual clue" that Congress viewed stay-relief motions as "proceedings" that were immediately appealable.[259] Second, the Court built upon its previous cases, which recognized that "Congress made 'orders in bankruptcy cases . . . immediately appeal[able] if they finally dispose of discrete disputes within the larger [bankruptcy] case."[260] The Court found that Ritzen's stay-relief motion was a "discrete proceeding" because it was "a procedural unit anterior to, and separate from, claims-resolution proceedings[,]" deciding for example whether a creditor would be able to isolate its claim from others and "go it alone outside bankruptcy."[261]

Finally, the Court rejected Ritzen's argument that holding for Jackson Masonry would encourage piecemeal litigation, finding instead that Mr. Ritzen was attempting a second bite at the apple. The Court found his appeal of the stay-relief motion to be an effort to "return to square one" and relitigate the contract claim in state court *after* he lost the stay-relief motion and subsequently litigated and lost his breach of contract claim during the bankruptcy proceeding.[262] According to Justice Ginsburg, "[t]he second

252 *Id.* at 586.
253 *Id.* (citation omitted).
254 *Id.* at 586.
255 *Id.* at 592.
256 *Id.* at 587, 590.
257 *Id.* at 586–87 (quoting 28 U.S.C. § 158(a)).
258 *Id.* at 590 (quoting 28 U.S.C. § 157(b)(2)).
259 *Id.*
260 *Id.* at 587 (quoting Bullard v. Blue Hills Bank, 575 U.S. 496, 501 (2015) (alterations in original) (some citations omitted).
261 *Id.* at 589–90.
262 *Id.* at 591.

bite Ritzen seeks scarcely advances the finality principle."[263] As this case illustrates, as plaintiffs formulate and litigate their claims, they must consider how and when core access-to-court principles may come into play, including those defining when the court has issued a final, immediately appealable order.

263 *Id.*

CONCLUSION

In its 2019–2020 Term, the Supreme Court decided a number of cases that will affect individuals' ability to obtain redress from a court of law. On balance, these cases maintained the Court's tilt toward curbing individual court access. The Court continued to limit rights against state actors, carried on a trend of narrow and textualist statutory interpretations, and provided leniency to agencies in procedural requirements. However, there were some bright spots for individual protections. The textualist definition of "sex" was found to include sexuality and gender identity, post hoc rationalizations were found an inadequate justification for attacking DACA, and important protections imposed by § 1981 of Title VI remained intact.

Looking forward, the 2020–2021 Term opened with the COVID-19 pandemic continuing to control operations. Once again, the Court heard oral arguments through telephone conference calls, with the public listening to live audio broadcasts of the arguments. As in previous years, the Court will decide a number of potentially significant access-to-court cases. Plaintiffs' standing, and thus their ability to be in court at all, is under attack.[264] As it did during the 2019–2020 Term, the Court will be assessing what it takes to prove a discrimination claim.[265] The Court also agreed to consider whether the Secretary of HHS has the authority to condition Medicaid coverage on a requirement that the individual work a certain amount. Citing the APA and rules of statutory construction, the lower courts concluded that the Secretary did not have this authority.[266] The Court will also decide when the federal government can keep pre-decisional information secret and when the Freedom of Information Act compels disclosure.[267] Another case addresses when Social Security claimants can question whether their hearing officer was properly appointed.[268]

264 *See, e.g.*, Sierra Club v. Trump, 963 F.3d 974 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 618 (2020) (questioning organization's standing to challenge Trump administration's redirection of appropriated funds to build border wall); Carney v. Adams, 922 F.3d 166 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 602 (2020) (questioning whether judicial candidate has standing to challenge state constitutional provision limiting state court judges to members of two major political parties).

265 Fulton v. City of Phil., Penn., 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (questioning standard of proof in case alleging religious discrimination after city did not contract with foster care agency that refused to comply with all-comers provisions, including those for married same-sex couples).

266 *See* Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020), *cert. granted sub nom.*, Azar v. Gresham, 141 S. Ct. 890 (2020) (mem.).

267 Sierra Club v. U.S. Fish & Wildlife Serv., 925 F.3d 1000 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020).

268 Carr v. Saul, 961 F.3d 1267 (10th Cir. 2020) (refusing to allow claimant to raise

On November 10, 2020, the Court heard two hours of argument in *California v. Texas*, a case with the potential for significant substantive and access-to-court rulings.[269] A group of Republican state attorneys general and individual taxpayers, supported by the Trump Administration, argued that the ACA's provision requiring individuals to have minimum insurance coverage or pay a tax penalty is harming them and is unconstitutional.[270] They asked the Court to find that the provision cannot be severed and that the entire ACA should fall. If the plaintiffs are found to have the standing to bring the case, and their claims are successful, the challenge would affect the health and public health of hundreds of millions of Americans because the ACA addresses everything from pre-existing health conditions to nutritional labeling and expanding Medicaid to adults and former foster youth.[271]

Those seeking to protect and preserve individuals' access to court will need to monitor the Court's decisions. Significantly, the composition of the 2020–2021 Supreme Court has changed. Added to the mix, newly installed Justice Coney Barrett provides conservatives with a clear 6-3 advantage.[272] Justice Ginsburg's absence is sure to be felt as the Court continues to limit entry to individual litigants.

constitutional appointment clause claim on appeal), *cert. granted*, 141 S. Ct. 813 (2020) (mem.), and Davis v. Saul, 963 F.3d 790 (8th Cir. 2020) (refusing same), *cert. granted*, 141 S. Ct. 811 (2020) (mem.).

269 *See* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (invalidating the ACA in its entirety), *aff'd in part, vacated in part and remanded*, 945 F.3d 355 (5th Cir. 2020) (remanding for reassessing severability), *cert. granted sub nom.*, California v. Texas, 140 S. Ct. 1262 (2020) (mem.); Oral Argument, California v. Texas, 140 S. Ct. 1262 (argued Nov. 10, 2020) (Nos. 19-840 & 19-1019), https://www.oyez.org/cases/2020/19-840 (transcript and audio recording).

270 Brief for Respondent/Cross-Petitioner States at 30, *California*, 140 S. Ct. 1262 (Nos. 19-840 & 19-1019), 2020 WL 3579860 at *30.

271 Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, *amended by* Tax Cuts and Jobs Act of 2017, 26 U.S.C. § 5000A.

272 *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. Times (Nov. 2, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html.

INTRODUCTION TO COMMENTARY ON THE ANNUAL CONSTITUTION DAY LECTURE

On September 17, 2020, Professor Jack Balkin, the Knight Professor of Constitutional Law and the First Amendment at Yale Law School, delivered Northeastern University's annual Constitution Day Lecture.[1] Balkin's lecture addressed the major arguments set forth in his recent book *The Cycles of Constitutional Time*,[2] providing a historical perspective on America's constitutional challenges and presenting ideas on how America might emerge from the current period of constitutional and democratic crises. Balkin was joined by three commentators, Northeastern University professors Patricia Williams (Law and Humanities), William Mayer (Political Science), and Jeremy Paul (Law). The *Northeastern University Law Review* continues its tradition of publishing comments from the annual Constitution Day lecturer and commentators and is proud to present the following pieces by Professors Balkin, Paul, and Mayer.

The turmoil following the 2020 presidential election—repeated attempts by the then-sitting President to undermine the democratic will of the electorate and an assault on Congress by an insurrectionist mob—underscored the importance of the issues addressed by Professor Balkin and the commentators and raised new questions and concerns. Professors Balkin and Mayer incorporated some post-election events into their pieces while Professor Paul preserved his thoughts at the time of the lecture, both valuable contributions to the literature. This temporal diversity provides readers with an opportunity to follow the authors' train of thought as it progressed through this important moment in constitutional history. As Americans contend with pressing concerns about the vibrancy and stability of American democracy, Professor Balkin's book and the commentary that follows provide a grounding context that helps to make sense of the possibilities and pitfalls that lie ahead.

Editorial Board
Northeastern University Law Review

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1 The *Northeastern University Law Review* would like to thank Northeastern University Professor Claudia Haupt for organizing the annual Constitution Day Lecture and facilitating the publication of these pieces. An archived recording of the Constitution Day Lecture can be accessed on Professor Balkin's blog, Balkinization. Jack Balkin, *Constitution Day Lecture at Northeastern on* The Cycles of Constitutional Time, BALKINIZATION (Sept. 28, 2020), https://balkin.blogspot.com/2020/09/constitution-day-lecture-at.html.

2 JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

ROT AND RENEWAL: THE 2020 ELECTION IN THE CYCLES OF CONSTITUTIONAL TIME

*By Jack M. Balkin**

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. This essay is based on the Constitution Day Lecture I gave at Northeastern University School of Law on September 17, 2020, updated to reflect the results of the 2020 election. My thanks to Bill Mayer, Jeremy Paul, and Patricia Williams for their commentary, and to Claudia Haupt for the invitation to give the lecture

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INTRODUCTION

Many people today worry that American democracy is in deep trouble. They are right to worry. My new book, *The Cycles of Constitutional Time*,[1] talks about these issues at length. Here I will merely summarize parts of the argument and apply them to the most recent election. My goal is to provide a little historical distance from our current difficulties, and to explain how we got to where we are now and where we are likely to be headed.

In *The Cycles of Constitutional Time*, I describe the American constitutional system in terms of cycles of expansion and contraction, rise and fall, decay and renewal.[2] By speaking in terms of cycles, I do not mean to suggest exact repetition, nor do I mean to suggest covering laws of history. Things will not happen the same way that they happened in the past, but, as Mark Twain is supposed to have said, although history may not repeat itself, it often does rhyme.[3]

With this in mind, I would like you to think about our current unhappy condition not as a single thing, but as a concatenation of different movements that together constitute what I call "constitutional time."[4] The goal is to figure out what constitutional time it is.

The first of these cycles is the rise and fall of political regimes and dominant political parties. The second is the waxing and waning of political polarization. And the third involves sporadic episodes of what I call "constitutional rot" that are usually followed by periods of constitutional renewal.

In the 2020 presidential election, the Democratic challenger, Joe Biden, defeated the Republican incumbent, Donald Trump. But following the election, Trump resisted accepting defeat for weeks, and instead sought to undermine confidence in the electoral system, making baseless allegations of widespread voter fraud that were repeated and elaborated by conservative media.[5] Because of Trump's skill as a propagandist and

1 JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020) [hereinafter BALKIN, CYCLES].

2 *Id.* at 6–7.

3 *See id.* at 5–7.

4 *Id.*

5 Philip Rucker et al., *20 Days of Fantasy and Failure: Inside Trump's Quest to Overturn the Election*, WASH. POST (Nov. 28, 2020), https://www.washingtonpost.com/politics/trump-election-overturn/2020/11/28/34f45226-2f47-11eb-96c2-aac3f162215d_story.html; Toluse Olorunnipa et al., *Trump's Assault on the Election Could Leave a Lasting Mark on American Democracy*, WASH. POST (Nov. 24, 2020), https://www.washingtonpost.com/politics/trump-election-democracy/2020/11/24/e78b8194-2e6a-11eb-bae0-50bb17126614_story.html; Jim Rutenberg & Nick Corasaniti, *Behind Trump's Yearslong*

his charismatic authority over large parts of the Republican base, many Republican politicians were reluctant to admit that Biden had won and that Trump had lost.[6]

Matters came to a head on January 6, 2021, when Trump incited a violent mob to storm the Capitol building and try to stop members of Congress from completing the count of electoral votes that would certify Trump's loss and the legitimacy of the incoming Biden Administration.[7] Even after the riots—which had put their own lives and the lives of their colleagues in danger—more than half of the Republican delegation in the House of Representatives and eight Republican Senators continued to try to contest the Electoral College results.[8]

The January 6th insurrection shocked Americans; it vividly displayed how deeply constitutional rot had advanced in the United States and how far American democracy had fallen. Although Trump did not succeed in preventing a new Biden Administration, he may well succeed in further undermining the norms of cooperation and trust that are crucial to American democracy.

What is the meaning of the 2020 election in terms of the cycles described in my book? In this essay, I will try to situate this election and

Effort to Turn Losing into Winning, N.Y. Times (Nov. 23, 2020), https://www.nytimes.com/2020/11/15/us/politics/trump-voter-fraud-claims.html; Amanda Seitz et al., *False Claims of Voting Fraud, Pushed by Trump, Thrive Online*, AP News (Nov. 10, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-politics-media-1bf96bf3910bdcbe0f125958357c8f1a.

6 Tim Alberta, *The Inside Story of Michigan's Fake Voter Fraud Scandal*, Politico (Nov. 24, 2020), https://www.politico.com/news/magazine/2020/11/24/michigan-election-trump-voter-fraud-democracy-440475; Andrew Feinberg, *Conservative Insiders Say Republican Politicians Aren't Scared of Trump Now—They're Scared of His Supporters*, Independent (Nov. 26, 2020), https://www.independent.co.uk/voices/trump-fox-news-randy-quaid-giuliani-b1761138.html.

7 Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, Guardian (Jan. 7, 2021), https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot; *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, Wash. Post (Jan. 7, 2021), https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/; Maggie Haberman, *Trump Told Crowd 'You Will Never Take Back Our Country with Weakness,'* N.Y. Times (Jan. 7, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html.

8 Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021), https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count (noting that 138 Representatives and 7 Senators objected to the count of electors from Pennsylvania, and 121 Representatives and 6 Senators objected to the count of electors from Arizona, with 8 Senators raising objections to one of the two states).

explain what time it is. I will argue, first, that although the Reagan regime that has structured American politics since the 1980s is nearing its end, the 2020 election showed that we cannot yet be certain that it has reached its conclusion. The COVID-19 pandemic and the economic contraction that accompanied it have handed the Democrats an opportunity to forge a new political regime and new political realities, but whether they can successfully capitalize on these possibilities is yet to be determined. The book points out, for example, that the Democrats missed an opportunity to create a new regime in 1896 and proved unable to do so in 2008.[9] Years later, we may retroactively identify the end of the Reagan regime with the 2020 election and the Capitol Hill insurrection that followed it. But we cannot say for sure at present.

Second, our deeply polarized politics will continue until party coalitions slowly begin to change, leading to a focus on a new set of issues. Those changes are already in motion, but the transformations will take time. Third, the gravest threat we face today is not polarization in and of itself but constitutional rot—a deepening decay in our political and legal institutions. This decay began well before the election of President Donald Trump. But Trump accelerated constitutional rot in the United States—by his creation of a cult of personality, by his abuses of power, and by his refusal to accept the legitimacy of the 2020 election and the opposition party's ascension to power through democratic means.

9 *See* BALKIN, CYCLES, *supra* note 1, at 16–17.

I. Constitutional Regimes

The United States has a presidential rather than a parliamentary system. It also has a party system organized around broad coalitions, usually involving two major political parties. Our system of first-past-the-post voting rules also encourages a two-party system.[10] Finally, the staggered rules of elections—four years for the White House, six years for the Senate (with only a third of the Senate up for election at a time), two years for the House, and life tenure for federal judges—make it very difficult to gain control of all of the levers of power in the federal government.[11] These features of our system slow down political change. This frustrates revolutionary movements for change, and it causes pressures for change to build over long periods of time until they finally break through. Our constitutional system makes revolutionary changes in government infrequent but fairly large when they do occur.

Because of these features of our system, some of which are consequences of design and some of which are the result of contingency, our politics has a distinctive shape. It turns out to feature political regimes, long periods of time in which one party tends to dominate politics. It doesn't win all of the elections, but it wins most of them, and it sets the agenda for what is thought politically possible at a particular period of time.[12]

This organization of American politics into regimes occurs in part because the political system in the United States makes political dominance hard to achieve and, once achieved, hard to displace. Once a party becomes dominant, it tends to stay dominant for a long period of time because, even if politics subsequently becomes more competitive, it takes a lot of time and many elections for the other party to become dominant in its place. If the United States had proportional representation and/or a multi-party system, it is doubtful that our politics would be organized into party regimes in the same way.

Another feature that makes political dominance hard to achieve is our presidential system, which separates control of the executive from control of the legislative branch. Compare our politics with a parliamentary

10 *See, e.g.*, *First Past the Post*, Electoral Reform, https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/ (last visited Apr. 10, 2021) (explaining that first past the post systems, in which candidates with the most votes win, even if they do not gain a majority, tend to produce two large parties, and third parties find it difficult to win elections).

11 *See* Balkin, Cycles, *supra* note 1, at 48 (noting how this system also helps the country survive constitutional rot).

12 *Id.* at 13.

system. In a parliamentary system, the head of the winning legislative party becomes Prime Minister, and the party immediately gains control of both the executive and legislative branches. There is no strict separation of powers, and there are fewer checks and balances. The new majority party can do pretty much what it wants (as long as its coalition partners go along), and the minority party is effectively shut out of governance for a time. That means that there are many small revolutions instead of a few big ones.

In American politics, by contrast, once a party becomes dominant and a new regime begins, the party tends to shape political agendas—and constrict opportunities for alternative policy agendas—even when the opposition party temporarily gains the White House or has a powerbase in particular states. For example, between 1860 and 1932, the Republican Party controlled the presidency most of the time, even though the South was usually controlled by the Democrats, and Democrats won control of one house of Congress from time to time.[13]

There have been about six of these regimes in American history, each featuring a dominant party. In each cycle a new dominant party rises, forms a winning coalition, dominates political agendas, and then slowly decays and falls apart, often the victim of its own success:

13 *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Apr. 5, 2021); *Party Division of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Apr. 5, 2021); *Presidents*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/ (last visited Apr. 5, 2021); *Party Divisions of United States Congresses*, WIKIPEDIA, https://en.wikipedia.org/wiki/Party_divisions_of_United_States_Congresses (last updated Jan. 29, 2021).

Table 1: Regimes in American Political History, 1789–2020[14]
(Years of White House control in parentheses)

Name	Years	Dominant Party	Opposition Parties
Federalist	1789–1801	Federalists (12)	Jeffersonians (0)
Jeffersonian	1801–1829	Democratic-Republicans (28)	Federalists (0)
Jacksonian	1829–1861	Democrats (24)	National Republicans; Whigs; Republicans (8)
Republican	1861–1933	Republicans (52)	Democrats (20)[15]
New Deal / Civil Rights	1933–1981	Democrats (32)	Republicans (16)
Reagan (Second Republican)	1981–?	Republicans (24)	Democrats (16)

An easy way to see how dominant parties shape the political possibilities within each regime is to compare the last two regimes.[16] The regime that was in place when I was born was the New Deal/Civil Rights regime, which lasted from 1933, when Franklin Roosevelt was elected, until 1981, when Ronald Reagan became President. The Democratic Party was the dominant party in this regime, but politics was relatively depolarized. There were liberals and conservatives in both parties. This was a period with strong labor unions and higher taxes on the wealthy. This regime built out the administrative and welfare state. Political liberalism was in the ascendant, and government grew in size. This regime also produced the Social Security Act, the Fair Labor Standards Act, Medicare, the Environmental Protection Act, and the great Civil Rights Acts.

Eventually, this regime fell apart. In fact, it is fair to say that almost as soon as a new dominant party establishes itself, its grip on political power slowly begins to decay as it navigates new problems and circumstances. The dominant party in the New Deal/Civil Rights regime, the Democratic Party, was an unwieldy coalition of Northerners who were relatively liberal on racial issues and Southerners who sought to defend Jim Crow. That alliance was repeatedly shaken as the country faced recurrent debates over civil

14 Balkin, Cycles, *supra* note 1, at 15. In Table 1, I begin each regime in the year a new president takes office, while in the book, I begin with the date of the preceding election that shifts power.

15 I count Andrew Johnson as a Democratic president, even though he ran as Lincoln's running mate in 1864 as part of a national unity ticket.

16 The next four paragraphs are adapted from Jack M. Balkin, *The Reagan Era Never Really Ended. A Trump Loss Could Change That.*, Wash. Post (Nov. 3, 2020), https://www.washingtonpost.com/outlook/2020/11/03/reagan-trump-political-regimes-biden-cycles/.

rights and civil liberties, especially in the years following *Brown v. Board of Education*.[17] The coalition was further shaken by the upheavals of the 1960s and by the stagnation of the 1970s.

The New Deal/Civil Rights regime eventually gave way to the Reagan regime that began in the 1980s. Since then, the Republican Party and the conservative movement have set the tone for American politics. This is the era of neoliberalism, deregulation, weak labor unions, decreasing investment in public institutions, increasing wealth inequality, and mounting political polarization. Even the two Democrats elected in the Reagan Regime, Bill Clinton and Barack Obama, had to bob, weave, triangulate, and make concessions to the conservative politics of the era. (This is, in fact, the usual problem for presidents of the opposition party in a given regime.)[18]

After many years of success, the Reagan regime is running out of gas. The conservative coalition that has kept Republicans dominant for decades has begun to fray. The wealthy donors who bankroll the party's policies of upward redistribution of wealth and downward redistribution of risk are increasingly out of touch with the concerns of rural, working-class, and non-college-educated voters who constitute the mass of the party. Increasingly, only cultural warfare and distrust of liberal institutions have kept the GOP together, and it is having difficulty attracting younger voters. The party's ideology of privatization, deregulation, and ever lower taxes; its attacks on public programs; and its complacency about wealth inequality appeared increasingly tone-deaf even before the country faced both a pandemic and a recession. In its weakened state, the GOP has been captured by a cartoonish demagogue, Donald Trump, who cares more about stoking hatreds and lining his own pockets than attending to the public good.

The Republican coalition faces another problem—generational replacement.[19] Regimes eventually crumble not only because people leave the dominant party but because new generations decide not to join up. By the end of the 2010s, the Republican Party's brand was increasingly toxic among the newly entering cohort of voters. These voters are not yet a large share of the voting population—young voters tend to vote less reliably than older ones—but the problem of generational replacement is on the horizon.

17 Brown v. Bd. of Educ., 347 U.S. 483 (1954); BALKIN, CYCLES, *supra* note 1, at 89–90.

18 *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 43–45, 449–51 (1997) (describing preemptive presidents); STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 103–13 (2d ed. 2011) (same).

19 BALKIN, CYCLES, *supra* note 1, at 164; *see also* Sam Wang, *An Early Look at 2024*, PRINCETON ELECTION CONSORTIUM (Nov. 2, 2016), https://election.princeton.edu/2016/11/02/demographics/ (describing long term voting trends).

Although the party retains a strong base of older voters, an increasing number of young people are turned off by the perception that the party is intolerant, corrupt, and anti-science, and that its policies are skewed to the wealthy and out of touch with contemporary needs. This makes it very difficult for a regime to remain dominant over time.

The Republican Party's problem of generational replacement is only compounded by the fact that newer generations are increasingly non-white, while the Republican base is overwhelmingly white. The Party's central challenge is to find ways to increase its share of Black, Latino, and Asian voters. Fortunately for the Republicans, in 2020, Donald Trump was able to increase his share of the non-white vote by about five percentage points (to 26%) from 2016,[20] but the party will need to do considerably better as time goes on.

The Republican Party has lost the popular vote for the presidency in seven of the last eight elections and has only been able to gain the White House through winning the Electoral College in 2000 and 2016. Increasingly finding itself speaking only for a minority of Americans, the party has resorted to stocking the federal judiciary with as many life-tenured judges as possible and using every possible trick and mechanism to limit the franchise, delegitimize its political opponents, and remain in power.

Taken together, these problems for the Republican regime create an opportunity—but by no means a certainty—that a new coalition led by a new party will arise to shape American politics for a generation or more.

If the Reagan regime finally does give way, the most likely successor will feature the Democrats as the dominant party.[21] The new majority coalition will be the natural evolution of the Obama coalition of minorities, women, college-educated professionals, city-dwellers, and suburbanites.[22]

20 Chris Alcantara et al., *How Independents, Latino Voters and Catholics Shifted from 2016 and Swung States for Biden and Trump*, Wash. Post (Nov. 12, 2020), https://www.washingtonpost.com/graphics/2020/elections/exit-polls-changes-2016-2020/ (noting that Trump's share of the non-white vote improved from 21% in 2016 to 26% in 2020); Avik Roy, *No, Trump Didn't Win 'The Largest Share of Non-White Voters of Any Republican in 60 Years*,' Forbes (Nov. 9, 2020), https://www.forbes.com/sites/theapothecary/2020/11/09/no-trump-didnt-win-the-largest-share-of-non-white-voters-of-any-republican-in-60-years (noting that Trump improved from an 8% to a 12% share of the votes of Black voters, a 29% share to a 32% share of Latino voters, and a 29% to a 31% share of Asian voters).

21 Balkin, Cycles, *supra* note 1, at 29.

22 Ronald Brownstein, *Kamala Harris's Nomination Is a Turning Point for Democrats*, Atlantic (Aug. 12, 2020), https://www.theatlantic.com/politics/archive/2020/08/kamala-harris-and-new-democratic-party-coalition/615187/ ("Harris embodies the Democratic Party of the 21st century: a biracial child of immigrants (who is herself in an interracial marriage) who rose to political prominence from a base in San Francisco,

This coalition will have a different ideology and a different set of interests. It will have a different policy agenda than the conservative movement did, and it will likely reject significant parts of the older neo-liberal regime. Just as the Reagan regime took politics in a different direction than the New Deal/Civil Rights regime that preceded it, so will the next regime.

The COVID-19 pandemic, and the economic contraction that accompanied it, have handed the Democrats an opportunity. But despite Joe Biden's victory in the 2020 election, it is premature to conclude that the Reagan regime is finally over.

First, Biden's margin of victory—approximately four percent—was substantial but not overwhelming.[23] Perhaps more importantly, Biden did not have coattails. The Democrats lost seats in the House of Representatives, maintaining only a slim majority. They underperformed expectations in the Senate, finally achieving a 50-50 tie following the January runoffs in Georgia. They will face determined Republican opposition in the Senate, and they must overcome filibuster rules that require sixty votes for most kinds of legislation. If Democrats do not alter these rules, many of their most ambitious plans for policy change may have to be put on hold—Democrats may find it difficult to pass a new voting rights act or admit new states to the Union to deal with the Senate's malapportionment, for example. Unless they can fit their reforms within reconciliation rules that allow passage by a simple majority, they will be constrained in passing new legislation or fixing existing programs.[24] For example, Democrats were able to push through a major piece of social welfare legislation, the American Rescue Plan Act of 2021, with only Democratic votes in the Senate.[25] But they had to omit a provision that would have raised the federal minimum wage because the Senate Parliamentarian ruled that it did not fit within the reconciliation rules.[26]

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a diverse, globalized hub of the emerging information economy."); Ronald Brownstein, *The Hidden History of the American Electorate (II)*, NAT'L J. (Aug. 24, 2012), https://www.yahoo.com/news/hidden-history-american-electorate-ii-175214333.html [https://perma.cc/M5JN-YMCP] (describing Obama's "coalition of the ascendant").

23 *See* David Wasserman et al., *National Popular Vote Tracker*, COOK POL. REP., https://cookpolitical.com/2020-national-popular-vote-tracker (last visited Dec. 1, 2020).

24 *See* Richard Kogan & David Reich, *Introduction to Budget "Reconciliation,"* CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 21, 2021), https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation (explaining the reconciliation rules).

25 American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; Chloee Weiner & Barbara Sprunt, *House Gives Final Approval to $1.9 Trillion COVID-19 Relief Packge*, NPR (Mar. 10, 2021), https://www.npr.org/2021/03/10/975030323/house-gives-final-approval-to-1-9-trillion-covid-19-relief-package.

26 Kelsey Snell, *Senate Can't Vote on $15 Minimum Wage, Parliamentarian Rules*, NPR (Feb. 25, 2021), https://www.npr.org/2021/02/25/970637190/senate-cant-vote-on-15-

Because Democrats will often need complete unanimity in their Senate caucus plus the Vice President's tie-breaking vote, they will be unable to make executive appointments that are very far to the left, and they may struggle to confirm new judges and Justices. The convention of using the Senate's filibuster rules to require sixty votes for most kinds of legislation is the product of the past twenty-five years.[27] It reflects the deepening polarization of politics characteristic of the Reagan regime. It also meshed well with the reigning ideology of the Reagan regime, which cast doubt on the ability of the federal government to solve the country's problems. Regular use of the filibuster, which prevented or hobbled many government reforms, allowed anti-government conservatives to claim that they had been right all along.

A new regime led by Democrats will require flexible and responsive government to meet current crises and promote the party's policies. Thus, although the political impact of the filibuster on the two parties changes over time, under current circumstances, the filibuster harms the policy goals and political success of Democrats far more than Republicans.[28] Therefore, one important sign that the Reagan regime has ended would be significant reform or elimination of the filibuster. Until that happens, Democrats will find it difficult to remake American politics.

A second reason why we cannot yet conclude that the Reagan regime is finally over is that it takes successive electoral victories to consolidate a new regime. The Democrats cannot achieve this goal unless they succeed in dealing with the immediate problems of the pandemic, economic contraction, and unemployment, not to mention the looming threats brought on by climate change.

That success is not guaranteed. Republicans in Congress are unlikely to be very cooperative, especially because they learned from the Obama years that intransigence could be good politics.[29] (That is another reason why Democrats will experience mounting pressure for filibuster reform.)

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minimum-wage-parliamentarian-rules.

27 Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take to Eliminate It?*, Brookings: Pol'y 2020 (Sept. 9, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/.

28 *See* Matthew Yglesias, *The Democratic Debate over Filibuster Reform, Explained*, Vox (Apr. 5, 2019), https://www.vox.com/2019/3/5/18241447/filibuster-reform-explained-warren-booker-sanders (arguing that, on balance, progressives benefit from eliminating the filibuster because "[i]t's very hard to create big new programs, but once they're in place, they are hard to take away.").

29 Michael Grunwald, *The Victory of 'No,'* Politico (Dec. 4, 2016), https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498 ("The GOP's unprecedented anti-Obama obstructionism was a remarkable success.").

Democrats also face a federal judiciary stocked with many new conservative Trump appointees and a 6-3 conservative majority on the Supreme Court. They must also contend with powerful conservative media organizations that have shown few scruples about engaging in propaganda and conspiracy theories.[30] The Capitol Hill insurrection of January 6, 2021, showed the power of propaganda in shaping American politics. Conspiracy theories alleging that the 2020 election was stolen—designed to de-legitimate the incoming Biden Administration—may persist for years.[31] Equally troubling, many Republican politicians have shown that they are willing to play along with conspiracy theories for political gain, further adding to the political hurdles that Democrats will have to overcome.[32]

If the Democrats stumble, and the pandemic gets worse and the economy sags, they will be punished in succeeding elections. The Reagan regime, which once seemed on the brink of exhaustion, may get a second wind. It will likely move forward on Trumpist terms—a strange brew of white grievance politics, conservative Christianity, bare-knuckled capitalism, deepening corruption, and authoritarian politics.[33]

Thus, the meaning of the 2020 election for the cycle of regimes is inconclusive. The Reagan regime seems to be nearing its end. But the 2020 elections showed that there is still life in it. Over seventy-four million people

30 YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 75–79 (2018) [hereinafter BENKLER ET AL., NETWORK PROPAGANDA] (arguing that conservative media have created a propaganda feedback loop that amplifies and encourages disinformation and conspiracy theories); Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV., (Mar. 3, 2017) [hereinafter Benkler et al., *Study*], https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php (showing the emergence of a distinctive right-wing media disinformation system); Kathleen Hall Jamieson & Dolores Albarracin, *The Relation Between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US*, HARV. KENNEDY SCH. MISINFORMATION REV. (Apr. 2020), https://misinforeview.hks.harvard.edu/wp-content/uploads/2020/04/April19_FORMATTED_COVID-19-Survey.pdf (finding that "conservative media use (e.g., Fox News) correlated with conspiracy theories including believing that some in the CDC were exaggerating the seriousness of the virus to undermine the presidency of Donald Trump"); Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house [https://perma.cc/S2XM-772U] (describing how Fox News became a propaganda arm of the Trump Administration).

31 Kaleigh Rogers, *The Birther Myth Stuck Around for Years. The Election Fraud Myth Might Too.*, FIVETHIRTYEIGHT (Nov. 23, 2020), https://fivethirtyeight.com/features/the-birther-myth-stuck-around-for-years-the-election-fraud-myth-might-too/.

32 *See* Sprunt, *supra* note 8.

33 BALKIN, CYCLES, *supra* note 1, at 27.

voted for four more years of Donald Trump[34]—despite a pandemic that had already taken hundreds of thousands of American lives; and despite overwhelming evidence of President Trump's venality, corruption, and incompetence. Even if we interpret Trump's loss as a repudiation of Trump personally, Republican gains in the House suggest that the election was not a repudiation of the party as a whole. Moreover, the success of Trump's propaganda meant that a large number of Republicans believe the election was stolen and that Trump actually won.[35]

The old regime is dying, but a new one has yet to be born. Instead, we appear to be continuing a period of intense competition between the two major political parties.[36] In American history, such periods of nearly equal party strength tend to be especially bitter and feature deep mutual enmity and hardball tactics. In this respect, our situation is very similar to the Gilded Age in the last decades of the nineteenth century. In fact, we should call that period the First Gilded Age because we are now in our Second Gilded Age. I will say more about this in a moment.

34 Wasserman et al., *supra* note 23.

35 *See Voters' Reflections on the 2020 Election*, Pew Rsch. Ctr. (Jan. 15, 2021), https://www.pewresearch.org/politics/2021/01/15/voters-reflections-on-the-2020-election/ (finding that approximately three quarters of Trump voters incorrectly believe that he won the 2020 election).

36 *See* Sam Wang, *Electoral Math and the New Gilded Age*, Balkinization (Sept. 24, 2020), https://balkin.blogspot.com/2020/09/electoral-math-and-new-gilded-age.html (comparing the closeness of presidential elections in the Gilded Age and today).

II. POLARIZATION AND DEPOLARIZATION

The years of transition between political regimes tend to be very confusing. Politics seems to be broken, and government seems to be ineffectual. For example, at the end of the 1970s, during the Carter Administration, people wondered whether the United States was even governable and whether the presidency was too big a job for one person.[37] After Reagan's landslide reelection in 1984, people stopped talking this way. A new regime had been born. Democrats and liberals may not have liked what Reagan was doing, but the confusion that occurs between regimes had all but dissipated.

But that transition—from the New Deal/Civil Rights regime to the Reagan Regime—was nowhere near as difficult as this one is going to be. The reason concerns the second of the cycles of constitutional time—the cycle of polarization.

Today we live in a strongly polarized political environment. Political tribalism has made cooperation between the parties very difficult, and each side distrusts the other. Propaganda and misinformation, especially by conservative media, only amplify this distrust.[38] But the kind of highly polarized politics that seems normal to us now hasn't always existed. In fact, there has been a very long cycle of polarization, de-polarization, and re-polarization stretching over about 150 years of American history and across several different political regimes.[39]

Like the cycle of regimes, political polarization in the United States is also shaped by the organization of the party system.[40] Our modern party system took many years to develop. The North and South were increasingly at odds from the Missouri Compromise to the Civil War, and several different parties sprang up and went out of business, including the National Republican (or Anti-Jackson) Party, the Whigs, the Know-Nothing Party, and

37 Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1160–61 (2014).

38 Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020), https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/.

39 Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016), https://www.vox.com/polyarchy/2016/3/24/11298808/ american-politics-peakpolarization [https://perma.cc/RDL4- XM9B]; Jeff Lewis, *Polarization in Congress*, UCLA DEP'T OF POL. SCI.: VOTEVIEW.COM (Mar. 11, 2018), https://www.voteview.com/articles/party_polarization [https://perma.cc/5VZB-DUJA] (graph of "Liberal-conservative partisan polarization by chamber").

40 BALKIN, CYCLES, *supra* note 1, at 30–31.

the Free Soil Party. A party system featuring two major parties—Democrats and Republicans—dates from just before the Civil War.

Not surprisingly, the Democrats—the party of the South—and the Republicans—the party of the North, founded in 1854—didn't like each other very much. After the Civil War, the enmity between the two parties and between their bases in the South and North, respectively, continued from the end of Reconstruction through the First Gilded Age and well into the 1890s.

Party polarization reached its peak right around the turn of the twentieth century. Over the next several decades, American politics began to depolarize rapidly.[41] Political polarization bottomed out sometime in the 1930s, at the beginning of the New Deal/Civil Rights regime.[42]

In fact, one of the characteristic features of the New Deal/Civil Rights regime is depolarization. It was a politics very unlike our own. There were liberal, moderate, and conservative Democrats, and there were liberal, moderate, and conservative Republicans. Members of the two parties often got along and often crossed party lines on particular subjects. Major legislation often passed with bipartisan coalitions. For example, the great Civil Rights Acts—the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968—were bipartisan projects of liberal Democrats and moderate to liberal Republicans. During the Nixon Administration, when the Republicans controlled the White House and the Democrats controlled Congress,[43] the federal government enacted many important pieces of legislation, including the National Environmental Policy Act of 1969,[44] the Equal Employment Opportunity Act of 1972,[45] and two extensions to the Voting Rights Act in 1970 and 1975.[46]

The New Deal/Civil Rights regime had so much bipartisan legislation because each party's coalition was ideologically incoherent judged by today's standards. The Democrats were a coalition of Northern

41 *Id.* at 30; Lewis, *supra* note 39.

42 Lewis, *supra* note 39.

43 *See* sources cited, *supra* note 13 (noting Democratic control of Congress during the Nixon Adminstration).

44 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347).

45 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.) (amending the Civil Rights Act of 1964).

46 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 52 U.S.C. §§ 10301–10314); Voting Rights Act of 1965 Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 52 U.S.C. §§ 10301–10314).

liberals and Southern conservatives who agreed on class issues and economic regulation but were intensely divided over issues of culture and race. The Republicans were also an incoherent coalition; tending as a whole to be conservative on economic issues while divided on social issues.[47] The power of the Southern bloc in the Democratic Party meant that African-Americans were left out of many programs during the New Deal,[48] and civil rights legislation was impossible until the Southern filibuster on civil rights legislation was finally broken in the 1960s.

After the Voting Rights Act of 1965, American politics began to change rapidly, and by the 1970s, the country entered what we now call the "culture wars."[49] The New Deal coalition began to fracture. A demagogue, Alabama governor George Wallace, split the Democratic vote in 1968 and was well on his way to doing so again in 1972 before he was shot.[50]

After Wallace, Republican politicians and the conservative activists who formed the New Right learned how to use wedge issues of culture and race to successfully break apart the old New Deal/Democratic coalition.[51] They started to form a new coalition that included many white ethnics, Catholics, and evangelical Christians. This eventually became the Reagan coalition that won the White House for three consecutive terms in 1980, 1984, and 1988.

Although the Republicans controlled the presidency from 1980 to 1992, they did not have control of both houses of Congress. Congressman (and later House Speaker) Newt Gingrich figured out that polarization would be an effective strategy for making Republicans a majority party that could also gain control of Congress. He encouraged his fellow Republicans

47 *See* BALKIN, CYCLES, *supra* note 1, at 16, 30–31; BYRON E. SHAFER, THE AMERICAN POLITICAL PATTERN: STABILITY AND CHANGE, 1932–2016, at 134 (2016). One could further divide Republicans into Regular Republicans and Northeastern Republicans. SHAFER, *supra*, at 34–35.

48 IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 17–18 (2013); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 29 (2005).

49 *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 287–97 (2011) (arguing that the Voting Rights Act of 1965, which broke the South's one-party monopoly, is an important cause of polarization).

50 The standard account of Wallace's political career is DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS (2d ed. 2000).

51 *See* Aram Goudsouzian, *Why the Republican Party Is So Polarizing*, WASH. POST (Nov. 6, 2018), https://www.washingtonpost.com/outlook/2018/11/06/why-republican-party-is-so-polarizing/ (arguing that the Republican Party's strategy of polarization began with George Wallace's 1968 campaign and the emergence of the New Right).

to engage in blistering rhetorical warfare, labeling Democrats as diseased, immoral, sick, and un-American.[52] Gingrich and his Republican allies sought out wedge issues involving race, religion, and sexuality to fracture formerly Democratic majorities; they played culture wars issues for all they were worth.[53]

Polarization in the modern era has been asymmetrical: over time, Democrats have moved a little to the left, mostly because conservative Southerners left the party, but Republicans moved considerably to the right.[54] Put another way, America began with a center-left and a center-right party in the 1970s and ended up with a center-left party and a very conservative party by the 2000s.[55] This had the effect of shifting the country's political

52 Julian E. Zelizer, Burning Down the House: Newt Gingrich, the Fall of a Speaker, and the Rise of the New Republican Party 4 (2020) (arguing that Gingrich developed a form of "smashmouth" politics designed to delegitimate the political opposition and sow distrust in institutions); Sam Rosenfeld, The Polarizers: Postwar Architects of Our Partisan Era 268 (2017) (arguing that Gingrich "led the way" in developing the GOP's "highly disciplined and confrontational political strategy that would take partisan combat in both chambers to new heights."); Steven Levitsky & Daniel Ziblatt, How Democracies Die 146–51 (2018) (describing Gingrich's strategy of demonizing his political rivals); Thomas E. Mann & Norman J. Ornstein, It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism 35–39 (2012) (same); McKay Coppins, *The Man Who Broke Politics*, Atlantic (Oct. 17, 2018), https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/ [https://perma.cc/WG2Y- Y6BA] ("[F]ew figures in modern history have done more than Gingrich to lay the groundwork for Trump's rise. During his two decades in Congress, he pioneered a style of partisan combat—replete with name-calling, conspiracy theories, and strategic obstructionism—that poisoned America's political culture and plunged Washington into permanent dysfunction.").

53 *See* Mann & Ornstein, *supra* note 52, at 44 (describing consequences of Republican strategies of polarization). For a recent mea culpa by a Republican strategist detailing the deliberate use of race and racial grievance as wedge issues, see Stuart Stevens, It Was All a Lie: How the Republican Party Became Donald Trump (2020).

54 Mann & Ornstein, *supra* note 52, at 51–58 (describing asymmetric polarization); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* Am. Political Sci. Ass'n, Negotiating Agreement in Politics 19–26 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (reviewing evidence of asymmetric polarization).

55 Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, N.Y. Times (June 26, 2019), https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html (explaining that "[t]he Republican Party leans much farther right than most traditional conservative parties in Western Europe and Canada," while "[t]he Democratic Party, in contrast, is positioned closer to mainstream liberal parties"); Anna Lührmann et al., *New Global Data on Political Parties: V-Party*, V-Dem Institute (Oct. 26, 2020), https://www.v-dem.net/media/filer_public/b6/55/b6553f85-5c5d-45ec-be63-a48a2abe3f62/briefing_paper_9.pdf ("[T]he Republican party in the US has retreated from upholding democratic norms in recent years. Its rhetoric is closer to authoritarian parties, such as AKP in Turkey and

center of gravity to the right.

Gingrich and other Republican operatives found that focusing on issues of identity and stoking the culture wars was the best way to break apart the New Deal coalition and make Republicans a majority party. The rise of conservative media also helped. The Federal Communication Commission's repeal of the Fairness Doctrine in 1987 made conservative talk radio possible.[56] Cable television allowed companies to appeal to niche audiences rather than broad segments of the public, and Fox News began its cable operations in 1996.[57]

Conservative media encouraged polarization and stoked cultural resentments and thereby promoted the Republican cause.[58] The role of pre-digital media—radio and cable—is important to the story because many people assume that the internet is the central cause of political polarization. In fact, social media built on the country's existing asymmetrical polarization and on an existing pre-digital media ecology that had long been encouraging asymmetrical polarization.[59]

Even if Republicans eventually lost many culture war issues, the culture war itself proved wildly successful from the standpoint of electoral politics. Former Democrats in the South joined the Republican Party, and a whole generation of new voters tilted to the right. Eventually, the Republican Party, originally a party of educated professionals and business people centered in the North and West, was transformed into a white person's party centered in the Sunbelt and especially the South.[60] Politically speaking, this turned out to be a good exchange, and it made the Republican Party the dominant party for many years. But the culture wars had the side effect of stoking polarization, which increased steadily during the 1970s and 1980s

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Fidesz in Hungary. Conversely, the Democratic party has retained a commitment to longstanding democratic standards."); *The Republican Party Has Lurched Towards Populism and Illiberalism*, ECONOMIST (Oct. 31, 2020), https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism; Ivana Kottasová, *US Republicans Are Starting to Look a Lot Like Authoritarian Parties in Hungary and Turkey, Study Finds*, CNN (Oct. 26, 2020), https://edition.cnn.com/2020/10/26/world/republican-party-more-illiberal-study-intl/index.html.

56 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 321; NICOLE HEMMER, MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS 261 (2016).

57 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 319.

58 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30; HEMMER, *supra* note 56, at 271–76; BRIAN ROSENWALD, TALK RADIO'S AMERICA: HOW AN INDUSTRY TOOK OVER A POLITICAL PARTY THAT TOOK OVER THE UNITED STATES (2019); Mayer, *supra* note 30.

59 BENKLER ET AL., NETWORK PROPAGANDA, *supra* note 30, at 311–12; Benkler et al., *Study*, *supra* note 30.

60 *See* BALKIN, CYCLES, *supra* note 1, at 172.

and really took off during the 1990s.[61] By Obama's election in 2008, the country had reached levels of polarization similar to those during the Civil War and the First Gilded Age.[62] Things have only gotten worse since then.

61 Lewis, *supra* note 39.
62 *Id.*

III. CONSTITUTIONAL ROT

This brings me to the third of the cycles I describe in my book—the cycle of constitutional rot and renewal.

The idea of the decline and renewal of political regimes is one of the oldest ideas in political theory. The Greek historian Polybius offered a famous version of this claim in Book VI of his *Histories*, and even before him, different versions of the idea appear in Plato and Aristotle.[63] Polybius argued that political regimes don't last forever, and eventually, they decay and turn into new forms. He wrote about cycling between different types of government, such as monarchies, aristocracies, and democracies.[64] But the idea that regimes rise and fall especially influenced people thinking about the health and survival of republics.[65]

Because they rely on norms of cooperation, devotion to the public good, and civic virtue, republics are delicate things, easily corrupted, and always subject to decay. The Framers of the Constitution, who had read the ancient authors, understood this problem well. They knew that every republic before them had fallen into mob rule, civil war, oligarchy, or tyranny. They tried to design a constitution that would make republican government last as long as possible.[66] To a significant extent, their design—and the work of those who followed them—has been successful. We still have a republic 230 years later, despite many periods of political and social upheaval, including a civil war. But, of course, we don't know how the story ends. Perhaps the ancients will be proved right after all.

American history has featured episodes of what I call "constitutional rot," which are followed by periods of constitutional renewal. Constitutional rot is a feature of republican governments. It is the process by which a constitutional republic becomes less democratic and less republican over time.[67] By less democratic, I mean less responsive to popular will. By less republican, I mean that public officials and citizens become less focused on the pursuit of the public good. Instead, politicians become more interested in promoting their own self-interest or protecting the interests of a small

63 3 POLYBIUS, THE HISTORIES bk. VI, at 372–79 (Robin Waterfield trans., Oxford University Press 2010); 2 PLATO, THE REPUBLIC bk. VIII, at 234–333 (T.E. Page et al. eds., Paul Shorey trans., Harvard Univ. Press 1935); ARISTOTLE, POLITICS bk. V, at 209–57 (Benjamin Jowett trans., Random House 1943).

64 POLYBIUS, *supra* note 63, at 372–79.

65 *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 77, 189, 401, 526, 539, 545, 548 (2d ed. 2003).

66 BALKIN, CYCLES, *supra* note 1, at 47–48.

67 *Id.* at 45.

group of powerful and wealthy individuals and groups who keep them in power. When this happens, constitutional rot leads to oligarchy or to authoritarianism, even if the outward forms of republican government are preserved.

The theory of republicanism—from Machiavelli to Montesquieu and the Founders—often emphasizes the importance of civic virtue as necessary to maintain republican government.[68] Thus, one might say that constitutional rot is the gradual loss of civic virtue and public-spiritedness in the country's leaders and in the public as a whole. Civic virtue, in turn, is connected to the virtues of trust, cooperation, and willingness to set aside partisan enmity in the service of making republican government work over time. Thus, when civic virtue decays, the public loses trust in its leaders—and in political and civic institutions generally. The leaders of different parties lose trust in each other. Each side stops cooperating with each other and working for a common good. Instead, each tries to dominate the other before the other has a chance to dominate them.

Political struggles are always struggles for power and over who gets to rule. But there is a difference between how people struggle for power in healthy republics and how they struggle for power in periods of constitutional rot. In healthy republics, politics is a struggle for power that is premised on—and that depends on—republican norms and practices. These norms and practices combine political contest with deeper forms of political cooperation. They are designed to keep the enterprise of republican government functioning even as the parties contend in politics. They operate for the purpose of reproducing the system of representative government and promoting the common good, including the common good of democratic politics. Thus, in healthy republics, the everyday struggle of different interest groups and parties—each of which pursues different values and goals and asserts its own version of the public interest—rests on a deeper set of republican values and republican conventions. Liberal pluralists are correct that the question of what is in the public interest is always contested and never finally settled. That contest drives politics forward. But in healthy republics, that perpetual contest over what is really in the public interest rests on something deeper: a shared commitment to fight over the nature of the public interest through republican institutions that the combatants promise

68 *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 105 (Vintage Books 1993) (1992) ("Precisely because republics required civic virtue and disinterestedness among their citizens, they were very fragile polities, extremely liable to corruption."); *see also* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 20, 245 (1997) (noting that the republican tradition assumes that civic virtue is necessary to the health of republics).

to further and reproduce over time.

In periods of constitutional rot, by contrast, politics degenerates into the naked struggle for power, heedless of the long-term effects on the health of republican institutions. Cooperative norms decay. The republican substrate on which liberal pluralist combat sits slowly dissolves. Norms of fair play disintegrate.[69]

Republicanism requires respect for majority rule and rotation in power when a party loses the support of the majority.[70] Thus, it requires fair elections that can measure and respond to majority will. But when constitutional rot sets in, parties are increasingly unwilling to accept democratic rotation in office. Party loyalists seeking to remain in power resort to whatever means are necessary to stay in power—even if this smashes previous norms and understandings—because they see the other side as an implacable enemy and do not trust their opponents with power.[71] Thus, the incumbent party may try to restrict the vote to its likely supporters and to find other ways to entrench itself so that it is impervious to changes in the voting population. It will attempt to maintain a minoritarian government in the face of majority will. Leaders who accelerate constitutional rot do not only destroy cooperative norms and reject standards of political fair play. They also systematically attack the institutions that keep democracies democratic, including an independent judiciary, independent media, professional journalism, scientific institutions, universities, and the electoral system.[72]

One must understand the idea of constitutional rot in context. The American Constitution has never been fully democratic. And it has never been fully republican. The American constitutional system has always been unrepresentative in important respects, and it has repeatedly either produced or ignored a series of great injustices and denials of liberty and equality. For the first eighty years of the country's history, slavery was permitted, and later

69 BALKIN, CYCLES, *supra* note 1, at 45–46. On the importance of norms to democracy, see LEVITSKY & ZIBLATT, *supra* note 52, at 102–17.

70 *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749, 757 (1994) (arguing that the central republican principle is majority rule); *id.* at 763 (quoting *The Federalist* No. 22 (Alexander Hamilton) for this proposition).

71 BALKIN, CYCLES, *supra* note 1, at 45–46.

72 *Id.* at 56–58; *see* LEVITSKY & ZIBLATT, *supra* note 52, at 177; Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, at 12–13, 16 (2020) (describing attacks on media, journalism, and universities as part of an authoritarian playbook.); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 133 (2018) (describing attacks on civil society institutions).

even celebrated by the dominant party in the United States—the Jacksonian Democrats. Even after slavery was abolished in 1865, all sorts of inequalities and injustices remained and troubled our country's history. Women did not get the right to vote until 1920, and our modern conception of civil rights and civil liberties, imperfect as it is, is only a little more than half a century old. Thus, when we talk about episodes of backsliding from democracy and republicanism, we can only speak of this in relative terms. To speak of constitutional rot, then, means backsliding from a particular form of democratic politics, which was already deeply imperfect and unjust in many respects. We must always recognize that the redemption of our Constitution remains an unfinished project.

Four features of politics exacerbate rot. I call them the "Four Horsemen of constitutional rot."[73] The first is increasing inequality of wealth. The second is increasing polarization. The third is loss of trust—in one's fellow citizens, in politicians, in institutions generally, and between leaders of opposing parties. In times of rot, people increasingly regard the fellow inhabitants of their country as enemies who cannot be trusted with power, and therefore cannot be allowed to assume power.

A fourth factor in exacerbating rot is policy disasters that demonstrate the inability of politicians to govern the country and the fact that politicians do not care enough about the citizens to protect their interests.[74] Recent examples might include the response to Hurricane Katrina, the Iraq War, the 2008 financial crisis, or the Trump Administration's response to COVID-19. These policy disasters also increase lack of trust in institutions and in politics generally.

In periods of constitutional rot, demagogues spring up.[75] They flatter the public, telling them that only the common people are wise and virtuous. They argue that ordinary people have been humiliated and undermined by unaccountable elites who scorn and look down on them, and who are not truly part of the people. Demagogues sow distrust and division in order to gain power. They attack institutions that produce trustworthy knowledge, and they disdain expertise. They identify scapegoats who, demagogues claim, are alien to the real people of the country and who are invading and undermining the country with the assistance of out-of-touch intellectuals and corrupt elites. Demagogues promise to restore the honor and status of the country's forgotten people and defeat the sneering elites who view ordinary people with contempt. Versions of these demagogic strategies are always present in democracies, even in relatively healthy times. But in periods of

73 Balkin, Cycles, *supra* note 1, at 49–50.

74 *Id.*

75 *Id.* at 53–56.

advanced constitutional rot, they grow, fester, and dominate politics.

Another worrisome feature of rot is the rise of propaganda.[76] In its most general sense, propaganda is the propagation of false and misleading claims and images for political advantage. But I am interested in a narrower class of propaganda, which we might call "democracy-destroying" or "democracy-debilitating" propaganda. This form of propaganda is a strategy of rhetoric that undermines trust and sows division in democracies. The point of democracy-debilitating propaganda is to spread distrust in institutions and to make it difficult for people to know what is true and what is false. As a result, people indulge in conspiracy theories and believe people who they think are most like them, or people in their own political tribe. As with demagoguery, there are always forms of propaganda in republics, even healthy ones. But a high level of propaganda in a republic is an especially worrisome sign of constitutional rot because it accompanies and exacerbates loss of trust in institutions, in organizations that produce and disseminate knowledge, in fellow citizens, and in political leaders. Propaganda accelerates rot, and rot in turn makes politics especially susceptible to demagogues who flatter and mislead the public.

Today, all of the Four Horsemen of constitutional rot are on the march. We have wealth inequality not seen since the First Gilded Age, deep distrust of institutions, severe polarization, loss of mutual accommodation and cooperation between politicians of different parties, and a series of policy disasters. The United States now is flooded with the kinds of propaganda that were common in communist countries in the former Soviet Empire. The dominant party—the Republican Party—is doing everything it can to maintain its power. Donald Trump—the party's nominal leader and its most recent president—has spread disinformation and sown distrust in science, news media, and the electoral system.[77] And to top it off, Trump is a racist demagogue who has encouraged other racists and demagogues to spring up and assert themselves.[78]

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76 *Id.* at 49, 60–61; *see* JASON STANLEY, HOW PROPAGANDA WORKS 93, 96, 108–09, 120–26 (2015) (explaining how propaganda erodes democratic norms and forms of reasoning necessary for democracy to function).

77 Hetherington & Ladd, *supra* note 38; Anne Applebaum, *Trump Is a Super-Spreader of Disinformation*, ATLANTIC (Oct. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/10/trump-super-spreader-disinformation/616604/.

78 Fabiola Cineas, *Donald Trump Is the Accelerant; A Comprehensive Timeline of Trump Encouraging Hate Groups and Political Violence*, VOX (Jan. 9, 2021), https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech; Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/.

Constitutional rot has been growing in the United States for the past forty years, but the Trump presidency greatly accelerated it. Trump treated the presidency as an opportunity to enrich himself and his family. He tried to use his powers as President to coerce a foreign government, Ukraine, into smearing his Democratic opponent in 2020.[79] Listing all of his contributions to constitutional rot in the United States would require a book in itself.[80] But his behavior following the 2020 election is a good example. Throughout the campaign, Trump had asserted that the election would be rigged against him and that voting by mail—the method he himself used to vote in previous elections[81]—was tainted by fraud.[82] Rather than accept the basic proposition that those who lose elections should concede and prepare for a transition of power, Trump refused to concede that he could lose an election. Instead, he made baseless claims of widespread voting fraud.[83]

Trump repeatedly sued in different states, trying to delay the certification of votes. While his lawyers were forced to backtrack from his false claims before courts, Trump and his supporters continued to lie shamelessly to the public.[84] In this way, he convinced many of his supporters that the electoral system was rigged and that the incoming president, Joe Biden, is illegitimate. Of course, Trump had risen to political prominence through a racist lie that his Democratic predecessor, Barack Obama, was born outside the United States and therefore was an illegitimate president.[85]

The members of Trump's party, with few exceptions, did little to resist his assault on republican institutions. Although many of them secretly despise Trump, they are deeply afraid of the Republican base that has been fed lies and propaganda for years and now believes Trump's fantasies.[86] Until

79 Balkin, Cycles, *supra* note 1, at 58–61.

80 For a recent bill of particulars, see Klarman, *supra* note 72, at 19–45.

81 Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020), https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again; Marshall Cohen, *'It's the Same Thing': Experts Baffled by Trump's Misleading Distinction Between 'Absentee' and 'Mail-in' Ballots*, CNN (Sept. 25, 2020), https://www.cnn.com/2020/07/10/politics/fact-check-trump-absentee-versus-mail-ballots/index.html.

82 See sources collected *supra*, in notes 5–6.

83 *Id.*

84 *Id.*

85 Michael Barbaro, *Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic*, N.Y. Times (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html ("[I]t took Mr. Trump five years of dodging, winking and joking to surrender to reality, finally, on Friday, after a remarkable campaign of relentless deception that tried to undermine the legitimacy of the nation's first black president.").

86 Feinberg, *supra* note 6; Tim Alberta, *The Election That Broke the Republican Party*, Politico

the assault on the Capitol on January 6, 2021, most Republican leaders either remained silent, acted as spineless sycophants, or became voluble cheerleaders spouting propaganda. As Trump tried to salt the ground of American democracy, most of them stood by and did nothing, while others dabbled in conspiracy theories and egged him on.[87] Only the shock of the attack on Congress finally caused a significant number of Republicans to break with Trump, and yet even after the insurrection, he still retained wide support among party leaders.[88]

So far in my analysis of the American constitutional system, I have said little about the Supreme Court, the lower federal courts, or constitutional doctrine. That omission is deliberate. The structures and cycles of party representation are far more important to understanding the health of our democracy than the details of constitutional doctrine.

Because of life tenure, courts are usually a lagging indicator of the cycles of constitutional time.[89] Turnover of personnel on the courts takes a fairly long time. That is especially so as judges live longer and politicians try to install younger judges on the bench. As a result, courts become polarized long after politics itself has become polarized, and they will continue to reflect that polarization for many years to come. In the same way, the judiciary will tend to experience and reflect the consequences of constitutional rot well after the country does.[90]

Even in a period of constitutional rot like the present, we can still expect courts to defend against the most naked attempts at overreach. For example, following the 2020 election, President Trump's lawyers made a

(Nov. 6, 2020), https://www.politico.com/news/magazine/2020/11/06/the-election-that-broke-the-republican-party-434797.

87 Paul Kane et al., *Most Republicans Greet Trump's Push to Overturn the Election with a Customary Response: Silence*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/politics/most-republicans-greet-trumps-push-to-overturn-the-election-with-a-customary-response-silence/2020/11/20/91948292-2b52-11eb-9b14-ad872157ebc9_story.html; Nicholas Fandos, *Republicans in Congress Stay Largely in Line Behind Trump*, N.Y. TIMES (Nov. 20, 2020), https://www.nytimes.com/2020/11/20/us/politics/republicans-congress-trump.html; Alberta, *supra* note 86.

88 Josh Dawsey, *At Party Retreat Far from D.C. Turmoil, Republicans Still Sing Praises of Trump*, WASH. POST (Jan. 8, 2021), https://www.washingtonpost.com/politics/trump-rnc-amelia/2021/01/08/6cd0c730-51e6-11eb-b2e8-3339e73d9da2_story.html; Eli Yokley, *Trump's Popularity Declines Among GOP Voters After Brutal Week for the Country*, MORNING CONSULT (Jan. 8, 2021), https://morningconsult.com/2021/01/08/trump-approval-rating-capitol-riot-poll/; Eli Yokley, *Half of Voters Call for Cabinet to Remove Trump as Bulk of Republicans Say He Should Retain 'Major Role' in Party*, MORNING CONSULT (Jan. 7, 2021), https://morningconsult.com/2021/01/07/capitol-riots-trump-blame-polling/.

89 BALKIN, CYCLES, *supra* note 1, at 149.

90 *See id.*

series of implausible claims trying to prevent the certification of votes, and judges—including judges Trump himself had appointed—rejected them.[91] But we should not rest our hopes for democratic renewal on the fact that courts will respond in the most extreme cases. We should not look to the courts as an effective counterweight to the decay of our institutions, much less a source of political leadership for constitutional renewal. Courts are generally not the solution to constitutional rot, and they may sometimes be part of the problem.[92] Moreover, in periods of constitutional rot, the courts are a special prize of politics, and politicians engage in constitutional hardball to entrench their ideological allies in the courts.[93]

We shouldn't give up on judicial review entirely—that would be throwing the baby out with the bathwater. But in times of high polarization and constitutional rot, courts are unlikely to be the heroes of the story. The Supreme Court in particular is unlikely to cover itself with glory during periods of high polarization and constitutional rot. Certainly the Justices did not do so in the 1840s and 1850s, when the Court defended the interests of the Slave Power, nor at the turn of the twentieth century, when the Court championed the ideology of Gilded Age capitalism. (The latter period is now known as the *Lochner* Era.) That should not be surprising. Courts are rarely much better or worse than the political environment they live in, and they tend to share many of the assumptions of the politicians who appointed them.[94]

Law professors and law students are often conditioned to look to the Supreme Court as a bulwark of constitutional democracy. But the courts are not coming to save us from our constitutional troubles this time around. In periods of polarization and rot, they will not prove reliable sources of constitutional renewal, and judging by the history of previous episodes of constitutional rot, the Supreme Court in particular is far more likely to serve as an impediment to the repair of our democratic institutions.[95] If America is to deal with constitutional rot, it will have to be through repeated political mobilizations that change the terms of our politics, as happened in the first decades of the twentieth century.

91 *See, e.g.*, Donald J. Trump For President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 391 (3d Cir. 2020) (upholding a lower court dismissal of the Trump campaign's claims with prejudice); Peter Baker & Kathleen Gray, *In Key States, Republicans Were Critical in Resisting Trump's Election Narrative*, N.Y. Times (Nov. 28, 2020), https://www.nytimes.com/2020/11/28/us/politics/trump-republicans-election-results.html (noting that Trump appointed judges dismissed the President's legal claims).

92 Balkin, Cycles, *supra* note 1, at 136–46.

93 *Id.* at 134–35.

94 *See id.* at 146.

95 *Id.* at 136–46.

IV. THE SECOND GILDED AGE

Now let's put all three of these cycles together. We are in the last days of a debilitated regime—the Reagan regime. The Republican Party is slowly losing its political clout and is now fighting with every last ounce of strength to entrench itself in power and to prevent the creation of a new political regime with a different winning coalition. We are at the peak of a cycle of political polarization the likes of which we have not seen since the late nineteenth century. And we are suffering from an advanced case of constitutional rot.

It is no wonder that people despair for the future of American democracy.

The extended transition between regimes in and of itself is not the central problem, even though these periods are often confusing and anxiety-provoking. As I noted previously, the United States has been through changes in regimes before. The last two occurred in the 1930s and 1980s when American politics was relatively depolarized. The current situation is likely to be very different from those two and far more fraught and even dangerous. The next regime, if and when it emerges, will commence under very stressful conditions of strong polarization and advanced constitutional rot. The problems of polarization and rot are a deeper cause of today's confusion and political despair than the gradual decay of the Reagan Regime.

There is no exact analogy between the situation we are in right now and America's past. But there is one fairly close analogy—at least with respect to the problems of high polarization and deep constitutional rot. That analogy is to the end of the 1890s—the close of the Gilded Age, or what I will call the First Gilded Age, for, as noted earlier, I think that we are now in our Second Gilded Age. Let me describe what the First Gilded Age was like, and perhaps you will see a few similarities to our own time.[96]

The First Gilded Age featured vast inequalities of wealth because rapid technological change had created huge fortunes and monopolies.[97] Huge waves of immigration destabilized American politics and led to a series of fights over identity and race and who was really American. Demagogues sprang up to stoke hatreds and fears. The Gilded Age was a period of social unrest, violence, riots, and assassinations. Politics in the First Gilded Age was

96 For general accounts of the Gilded Age and its politics, see RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–96 (2017); ROBERT W. CHERNY, AMERICAN POLITICS IN THE GILDED AGE: 1868–900 (1997).

97 BALKIN, CYCLES, *supra* note 1, at 62–63.

thoroughly corrupt, and government was effectively for sale. Because the cost of producing newspapers has decreased due to technological innovation, there was intense competition among newspapers for audience attention. In order to increase circulation and fill up content, they resorted to made-up stories. This is the era that introduces the phrase "yellow journalism"—sensationalistic stories designed to play to readers' emotions, and often with only a strained relationship to the truth.[98]

Politics during the First Gilded Age was often mindless and demagogic. It was a period of intense competition between the two major political parties. It was so competitive, in fact, that twice—in 1876 and 1888—the electoral college winner lost the popular vote.[99] Because margins of victory were often razor-thin, the parties were at each other's throats.

If you had lived during the First Gilded Age and you had looked around at the demagogy, at the inanity of politics, at the polarization of attitudes, at the vast inequalities of wealth, and at the deep corruption of American politics, you might well have feared that American democracy would fail.

But that's not what happened. The excesses of the First Gilded Age led to the political and constitutional reforms of the Progressive Era, which proved to be a period of great constitutional creativity, not only at the federal level, but also in the states. These movements for reform eventually led to the New Deal.

In my book, I describe how party coalitions changed after 1896, and how this transformation led to depolarization and political renewal.[100] One reason to think that our current level of polarization is not permanent is that—as in years past—political coalitions are always transforming through slow processes of generational change. As coalitions change, so too do the central issues that divide the major parties.

In the First Gilded Age, much like today, politics was highly

98 *Id.* at 63; *see* Ted Curtis Smythe, The Gilded Age Press, 1865–1900, at 182–97 (2003); David R. Spencer, The Yellow Journalism: The Press and America's Emergence as a World Power 95–121 (2007); Randall S. Sumpter, *Think Journalism's a Tough Field Today? Try Being a Reporter in the Gilded Age*, Conversation (Oct. 4, 2018), http://theconversation.com/thinkjournalisms-a-tough-field-today-try-being-a-reporter-in-the-gilded-age-103420 [https://perma.cc/ 5HJQ- NABC] ("Fakes became so common that an article in an 1892 issue of The Journalist estimated that the majority of stories supplied to newspapers by local news bureaus and press associations were fiction."). *See generally* Randall S. Sumpter, Before Journalism Schools: How Gilded Age Reporters Learned the Rules (2018) (describing technological changes that undermined newspaper profits and led to cut-throat competition and sensationalism).

99 *See* Wang, *supra* note 36.

100 Balkin, Cycles, *supra* note 1, at 36–37, 166.

polarized, and the parties faced off against each other on issues of race, religion, culture, and identity. Issues of economics and class, which cross-cut party coalitions, were relegated to the background.[101] As I explain in my book, within two generations, this arrangement flipped.[102] New sets of issues came to the fore, especially those involving economics, labor, and class. Immigrants and their American-born children joined the political parties and reshaped political coalitions. As politics moved from zero-sum disputes about identity and status competition to different sets of issues, depolarization rapidly gathered steam. By 1932, the situation had almost completely changed from the 1890s. Now the parties faced off primarily on economic and class issues, while each party was internally divided on questions of identity, religion, culture, and race.[103]

Something similar, I believe, may well happen in our own time. In the late twentieth century, Republicans dismantled the New Deal coalition by moving issues of identity—race, ethnicity, religion, gender, and sexuality—to the forefront of American politics, and successfully pushing issues of class and economic inequality into the background.[104] This was part and parcel of the successful strategy of polarization in the Reagan Regime. Republican politicians and their allies in conservative media were so successful at this, in fact, that by the 2010s, the two major parties faced off once again primarily over issues of identity, a sort of replay of 1896.

In the process, both parties have changed markedly from where they stood during the New Deal/Civil Rights regime.[105] The Democrats are no longer primarily a labor and working-class party with a strong base in the South. The Republicans are no longer a party of professionals and business interests centered in the North and the West. Instead, the Democrats have become a cosmopolitan party, strong in the cities, the suburbs, and along the coasts, supported both by working-class and business interests as well as by increasing numbers of minority voters. Meanwhile, Republicans have

101 CHERNY, *supra* note 96, at 29–31.

102 *Id.*; Julia Azari & Marc J. Hetherington, *Back to the Future? What the Politics of the Late Nineteenth Century Can Tell Us About the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 92 (2016).

103 BALKIN, CYCLES, *supra* note 1, at 36–37, 166.

104 *See* STEVENS, *supra* note 53, at 31 (describing Republican strategists' and politicians' use of race); E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS: DEATH OF THE DEMOCRATIC PROCESS 12 (1991) (arguing that cultural issues allowed Republicans to split the New Deal coalition); THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 98 (1992) ("Race was central, Nixon and key Republican strategists began to recognize, to the fundamental conservative strategy of establishing a new, non-economic polarization of the electorate.").

105 BALKIN, CYCLES, *supra* note 1, at 166–70.

become the dominant party in the Democrats' old stronghold—the South. They have gained a large number of white working-class and rural voters along with their traditional support in the business community and their powerful base of wealthy donors.

As a result of these transformations, each party now has both a neoliberal wing and a populist wing, which are more or less united on cultural and identity issues but are currently papering over deepening internal differences on class and economics.[106] As voting populations slowly evolve, the internal fissures within each party will grow larger and more salient. Our current structure of deeply polarized party coalitions—which is now organized primarily around zero-sum issues of identity and status—will gradually be replaced by a new structure of party competition in which class and economic issues will increasingly dominate. This process of evolution will slowly reduce polarization and offer, once again, the possibility of cross-party alliances.[107]

Demographic changes are another important factor; the country is slowly becoming less white.[108] In the short run, this will make political polarization worse and lead to increasing racial tensions because many whites will feel threatened as they see themselves becoming a political minority. As non-white minorities make political, social, and economic gains, the perception that white dominance is ebbing will embolden fringe white supremacist groups.[109]

But in the long run, these changes will cause polarization between the two major parties to decline. That is because demographic shifts in

106 *Id.* at 168–69.

107 *Id.* at 166–74.

108 William H. Frey, *The US Will Become 'Minority White' in 2045: Census Projects Youthful Minorities Are the Engine of Future Growth*, Brookings: The Avenue (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/.

109 *See* Katanga Johnson & Jim Urquhart, *White Nationalism Upsurge in U.S. Echoes Historical Pattern, Say Scholars*, Reuters (Sept. 4, 2020), https://www.reuters.com/article/us-global-race-usa-extremism-analysis/white-nationalism-upsurge-in-u-s-echoes-historical-pattern-say-scholars-idUSKBN25V2QH (noting historical pattern that "any expansion of civil rights for a minority group leads to a rise in intolerance"); Char Adams, *'Vintage White Rage': Why the Riots Were About the Perceived Loss of White Power*, NBC News (Jan. 7, 2021), https://www.nbcnews.com/news/nbcblk/vintage-white-rage-why-riots-were-about-perceived-loss-white-n1253292 (connecting assault on Capitol by white supremacist groups to perceived loss of white power and status); Hakeem Jefferson, *Storming the U.S. Capitol Was About Maintaining White Power in America*, FiveThirtyEight (Jan. 8, 2021), https://fivethirtyeight.com/features/storming-the-u-s-capitol-was-about-maintaining-white-power-in-america/ (arguing that a perceived loss of white dominance leads to loss of faith in democracy, and, among extremist elements, increasing resort to violence).

the voting population give both parties incentives to become multiracial coalitions. This, in turn, will give each of them incentives to move away from the racially polarized politics of the past forty years as they fight about economic issues that can appeal across the different parts of their respective coalitions.[110]

The Democrats have an obvious head start in this project; their coalition is already multiracial. In contrast, the Republicans currently seem to be trapped in a cul-de-sac. They are still trying to win elections with a shrinking base of white working-class voters while attempting to restrict the non-white vote. Eventually, however, Republicans will have to expand and alter their coalition. They will have to attract increasing numbers of minority voters to survive as a national party.[111] As the two-party coalitions evolve, so too will the political terrain on which they will fight.

To be sure, this is only one possible future, and things will not change overnight. Even if my analysis is correct, we may still have to slog through many more years of bitter status-driven politics with deep mutual hatreds. But eventually, party coalitions will begin to look different, and the central issues of contention between the two parties will begin to change. Americans will begin to abandon the zero-sum politics of identity and culture for a more complicated mix of disputes. Politics will remain contentious, but the fights will be more complex and variegated, creating new possibilities for compromise.

110 *See* Jack M. Balkin, *Race and the Cycles of Constitutional Time*, MO. L. REV. (forthcoming 2021) (manuscript at 31–34, 42) (on file with author).

111 *Id.*

Conclusion: Rot and Renewal

Although we are slowly and painfully approaching the end of our Second Gilded Age, the election of 2020 suggests that we are not there yet. But we should not assume, as many people fear, that our democracy is doomed. If Americans mobilize for change, we may witness the beginning of a Second Progressive Era of reform both at the state and federal levels. And because the next dominant coalition is likely to be multiracial, we may even see a Third Reconstruction that will address racial injustices long ignored.[112]

One should not romanticize these possibilities. The Progressive Era of the early twentieth century was highly imperfect. It was not only a period of reform but also a period of social unrest, heightened racial tensions, and violence, including lynchings and race riots.[113] It was anything but a calm and placid time.[114]

The point of my comparison to the Progressive Era is that periods of constitutional renewal can and do follow periods of constitutional rot that seemed altogether hopeless. But what makes the renewal of democratic institutions possible? Renewal has two prerequisites. The first is mobilization. The second is destruction.

The 1960s and 1970s were a period of considerable mobilization in American politics, but sometime around the 1980s, politics began to demobilize. In the 2010s, however, Americans got a jolt of new political energy, starting first on the right with the Tea Party, and then on the left with the Black Lives Matter movement, the Women's March and other anti-Trump mobilizations, and the protests that followed the murder of George Floyd in the spring of 2020.

The Trump years have been a period of continuous agitation on the left and the right, although these protests haven't come together in a single focal point. Turnout for the 2020 election was very large, and the percentage of Americans who voted was the highest in a century.[115] What comes of all

112 This paragraph is adapted from Balkin, *supra* note 16.

113 *See* Ann V. Collins, All Hell Broke Loose: American Race Riots from the Progressive Era through World War II, at xv–xvi, 1–3 (2012) (describing patterns of racial violence directed against African-Americans in the first half of the twentieth century); David W. Southern, The Progressive Era and Race: Reaction and Reform, 1900–1917, at 29, 107, 134–35, 185 (2005) (chronicling the Progressive Era's history of racial violence).

114 It was also a period of racial retrenchment in which the Republican Party essentially gave up on protecting the rights of African-Americans. For reasons why a Second Progressive Era may be different, see Balkin, *supra* note 110.

115 Kevin Schaul et al., *2020 Turnout Is the Highest in over a Century*, Wash. Post (Nov. 5, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

this mobilization, of course, is yet to be determined. But at the very least it signals possibilities for political transformation.

Destruction often precedes renewal and clears a path for renewal. Each new political regime builds on the wreckage of older ones.[116] Sometimes a new regime actively dismantles the old regime. But sometimes the old regime is already self-destructing, and the new regime simply builds on its wreckage. The GOP built on the ruins of the Civil War. The New Deal emerged in the wake of the Great Depression, shoved aside the laissez-faire assumptions of the older Republican regime, and built a new politics that expanded and consolidated the administrative, regulatory, and welfare state. In like fashion, a new regime led by Democrats, if successful, might reject the neoliberal assumptions of the Reagan regime, respond to the destruction and chaos of Trump's presidency, and begin a new phase of American state-building.

Sadly, the renewal of American democracy usually does not occur without calamity and disaster. The constitutional rot of the 1850s was cured only by the destruction of the Civil War. The constitutional rot of the First Gilded Age, and the inequalities of wealth that helped produce it, eventually receded, but a major cause was two world wars and a great depression. Can we avoid something so terrible in renewing our democracy a third time? I hope so, but that hope is not a prediction. Yet if we focus on what has already been destroyed, we can glimpse a few clues about how renewal might come about.

For good or for ill, Donald Trump is the great destroyer of American politics. He has shattered the old version of the Republican Party, he has unraveled significant swaths of the American government, and he has shredded political norms of democracy and decency. Because Trump has been such a reckless destroyer of things, both good and bad, he has unwittingly opened up opportunities for repair and renewal in the years to come.

Through incompetence and self-absorption, Trump has bungled the country's response to the pandemic, rejecting the views of scientists, spreading conspiracy theories and propaganda, and failing to take steps that would have alleviated great human misery and suffering. The pandemic, in turn, has generated an economic contraction, and we do not know how quickly the country will bounce back once vaccines are distributed. Yet another catastrophe has been occurring in slow motion: climate change, which has increased damage from fires, floods, and hurricanes, and threatens

116 BALKIN, CYCLES, *supra* note 1, at 12–19.

even more damage and human suffering in the years to come.[117]

How the public understands these problems, and whether they blame the Trump Administration for failing to deal with them, is yet to be determined. In any case, Trump's failures at dealing with the pandemic have unwittingly generated pressures for more energetic government to solve the nation's problems. They have created new constituencies for government programs and redistributional reforms.

The mere fact that Trump has created these opportunities for political change, however, does not guarantee that the Democrats will successfully capitalize on them. If an ascendant party successfully manages the problems it has inherited, its leaders will be rewarded. But if its leadership fails, the party will be punished, and the public will look elsewhere for solutions.[118] A new regime doesn't have to succeed completely or brilliantly to gain the public's confidence. Republican Reconstruction was only a partial success, and significant parts of it were eventually abandoned. Yet a majority of voters saw the Republican Party as the savior of the Republic, and the GOP retained its political dominance for many years. Franklin Delano Roosevelt did not completely succeed at alleviating the economic problems brought on by the Great Depression, which were not really resolved until World War II. Yet the public appreciated his leadership and his efforts, and this allowed Roosevelt and his party to forge a new political regime that lasted for decades.

In his inaugural address, President Trump promised an end to American carnage.[119] Instead he allowed it to grow. The unnecessary loss of life during the pandemic cannot be replaced. But other things Trump has damaged or destroyed will have to be rebuilt, and this will create new constituencies and alter existing ones.

The renewal of our institutions is hardly guaranteed. It will require a great deal of mobilization, a great deal of commitment, and a great deal of

117 William Mayer argues that new political regimes do not take advantage of demographic change but rather achieve political dominance in the wake of catastrophes. Successful new regimes form because they help the country deal with catastrophes that occurred under the old regime's watch. William G. Mayer, *The Cycles of Constitutional Time: Some Skeptical Questions*, 13 Ne. Univ. L. Rev. 655, 663–64 (2021). Mayer doubts that the pandemic and the economic contraction that have accompanied it are severe enough to count as a regime-changing catastrophe. *Id.* at 664. Whether or not Mayer's characterization of the severity of the pandemic is correct, his emphasis on catastrophe may point only to a sufficient condition for regime change, and not a necessary condition. It may help account for the regime changes in 1860 and 1932, but it does not really explain the regime changes in 1800, 1828, and 1980.

118 *See id.* at 664–65.

119 Donald J. Trump, *Inaugural Address*, Am. Presidency Project (Jan. 20, 2017), https://www.presidency.ucsb.edu/documents/inaugural-address-14.

political fighting. It won't be pretty. We should not expect that the next two decades will go smoothly, or even the next three. But American democracy, although damaged, has not failed yet. The resources for renewal are present, if we have the courage to use them.

THE CYCLES OF CONSTITUTIONAL TIME: SOME SKEPTICAL QUESTIONS

*By William G. Mayer**

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INTRODUCTION

Though regular readers of law journals may not be aware of it, there is a burgeoning subfield in political science known as American political development. In general terms, American political development may be described as history with a distinctly political science spin. It examines the ways that American political institutions and practices have changed over the course of our nation's history, with a focus less on simple narrative description than on how such changes have affected the operations and outputs of the political system. To date, almost all of this work has focused on Congress, the presidency, the bureaucracy, political parties, and voting behavior. Jack Balkin's *The Cycles of Constitutional Time* is one of the first major attempts to apply such an approach to the judiciary, particularly the Supreme Court.[1] For that reason alone, I suspect it will attract a wide readership. The remarkable range of Balkin's analysis is also quite impressive. In the pages that follow, I will raise a number of questions and put forward a few criticisms, but that in itself is a kind of back-handed compliment. Provocative, wide-ranging books invariably raise as many questions as they answer.

Since my own work in political science is primarily concerned with elections and political behavior, I will confine most of my comments to the first five chapters in Professor Balkin's book.

1 All subsequent references to Balkin's analysis are drawn from JACK BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

I. A New, Democratic Political Regime?

For many readers, the most hopeful part of Professor Balkin's book will probably be chapter 2, in which he argues that what he calls the "Reagan regime," in which the Republicans have been the electorally dominant party, will soon be replaced by a new era in which Democrats will win most elections. The framework that Balkin uses to analyze American politics is borrowed from his fellow Yalie Stephen Skowronek's book *The Politics Presidents Make*.[2] Though Balkin asserts at one point that Skowronek's schema is different from the theory of partisan realignment,[3] which is more popular—and more thoroughly analyzed—among political scientists, I think the two ways of dividing up American political history are all but identical. On page fifteen of his book, Balkin provides a table listing the various "political regimes" in American history.[4] This table is point-for-point the same as the standard list of realignments and party systems, except that most political scientists would claim that 1896 was also a realigning election and that the years between 1896 and 1928 constitute a distinct, fourth party system.[5] In my comments with respect to chapter 2, I will therefore discuss its central argument mainly through the prism of realignment theory.

To provide a brief summary of a quite substantial body of political science writing: The theory of partisan realignments argues that American electoral history under the Constitution can be divided into "a number of distinct periods of relative stability, often called *party systems*, in which the identities of the two major parties, the relative electoral success of these parties, and the composition of the party coalitions don't change very much."[6] One party may do unexpectedly well in an election or two, but

2 Stephen Skowronek, The Politics Presidents Make: Leadership from John Adams to Bill Clinton (1997).

3 Balkin, *supra* note 1, at 13–14.

4 *Id.* at 15.

5 For a table that lists the standard division of American electoral history into six party systems, see Morris P. Fiorina et al., The New American Democracy 213 (7th ed. 2010).

6 William G. Mayer, The Uses and Misuses of Politics: Karl Rove and the Bush Presidency 8 (2021) [hereinafter Mayer, The Uses and Misuses]. For an introduction to and assessment of the realignment literature, see William G. Mayer, *Changes in Elections and the Party System: 1992 in Historical Perspective*, *in* The New American Politics: Reflections on Political Change and the Clinton Administration 19–50 (Bryan D. Jones ed., Taylor & Francis 2018) (1969) [hereinafter Mayer, *Changes in Elections*]. Other major works in the realignment canon include Walter Dean Burnham, Critical Elections and the Mainsprings of American Politics (1970); Everett Carll Ladd, American Political Parties: Social Change and Political Response (1970); Jerome M. Clubb et al., Partisan Realignment: Voters, Parties, and Government in

soon the forces of continuity and stability reassert themselves, and the normal pattern of electoral politics returns. And then, quite suddenly, the existing party system breaks down, and a new one emerges to take its place. Over a period of just one or two elections, the balance of strength between the parties changes, and the composition of each party's regular, core supporters is substantially recast. Once established, this new regime—the new party system—lasts for about twenty-eight to thirty-six years until it too is overturned by the next realignment. The elections that are usually singled out as critical or realigning elections are those of 1800, 1828, 1860, 1896, and 1932.[7]

If realignments occur about every thirty years, it was hardly surprising that in the late 1960s, many political scientists believed that we might be on the cusp of another realignment. And when Richard Nixon was elected president in 1968 and then overwhelmingly re-elected in 1972, and the once solidly Democratic South seemed no longer willing to vote for Democratic presidential candidates, a fair number of commentators became convinced that the next realignment was now in process.[8] The glaring problem with this claim involved Congress: while Republicans would win five of the six presidential elections between 1968 and 1988, they would have a Senate majority only between 1980 and 1986, and not once would they win a majority of seats in the House of Representatives. Democrats also won a regular majority of gubernatorial and state legislative elections.

What all this meant for the theory of realignment was a subject of some disagreement. Some commentators believed that 1968 was a realigning election, though, for various reasons, it was not as thorough-going as the realignment of 1932.[9] Another school of thought held that 1968 might have initiated a realignment had it not been interrupted by Watergate; but once memories of that nightmare had dimmed, the realignment was consummated by Ronald Reagan's triumph in 1980.[10] Yet others have argued that the whole idea of realignments was no longer applicable—indeed, perhaps

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AMERICA (1980); and JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (2d ed. 1983).

7 Mayer, *Changes in Elections*, *supra* note 6.

8 For the most influential statement of this claim, see KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY: UPDATED EDITION (Princeton Univ. Press 2014) (1969).

9 This is, for example, the conclusion that I reach in Mayer, *Changes in Elections*, *supra* note 6.

10 *See* KEVIN P. PHILLIPS, POST-CONSERVATIVE AMERICA: PEOPLE, POLITICS, AND IDEOLOGY IN A TIME OF CRISIS 53–62 (1982); Thomas E. Cavanagh & James L. Sundquist, *The New Two-Party System*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 33–67 (John E. Chubb & Paul E. Peterson eds., 1985).

never had been.[11] To further complicate matters, developments since 1990 seemed to point in two very different directions. On the one hand, what had once seemed to be a reliable Republican majority at the presidential level has apparently disappeared. In the last eight presidential elections, only one Republican candidate has managed to win a plurality of the popular vote. Yet, at the same time, ten of the last fourteen congressional elections have resulted in a Republican majority in the House of Representatives[12] and, putting aside the difficult-to-classify case of 2000,[13] Republicans have had Senate majorities on eight of twelve occasions. It is most unclear, in short, that there really was such a thing as the "Reagan regime" (or a "Nixon regime" that was derailed by Watergate).

Whatever one makes of such issues, analysts have regularly insisted that the coming years would see a new political era in which the Democrats would win consistent majorities in elections at all levels of American government. One of the first such claims was put forward in 1974, when Lanny Davis, a political operative who would later become a top advisor to Bill Clinton, wrote a book called *The Emerging Democratic Majority*.[14] As its title indicates, Davis' book argued that the Democrats were on the verge of starting a new political era, different in some ways from the New Deal Era, but nevertheless dominated by the Democrats. And his argument was recognizably similar to the one Balkin suggests: that the Democrats would draw a special strength from rising groups like women, racial minorities, the student left of the 1960s, and New Politics suburbanites, while the Republican Party was based on groups that represented a declining share of the electorate.[15] Given what happened just six years later, when Ronald

11 Anyone interested in realignment theory—or Skowronek's classification of political regimes and their associated presidencies—must come to grips with David R. Mayhew, Electoral Realignments: A Critique of an American Genre (2002).

12 *Party Dvisions of the House of Representatives, 1789 to Present*, Hist., Art & Archives, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Feb. 1, 2021). Since Balkin and other commentators imply that the Republican House majorities owe much to partisan gerrymandering, it is worth pointing out that the GOP won a majority of House votes in eight of fourteen elections. *Id.*

13 The 2000 election produced a tie in the U.S. Senate: 50 Democrats and 50 Republicans. With Vice President Dick Cheney casting the tie-breaking vote, the 107th Congress began with Republicans in control of the Senate. In May 2001, however, Vermont Senator Jim Jeffords, up to that time a Republican, announced that he would now be an independent who would caucus with the Democrats, thereby giving the Democrats an effective 51-to-49 majority in the upper house.

14 *See* Lanny J. Davis, The Emerging Democratic Majority: Lessons and Legacies from the New Politics (1974); *see also* Arthur M. Schlesinger, Jr., *How McGovern Will Win,* N.Y. Times, July 30, 1972, at 10.

15 Balkin, *supra* note 1, at 12–29.

Reagan decisively trounced Jimmy Carter and brought in a Republican Senate majority along with him, I doubt that even Davis himself would stand by his prediction.

Undeterred by Davis' example, in 2002, John Judis and Ruy Teixeira wrote a book, also called *The Emerging Democratic Majority*, that made much the same argument, albeit with better data.[16] And though the 2002 and 2004 elections didn't exactly turn out the way they had hoped, the 2008 election seemed to bear out their prophecy. The Democrats won the presidency that year by a decisive margin; they also scored large majorities in both the House and the Senate. More than a few commentators were accordingly convinced that the new Democratic era had finally arrived. Harold Meyerson, for example, said that "[e]ven though Obama's victory was nowhere near as numerically lopsided as Franklin Roosevelt's in 1932, his margins among decisive and growing constituencies make clear that this was a genuinely realigning election."[17] John Judis similarly proclaimed, "[Obama's] election is the culmination of a Democratic realignment that began in the 1990s[.]"[18] And then the Democrats suffered major losses in the 2010 and 2014 midterm elections and surrendered the White House in 2016.

Against that background, readers will understand why I am skeptical that Professor Balkin's prediction of a new Democratic electoral regime will come to pass. The 2020 election results might superficially seem to support his analysis. Joe Biden defeated Donald Trump by a comfortable margin in the popular vote (the electoral vote was much closer), and the Democrats managed to win fifty seats in the Senate, which, with a Democratic vice president, gives them effective control of that body as well. The Democrats also retained their majority in the House of Representatives, though they lost thirteen seats. But I do not think this can be interpreted as a wholesale rejection of Republican policies or even of the party as a whole. What ailed the Republican Party in 2020 was the man at the head of the ticket: a President, Donald Trump, who was, as compared with all other contemporary Presidents, uniquely intemperate, dishonest, narcissistic, overconfident in his own abilities and therefore loath to take advice, and showing no apparent qualms about using his office to benefit his own and his family's economic interests.[19]

The impact of Trump's personal failings, independent of his policies, was clearly visible in 2019, well before anyone anticipated the COVID-19

16 *See* JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY (2002).

17 Harold Meyerson, *A Real Realignment*, WASH. POST, Nov. 7, 2008, at A19.

18 John B. Judis, *America the Liberal*, NEW REPUBLIC, Nov. 5, 2008, at 20.

19 For a good summary of Trump's many problems, see JOHN J. PITNEY, JR., UN-AMERICAN: THE FAKE PATRIOTISM OF DONALD J. TRUMP (2020).

pandemic. Though the Democrats and the media were loath to give Trump credit or even to acknowledge the facts, as of 2019, the American economy was enjoying its best-sustained performance in the last fifty years. From February 2019 through February 2020, the national unemployment rate was consistently below 4.0%, averaging a remarkable 3.6%.[20] Nor, contrary to an often-made Democratic charge, was it only whites and the wealthy who were benefiting. In late 2019, both Black and Hispanic communities enjoyed their lowest unemployment rates since the federal government began keeping statistics by race.[21] In virtually any other circumstances, a President who presided over such a record-breaking economy would have had an approval rating of at least 60%.[22] Yet throughout this period, more Americans disapproved of Trump's job performance than approved of it. According to RealClearPolitics, which averages the results from numerous polls and thereby largely washes out the effects of sampling error, Trump's approval rating during this time of stunning economic performance never climbed above 46%, and his disapproval numbers never fell below 50%.[23] By comparison, in the final two years of Bill Clinton's presidency—the last time when the U.S. unemployment rate was even roughly comparable to Trump's pre-pandemic record—his average approval rating was 60% in 1999 and 61% in 2000.[24]

Will Trump's image continue to haunt the Republican Party after he leaves office? Given the highly personal nature of Trump's failings, I doubt this will occur—unless the Republicans nominate him or one of his children as their next presidential candidate. In 2008, George W. Bush's approval ratings were far lower than Trump's,[25] and his failings, in both

20 See the data reported at *Unemployment Rate from 2010 to 2020*, U.S. Bureau Lab. Stat., https://data.bls.gov/timeseries/LNS14000000?years_option_=all_years (last visited Dec. 28, 2020).

21 In August 2019, the Black unemployment rate was 5.2%. Its previous low point was 7.0% in April 2000. *Unemployment Rate—Black or African American Men*, Fed. Rsrv. Bank St. Louis: Fred Econ. Data, https://fred.stlouisfed.org/series/LNS14000031 (last visited Oct. 18, 2020). Hispanic unemployment bottomed out at 4.0% in September 2019; prior to the Trump presidency, its lowest point was 4.8% in October 2006. *Unemployment Rate—Hispanic or Latino,* Fed. Rsrv. Bank St. Louis: Fred Econ. Data, https://fred.stlouisfed.org/series/LNS14000009 (last visited Oct. 18, 2020).

22 The strong relationship between economic performance and presidential approval ratings is a standard finding in the large literature on approval ratings. *See, e.g.*, Samuel Kernell, *Explaining Presidential Popularity*, 72 Am. Pol. Sci. Rev. 506, 506–22 (1978).

23 *See President Trump Job Approval*, RealClear Politics, realclearpolitics.com/epolls/other/president_trump_job_approval-6179.html (last visited Jan. 13, 2021).

24 *See Presidential Approval Ratings – Bill Clinton*, Gallup, https://news.gallup.com/poll/116584/presidential-approval-ratings-bill-clinton.aspx (last visited Feb. 4, 2021).

25 *See President Bush Job Approval*, RealClear Politics, https://www.realclearpolitics.

the economy and foreign policy, were far more severe.[26] Yet just two years later, the Republicans had regained all of their lost ground in the House of Representatives and most of their losses in the Senate and might have won back the presidency in 2012 had Mitt Romney not run such a poor campaign.[27]

Why do predictions of a new party system keep falling short? As I argued in an article published a few years ago, I believe it's because all these predictions are based on a fundamentally inaccurate theory as to the causes of realignments.[28] What is probably the dominant theory on this subject is that realignments are a kind of inevitable product of social change. This is also pretty clearly the theory Balkin endorses in his book.[29] A party system is created around one set of issues and cleavages, like slavery and the Civil War, or the problems of industrialization. But gradually, that set of issues fades in significance, there is an accumulation of social and demographic changes, and so, finally, a new party system is established to take its place.[30]

I have a very different take, which might be called the catastrophe theory of realignments. In my view, realignments—or political regimes—are created in the wake of some kind of serious catastrophe. For example, what political scientists have called the third party system—what Balkin calls the Republican regime—was forged by the Civil War, which threatened to divide the nation into two antagonistic countries and eventually resulted in the deaths of more than 600,000 American soldiers. The next party system was established in reaction to the second-worst economic depression in American history. And the New Deal system was the result of the worst depression in American history. There are analysts who have tried to claim that in the late 1920s, the pre-New Deal party system was already being steadily undermined by various social changes, such as the huge number of immigrants who had come to this country in previous decades, and that

com/epolls/other/president_bush_job_approval-904.html (last visited Jan. 13 2021).

26 Between 2003 and 2008 inclusive, 4,539 American soldiers died in Iraq; nothing remotely similar occurred during Trump's presidency. *See Iraq Coalition Casualty Count*, ICASUALTIES.ORG, http://icasualties.org/ (last visited Feb. 4, 2021). The lowest unemployment rate during George W. Bush's presidency was 4.4% at a number of points in 2006 and 2007; in the final six months of Bush's tenure, the average unemployment rate was 6.4%. *See* BUREAU LAB. STAT., *supra* note 20.

27 On the many failings of the Romney campaign, see William G. Mayer, *How the Romney Campaign Blew It*, *in* THE FORUM 10, at 40–50 (2012).

28 William G. Mayer, *With Enemies Like This, Who Needs Friends? How Barack Obama Revived the Republican Party*, *in* DEBATING THE OBAMA PRESIDENCY 103–22 (Steven E. Schier ed., 2016).

29 *See* Balkin, *supra* note 1, at 14.

30 Probably the fullest statement of this perspective is found in EVERETT CARLL LADD, AMERICAN POLITICAL PARTIES: SOCIAL CHANGE AND POLITICAL RESPONSE (1970).

Franklin Roosevelt's election in 1932 merely administered the coup de grace. I think this argument is entirely unsupported by the election results. In 1928, Republican presidential candidate Herbert Hoover won 58% of the popular vote and 444 electoral votes, while Republicans racked up a 100-seat majority in the House and a 17-seat majority in the Senate.[31] Had the Great Depression not begun in late 1929, there is not the slightest reason to think that the GOP would not have scored reasonably similar victories in 1930 and 1932.

My perspective on realignment theory has several important implications for the likely future of American politics—and for Balkin's prediction that succeeding years will be dominated by the Democratic Party. First, it is far from clear that the events of the last several years constitute a real "catastrophe." Up until early 2020, as I have already noted, the American economy was in very good shape, and while many other countries deplored Trump's foreign policy, that alone was not likely to affect many votes in this country. Foreign policy generally becomes an important voting issue only when many American soldiers are being killed in foreign conflicts or other vital U.S. interests are seriously threatened.[32] Nothing of that sort has taken place during Trump's presidency. As for COVID-19, while it has cost the country many thousands of lives and administered a significant hit to the economy, it is far from clear how much voters will blame Trump for such consequences. In shutting down the economy, Trump was following a course of policy that was, at least in the beginning, endorsed by both parties and experts of all political stripes. How voters will assess the loss of life that occurred because of COVID-19 during Trump's presidency is more difficult to estimate. While more than 335,000 US deaths were attributed to COVID-19 in 2020, the number of deaths per capita is not very different from that in most European countries.[33] Though it came too late to affect the 2020 election, Trump will also probably receive some credit for the rapid development and implementation of the COVID-19 vaccines.

More importantly, catastrophes only create the *opportunity* for a new party system. Whether a realignment actually comes about depends on the success of the new, incoming party in handling the set of problems they

31 Results of the 1928 elections are taken from Congressional Quarterly's Guide to U.S. Elections 249, 288, 928 (1975).

32 *See* Kernell, *supra* note 22. The only foreign policy variables that are usually included in presidential approval ratings are "rally events," which generally have significant but temporary effects, and casualties in foreign wars. *Id.*; *See also* Douglas A. Hibbs, Jr., et al., *On the Demand for Economic Outcomes: Macroeconomic Performance and Mass Political Support in the United States, Great Britain, and Germany*, 44 J. Pols. 426, 426–62 (1982).

33 *See Reported Cases & Deaths by Country or Territory*, Worldometer, https://worldometers.info/coronavirus/ (last visited Dec. 28, 2020).

are confronted with. The Civil War only made Republicans the dominant party because the North won the Civil War. If the South had prevailed, the Republicans would probably have disappeared from the political scene or at least become the minority party. The Republicans gained new life and new votes after 1896 because, beginning in 1897, the depression that began in 1893 ended and a sustained period of economic expansion soon followed.[34] The New Deal was a bit less successful in bringing the Great Depression to an end, but at least Roosevelt did a whole lot better than Herbert Hoover, and he also enacted a fair amount of useful social and regulatory legislation.

In order to establish a new political regime, in short, the Democrats will have to show that they can actually solve most of the problems that now afflict the country. A useful take-off point for thinking about such matters appears on page seventeen of *The Cycles of Constitutional Time*, where Professor Balkin provides a list of problems that the Republicans have supposedly not been able to cope with: "stagnant wages, decreasing social mobility, an opioid epidemic, crumbling infrastructure, a decaying educational system, crippling student debt, unaffordable health care, and so on."[35] What is notable is that Balkin simply assumes that the Democrats have the answers to all these problems. Based on past performance, I find such a view highly questionable.

Did the Democrats make health care more affordable? Maybe for some people, but not for most Americans. When the proposal was being debated, the White House claimed that their bill would "cut the cost of a typical family's premium by up to $2,500 a year." In fact, no such savings ever materialized.[36] Did stagnant wages revive during the Obama presidency? Did social mobility increase? In fact, as has been widely pointed out, the Obama "recovery" was the slowest and most anemic since the Great Depression.[37]

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34 For data on unemployment rates during and immediately after the 1893 depression, see Christina Romer, *Spurious Volatility in Historical Unemployment Data*, 94 J. ECON. HIST. 31 (1986).

35 Balkin, *supra* note 1, at 17.

36 For two good analyses of Obama's promise and the actual results of the Affordable Care Act, see Yevgeniy Feyman, *Dispelling Obamacare Cost Saving Myths*, FORBES (Sept. 28, 2015), forbes.com/sites/theapothecary/2015/09/28/dispelling-obamacare-cost-saving-myths/#669a74821ae2, and J.B. Wogan, *No Cut in Premiums for Typical Family*, POLITIFACT (Aug. 31, 2012), politifact.com/truth-o-meter/promises/obameter/promise/521/cut-cost-typical-familys-health-insurance-premium-/.

37 *See* Louis Woodhill, *Obama Wins the Gold for Worst Economic Recovery Ever*, FORBES (Aug. 1, 2012), https://www.forbes.com/sites/louiswoodhill/2012/08/01/obama-wins-the-gold-for-worst-economic-recovery-ever/?sh=15f81a353ca2; Heather Long & Tami Luhby, *Yes, This Is the Slowest U.S. Recovery Since WWII*, CNN BUS. (Oct. 5, 2016), https://money.cnn.com/2016/10/05/news/economy/us-recovery-slowest-since-wwii/index.

The "decaying educational system" provides a particularly good venue for considering the problematic nature of many traditional Democratic policies. For most of the last fifty years, the Democratic plan for improving the shortcomings of American education has been to increase spending. And contrary to what some have asserted, this policy has been implemented—dramatically so.[38] As education scholar Jay Greene has shown, between 1945 and 2001, real per-pupil spending for elementary and secondary education increased by more than 700%. But as Greene also shows, educational test scores during this same period were absolutely flat.[39] Yet Democrats continue to insist that the key to better education is more spending. Given the very large number of American children who are now raised in single-parent households, there are probably distinct limits on how much the schools alone can accomplish.[40] But if our decaying educational system can be revived, it will almost certainly require a major effort to shake up the educational bureaucracy and its associated practices—but the Democrats, given their substantial indebtedness to teachers' unions, are unlikely to make an attempt.

html?iid=hp-stack-dom.

38 On the strange—and false—claim that educational spending has been cut, see Corey DeAngelis & Matthew Nielsen, *No, We Haven't "Defunded Education for Years.,"* Wash. Examiner (June 11, 2020), https://www.washingtonexaminer.com/opinion/no-we-havent-defunded-education-for-years.

39 Jay P. Greene, Education Myths: What Special Interest Groups Want You to Believe About Our Schools—and Why It Isn't So 9–12 (2005).

40 The literature on this point is voluminous, *see, e.g.*, Sheila Fitzgerald Krein & Andrea H. Beller, *Educational Attainment of Children from Single-Parent Families: Differences by Exposure, Gender, and Race*, 25 Demography 221, 221–32 (1988).

II. A CYCLE OF POLARIZATION?

In chapter 3 of his book, Balkin, like virtually every other commentator on contemporary American politics, takes note of the substantial level of polarization between the Republican and Democratic parties in Congress.[41] More boldly, Balkin predicts that polarization will decline in the years ahead. Recent problems, he argues, are part of a long "cycle of polarization" that will "slowly turn once again."[42] On the whole, I hope he is right, but again I am more skeptical.[43]

To begin with, it is far from clear that the changes in the level of congressional polarization can truly be called cyclical. The essence of a cycle is precisely that it occurs with some regularity. A cycle, according to one authoritative dictionary, is "a recurring succession of events or phenomena[.]" It is also defined as "a course or series of events or operations that recur regularly[.]"[44] One reason so many political scientists were intrigued by the theory of realignments was that realignments really did seem to occur about every thirty-six years or so. The rise and fall of polarization is nowhere near as regular as that. By almost all measures (including the one Balkin relies upon), polarization existed at a fairly high level from the years immediately preceding the Civil War through the Gilded Age, began to decline near the end of the Progressive Era, stayed at a reduced level to the end of the 1960s, then began to grow again in the mid-to-late 1970s, reaching very high levels in the mid-1990s. Such a pattern could just as easily be read as indicating that a high level of polarization is the normal condition of American politics and that the years from about 1912 to 1976 were simply an exception to the norm.[45] My demurral here is not simply a quibble about wording. If

41 For a good overview of the issue, see JAMES E. CAMPBELL, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA (2018). *But see* MORRIS P. FIORINA, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005).

42 Balkin, *supra* note 1, at 37.

43 There is no doubt that congressional polarization imposes a number of costs on the American political system. But when most political activists lament polarization, what they really mean is not, *People on my side should become more moderate*, but, *The other side should give in and endorse our policies*. For example, if the pro-choice side of the abortion wars were really bothered by the level of polarization around this issue, as they so often claim, they could easily reduce it by agreeing to some of the more widely-supported proposals advanced by the pro-life side, such as requiring minors who want abortions to get parental consent. In fact, what abortion advocates really want is for pro-life groups to fold their tents and go home.

44 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 310 (11th ed. 2009).

45 One reason why the level of polarization between 1912 and 1976 may have been so anomalous was the strange alliance then existing between southern Democrats, who were part of the Democratic Party because they were still refighting the Civil War, and

polarization is genuinely cyclical, then presumably, it will come back down again. If it has simply gone up and down at various times in the past, the future is much less certain.

Why might polarization decline in the years ahead? Drawing on the work of McCarty, Poole, and Rosenthal,[46] Balkin claims that the level of polarization is correlated with the level of income inequality.[47] Actually, the correlation between these two variables is much more ragged than Balkin (or McCarty, Poole, and Rosenthal) acknowledges, and it is not clear what is causing what or if the correlation is entirely spurious. The years immediately after the Civil War were a time of decreasing inequality, Professor Balkin tells us,[48] yet polarization remained at a very high level. More importantly, such a pattern, if true, suggests that contemporary American politics faces a serious predicament. Polarized politics means that there is unlikely to be a serious attack on income inequality, and high levels of income inequality mean that our politics is likely to remain polarized.

This kind of stalemate was broken during the late Progressive Era, according to Professor Balkin, largely because of a set of outside or exogenous influences:[49] the declining salience of Civil War-related issues; the change in party coalitions after the 1896 realignment; and the decline in the rate of immigration.[50] But it is far from clear if a similar constellation of factors can be counted upon to depolarize the parties in the third or fourth decades of the twenty-first century. For example, on page thirty-seven, Balkin notes that the rate of illegal immigration has declined somewhat in recent years. But if the economy recovers from the COVID-19 recession and Trump's anti-illegal-immigration policies are replaced by the less aggressive stance of Joe Biden, immigration rates will likely rebound. As of December 2020, there is already an indication of a surge in illegal immigration in anticipation of the Biden presidency.[51]

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northern Democrats, who by 1912 had become increasingly progressive. On the latter point, see David Sarasohn, The Party of Reform: Democrats in the Progressive Era vii–xvii (1989).

46 *See generally* Nolan McCarty et al., Polarized America: The Dance of Ideology and Unequal Riches (2006).

47 Balkin, *supra* note 1, at 34.

48 *Id.*

49 Outside or exogenous, that is, to the polarization-income inequality connection. The three factors named here are not, of course, exogenous to the American political system as a whole.

50 Balkin, *supra* note 1, at 36.

51 Sumner Park, *Biden's Immigration Plans to be Put to the Test with Recent Surge in Border Crossings*, Fox Bus., foxbusiness.com/lifestyle/illegal-immigrants-up-ahead-of-biden-presidency (last visited Dec. 28, 2020).

III. WHO'S AT FAULT?

The final disagreement I wish to lodge against Professor Balkin's analysis, which applies with particular force to chapters 3 and 5, is that he places the blame for current problems almost entirely on the Republicans. Why, for example, has our politics become so polarized? According to Balkin, it was a deliberate *Republican* strategy. Newt Gingrich "perfected a new slash-and-burn style of rhetoric" because it was "the best way for Republicans to become a majority party[.]"[52] No doubt Gingrich often attacked Democrats in very sharp and uncivil terms. But does Balkin truly believe that Democrats have been innocent of such practices? Had he consulted a few conservatives in the course of writing his book, they would have told him that the real turning point in the decline of American political civility came in 1987 with the liberal campaign against the Supreme Court nomination of Robert Bork. In the words of Roger Kimball:

> The vicious campaign waged against Judge Bork set a new low—possibly never exceeded—in the exhibition of unbridled leftist venom, indeed hate . . . So hysterical was the campaign against Judge Bork that a new transitive verb entered our political vocabulary: "To Bork," scruple at nothing in order to discredit and defeat a political figure.[53]

In defending Bork, Cass Sunstein has noted, Republicans "argued that public vilification of judicial nominees would become common, and that constraints of civility and charity might be obliterated . . . You could make a good argument that they were right."[54]

In a similar way, Balkin blames George W. Bush for failing to reach out to Democrats after he became president in the disputed election of 2000.[55] This characterization ignores a fair number of times when Bush *did* push programs that might reasonably have been expected to win bipartisan support, such as the No Child Left Behind education act, which dramatically increased federal spending on and control over elementary and secondary education, and the Medicare prescription drug bill, the first major expansion of federal entitlements since the 1960s. Bush also refrained from blaming the September 11 attacks on his Democratic predecessor's failure to take

52 Balkin, *supra* note 1, at 31.

53 Roger Kimball, *Robert H. Bork, 1927-2012*, PJ MEDIA (Dec. 19, 2012), pjmedia.com/rogerkimball/2012/12/19/robert-h-bork-1927-2012-n117242.

54 Cass R. Sunstein, *Beware the Revenge Impeachment*, BLOOMBERG: OPINION (Jan. 30, 2020), https://www.bloomberg.com/opinion/articles/2020-01-30/trump-impeachment-beware-of-republican-revenge?sref=47bobj3.

55 *See* Balkin, *supra* note 1, at 31.

more aggressive action against terrorism.[56] And though Barack Obama first came to national attention after a speech to the 2004 Democratic National Convention in which he asserted that "we are one people, all of us pledging allegiance to the stars and stripes," his approval ratings among Democrats and Republicans were even more polarized than those of George W. Bush.[57] Did Karl Rove, Bush's principal political strategist, try to energize the Republican base when Bush sought re-election in 2004, as Balkin also argues?[58] Yes, though most of this involved on-the-ground mobilization efforts that were not incompatible with a parallel effort to win the support of more moderate swing voters. In his memoirs, Rove argues, on the basis of quite a bit of hard data, that it is impossible to win a national election today just by appealing to a party's "base vote."[59] A dispassionate look at the 2000 and 2004 Bush campaigns shows, I believe, that Rove and Bush really did make a strong, good-faith effort to win the support of swing voters. They were not entirely successful in this endeavor—but they certainly tried. Nor, again, are Democrats innocent of playing to their base. In 2012, to cite just one example, then-vice president Joe Biden told an audience comprised of many Black individuals that if Republican policies were enacted, "[t]hey're going to put you all back in chains."[60] Given that virtually every recent Democratic presidential candidate has won about 90% of the Black vote, it is unlikely that Biden's crude allegation was made to gain the support of swing voters.

I have similar problems with Balkin's chapter on "constitutional rot." No doubt Republicans deserve their share of the blame for such problems, but the Democrats are quite far from guiltless.

First, Balkin notes correctly that many prominent structural features of the US Constitution were designed to "dampen and limit the downside

56 *See* Mayer, The Uses and Misuses, *supra* note 6, at 204–48 (detailing the arguments Bush could have used against the Democrats but for some reason declined to do so).

57 For the text of Obama's 2004 speech, see *Barack Obama's Remarks to the Democratic National Convention*, N.Y. Times (July 27, 2004), https://www.nytimes.com/2004/07/27/politics/campaign/barack-obamas-remarks-to-the-democratic-national.html. The partisan gap in Obama's approval ratings is discussed in Jeffrey N. Jones, *Obama Approval Ratings Still Historically Polarized*, Gallup (Feb. 6, 2015), https://news.gallup.com/poll/181490/obama-approval-ratings-historically-polarized.aspx.

58 *See* Balkin, *supra* note 1, at 31 ("Karl Rove[] recognized that Republicans were more likely to win national elections if they appealed to their base of loyal voters and got them out to vote in large numbers.").

59 Karl Rove, Courage and Consequence: My Life as a Conservative in the Fight 70–72 (2010).

60 Rodney Hawkins, *Biden Tells African-American Audience GOP Ticket Would Put Them "Back in Chains,"* CBS News (Aug. 14, 2012), https://www.cbsnews.com/news/biden-tells-african-american-audience-gop-ticket-would-put-them-back-in-chains/.

of inevitable decay in our republican institutions—to keep democracy afloat and republicanism running until the political system has a chance to renew and right itself."[61] One such feature he mentions is federalism. But Democrats and liberals, especially on the Supreme Court, have done far more to undermine federalism than Republicans. A great deal of the polarization in contemporary American politics can be traced back to liberals' efforts to take a number of issues that were once handled by state and local governments on a highly decentralized basis and insist that, because fundamental rights were involved, one national policy had to be imposed on the entire country. School prayer, abortion, and same-sex marriage are obvious examples.

Second, Balkin's picture of how wealthy individuals and interests have used their money to influence the course of American politics[62] is strikingly one-sided. No doubt conservative money has been used to establish think tanks and research institutions, but there are also a sizable number of left-wing think tanks. Prominent examples include the Brookings Institution, Center for American Progress, Guttmacher Institute, Center on Budget and Policy Priorities, Urban Institute, and Open Society Foundation. And as a great deal of survey research has shown, the professors at America's principal research institutions, colleges and universities, are disproportionately liberal, especially in law schools and the social sciences.[63]

Third, at a number of points in his book, Balkin laments the rise of conservative media, especially talk radio and Fox News.[64] What he might have more profitably asked is why conservative media have thrived in recent years. The simple answer is that the so-called mainstream media are dominated by reporters and editors who are substantially more liberal than most of the American people. In an unpublished paper, I reviewed twenty-nine separate surveys of American journalists of one kind or another.[65] These surveys clearly demonstrate that the people who produce contemporary American journalism are far to the left of their purported audience. When journalists are

61 Balkin, *supra* note 1, at 48.

62 *Id.* at 51.

63 The literature on this point is voluminous. *See e.g.*, STANLEY ROTHMAN ET AL., THE STILL DIVIDED ACADEMY: HOW COMPETING VISIONS OF POWER, POLITICS, AND DIVERSITY COMPLICATE THE MISSION OF HIGHER EDUCATION (2010); Christopher Ingraham, *The Dramatic Shift Among College Professors That's Hurting Students' Education*, WASH. POST (Jan. 11, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/11/the-dramatic-shift-among-college-professors-thats-hurting-students-education/; Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON. J. WATCH 422, 422–51 (2016).

64 *See generally* Balkin, *supra* note 1, at 57.

65 *See generally* William G. Mayer, The Political Attitudes of American Journalists: A Survey of Surveys 2010 (unpublished manuscript) (on file with author).

asked whether they consider themselves liberal, moderate, or conservative, self-described liberals generally outnumber conservative by margins of about three-to-one.[66] In surveys of the mass public, conservatives outnumber liberals by a margin of about two-to-one.[67] When surveys concentrate on elite journalists, such as those who work for the major television networks, the *New York Times*, and the *Washington Post*, liberal dominance increases to four- or five-to-one[68] and, in one case, twelve-to-one.[69] I was also able to find fifteen instances where a survey organization asked a sample of journalists whom they had voted for in a recent presidential election. On average, 76% of journalists voted for the Democratic candidate—this in a set of elections in which the American electorate as a whole voted just 45% Democratic.[70]

The gap between journalists and their audience is particularly wide on social and cultural issues, such as crime, abortion, and immigration. In one survey of elite journalists conducted in 1995, the journalists rejected a proposal to give "[l]ifetime jail[] sentence[s] with no chance of parole for anyone convicted of three or more violent crimes"[71]: 44% in favor, 55% against. The public, by contrast, overwhelmingly supported such a law: 86% in favor, just 12% against. 24% of journalists endorsed "[c]utting off the eligibility of illegal immigrants for government benefits," versus 58% of the public.[72] In a survey of national newspaper journalists, 83% were pro-choice on abortion, as against 49% of the public.[73]

It is sometimes said (usually by journalists) that nobody likes the press coverage their side gets and that the media get criticism from both the left and the right, thus allowing journalists to claim that they are comfortably in the middle, holding up the light of truth to all sides without fear or favor. It's a nice thought, but it's quite untrue. Surveys of the mass public show that conservatives are far more convinced of media bias than liberals.[74]

66 *Id*. at 11.

67 *Id*.

68 *Id.* at 35–37 tbl.1.

69 *Id.*

70 *Id.* at 38 tbl.2.

71 *Id*. at 57–58 tbl.8.

72 *Id*.

73 *Id.* at 47 tbl.5. The 1995 survey of journalists at fourteen nationally influential news outlets was conducted by Stanley Rothman and Amy Black in April–December, 1995 (n=242). *Id.* at 18. Figures for the American public are drawn from, respectively, Times Mirror/PSRA survey of July 1994 (n=3,800) and Times Mirror/PSRA survey of October 1995 (n=3,800). *Id.* at 59 tbl.8, nn.5 & 7. Parallel surveys of newspaper journalists and the American public were conducted by the *Los Angeles Times* in February 1985 (n journalists=2,703). *Id.* app. at 33 (Surveys Analyzed in This Article).

74 All surveys were conducted by the Gallup Poll, and the results are archived at the Roper Center for Public Opinion Research at Cornell University, accessible via its

On fourteen occasions between 2001 and 2014, the Gallup Poll asked its respondents, "[i]n general, do you think the news media is too liberal, just about right, or too conservative?" In every single instance, the number who thought the media were too liberal swamped the number who thought the media had a conservative bias, generally by a margin of about three-to-one.[75] Even more revealing are the results when these figures are broken down by ideology. Conservatives have no doubt about the tenor of news media reporting: 73% say the media are too liberal, versus just 7% who thought them too conservative. By contrast, liberals are much less upset about the media. Only 33% of liberals said the media were too conservative. Most liberals—51%—said the media got things "just about right."[76]

From this perspective, what some critics dismiss as an unfortunate effort to deny the American public a basis of common knowledge and facts that can serve as a foundation for political discussion could also be celebrated as a case of pluralism in action. Finding that the mainstream media have repeatedly ignored their concerns and criticisms, conservatives have created a set of alternative institutions, just as many ethnic groups have done throughout American history. Meanwhile, the established media institutions have almost uniformly failed to acknowledge that there is even a problem, much less act to remedy it. Though almost every media organization today proudly touts its efforts to improve its racial and gender diversity, I know of none that has made a concerted effort to make its workforce more politically diverse. A similar criticism could be leveled at most American colleges and universities. In short, if lots of Americans distrust elites in such areas as journalism and academia, most conservatives would argue that the elites have done a great deal to earn that distrust.

As is clear throughout this book, Jack Balkin's political perspective is strongly left of center. I do not mean this as a criticism; it is hard to imagine that a person could spend decades studying current constitutional debates without developing some kind of rooting interest. But one does sometimes wish that he had made a greater effort to acknowledge and respond to the most obvious conservative counterarguments.

iPOLL database.

75 The average results were 46% too liberal, 15% too conservative, 36% about right.

76 The ideological breakdown is based on the Gallup survey of September 13–16, 2010.

CONSTITUTIONAL SPIRALS

*By Jeremy Paul**

* Jeremy Paul is a Professor of Law at Northeastern University. This essay expands upon my comments at the Constitution Day presentation delivered at Northeastern University by Yale Law School Professor Jack Balkin on September 17, 2020. As the text makes clear, the essay was completed prior to the November 3, 2020 presidential election and focuses on Professor Balkin's pre-election book, *The Cycles of Constitutional Time*. Long delays occasioned by the pandemic have created space in these pages for post-election updates, and both Professors Balkin and Mayer have seized this opportunity. The editors of the *Northeastern University Law Review* kindly offered me the chance to do the same, but I would have written an entirely different piece post-election and thus have declined that invitation. I applaud Professor Balkin's elaboration in these pages of the implications of demographic changes in the United States and am otherwise content to let this pre-election piece speak for itself. Special thanks to Sarah Midkiff for editorial assistance.

As I complete this essay, only days remain before the 2020 election. As a professor of constitutional law, as an American, and as a father, I am terrified. From my vantage point, the nation is in the grip of leaders, especially President Trump, who, if given the chance, will crush the democratic and legal traditions that have made the United States the long-time leader of "the free world." During his first term, President Trump has openly solicited foreign assistance in his efforts to win re-election,[1] brazenly exploited racial divisions by making rhetorical peace with white supremacy,[2] politicized the Department of Justice and the intelligence community, personally profited by steering government and campaign funds to his business interests from which he should have divested himself, manipulated the security clearance process in pursuit of nepotistic hiring, demolished the line between governing and politics by holding his convention speech on the White House lawn, openly celebrated the extrajudicial killing of an alleged criminal, withdrawn the nation from crucial international cooperative efforts (such as the Paris Climate Accords, the nuclear treaty agreement with Iran, and the World Health Organization), and repeatedly lied to the American people while attacking the press as the enemy of the people. Despite these corrosive actions, leading members of the Republican Party in the Senate and the House supported him every step of the way. The overwhelming majority of GOP elected officials presumably concluded that confirmation of conservative federal judges and tax cuts for corporate America and the nation's wealthiest individuals outweighed any risks Trump's volatile presidency entailed. We can only imagine how much further the nation will sink should voters grant Trump an Electoral College victory again.

In his erudite, easily accessible, and undeniably compelling new book, *The Cycles of Constitutional Time*,[3] Professor Jack Balkin articulates a

1 "Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election." Articles of Impeachment Against Donald John Trump, Article 1, H.R. Res. 755, 116th Cong. (2019) (enacted). For a description of similar transgressions during the 2016 campaign, see Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), https://www.nytimes.com/2018/07/13/us/politics/trump-russia-clinton-emails.html.

2 Following a neo-Nazi march in Charlottesville, Virginia in August 2017, Trump condemned the neo-Nazis but then said: "You had many people in that group other than neo-Nazis and white nationalists . . . . You also had some very fine people on both sides." Rosie Gray, *Trump Defends White-Nationalist Protesters: 'Some Very Fine People on Both Sides*,' ATLANTIC (Aug. 15, 2017), https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/.

3 JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

view of the Trump presidency that parallels my harsh assessment.[4] Yet, nonetheless, Balkin adopts an optimistic stance that encourages readers to temper their alarm over the nation's political predicament.[5] He concedes that President Trump may win re-election, offering many sound and sober warnings that the future has not yet been written and anything can happen,[6] but Balkin places his money tentatively on former Vice President Biden. In his grand narrative, and it really is grand, Professor Balkin sees the United States as coming to the end of a long political era, begun under President Reagan, in which unbridled individualism and suspicion of collective action have permeated American life. A new progressivism aimed at revivifying democracy and reducing economic inequality is on its way, Professor Balkin tells us, a trend he infers partly from a lack of support for conservative principles among younger voters. He then predicts the imminent collapse of the Reagan coalition, now barely held together by President Trump, as part of a longtime process within American democracy in which one coalition and loose set of ideas dominates for long periods only to ultimately "cycle" out in favor of new coalitions and ideas.[7]

For those who worry that our current situation is simply too different from past eras to draw conclusions about future cycles, Professor Balkin begins with an opening foray—reassuring us that we have not faced, during the Trump administration, what could fairly be called a constitutional crisis.[8] Such a crisis might understandably turn our attention away from the desirable arrival of a new political regime and toward the fear that we have come to the end of what is often called the "American experiment." Yet, as Professor Balkin sees it, constitutional crises occur only when the Constitution itself ceases to have the ability to prevent disputes between rival political factions from spiraling out of control into violence or chaos or both.[9] A constitutional crisis might occur when those in power openly refuse to follow the Constitution (perhaps employing the military to reverse an election or defying a Supreme Court order); when everyone agrees that

4 *Id.* at 55 ("Trump is a demagogue."); *id.* ("[He] is by turns uncouth, ill-mannered, boorish, corrupt, cunning, and entertaining."); *id.* at 56 ("His administration is a mess, his executive branch is woefully understaffed, his backstabbing underlings leak like sieves, the country is perpetually in an uproar, and he lurches daily from scandal to scandal.").

5 *Id.* at 3 (stating that our current "malaise is only temporary"); *id.* at 10 ("The message . . . is ultimately optimistic. We have been through these cycles before and we will ultimately get out of our present troubles[.]").

6 *Id.* at 6–8.

7 *Id.* at 12–29.

8 *Id.* at 38–43.

9 *Id.* at 38–39.

following the Constitution would require the nation to take some entirely self-destructive act; or when people conclude that only violence can solve current political problems.[10] Admittedly, we may be teetering on the edge of such things; for example, the Trump Administration's attitudes toward congressional subpoenas and foreign election meddling strike many as lawless. But, Balkin argues, we are not there yet.[11]

Instead, he tells us, what we are experiencing is something slightly different, which often occurs near the end of a political regime: an excess of what Professor Balkin calls "constitutional rot."[12] As its name implies, constitutional rot is a slowly deteriorating condition in which the country's political leaders drift away from their commitment to pursue the public good in favor of personal gain, and the country as a whole backslides from higher levels of commitment to democracy. Additional features of constitutional rot include a decline in public trust in government and steady erosion of the mutual forbearance that permits political leaders to govern successfully despite deep disagreements.[13] There's no more striking example than the bitterness generated when the GOP-controlled Senate denied a hearing to Supreme Court nominee Merrick Garland in March 2016 on the grounds that voters should have a say about the Court in the November 2016 election but then on a partisan vote confirmed Amy Coney Barrett as an Associate Justice just eight days before the 2020 presidential election. GOP leaders routinely point to the passage of Obamacare on a partisan vote as evidence of the Democratic party legislating without due regard for the strong opposing views on the other side. Both parties might agree that the inability of officials in Washington to come together on a second COVID-19 relief package is a dramatic example of constitutional rot.[14]

Balkin attributes our current high levels of constitutional rot to what he calls "the Four Horsemen": political polarization; increasing economic inequality; loss of trust; and significant policy failures such as the Vietnam War, the Iraq War, and the 2008 financial crisis.[15] Had he been writing now, I suspect he might add the failed response to the COVID-19 pandemic to his list of catastrophes. I agree wholeheartedly that each of Balkin's Four Horsemen characterizes our era, and data certainly support his conclusions

10 *Id.*
11 *Id.* at 43.
12 *Id.* at 44–62.
13 For a sterling treatment of the importance of forbearance to the maintenance of a stable democracy, see STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 106–17 (2018).
14 BALKIN, *supra* note 3, at 44–45.
15 *Id.* at 49–50.

concerning polarization and inequality.[16] I find these trends deeply alarming. Polarization and inequality make it difficult for our citizens to come together to tackle the problems of our day, including racial justice, housing affordability, student debt, declining life expectancy, and above all, climate change. But Balkin reminds us that the country has faced similar challenges before and yet has managed to make progress as new political cycles brought solutions to chronic problems. His paradigm example is the country's emergence from the Gilded Age in the 1890s, which was also marked by dramatic inequality and rampant public corruption. The Progressive Era's attack on monopoly power and ultimately the New Deal's embrace of an activist government are part of his story of a new political cycle. He celebrates past success in having surmounted constitutional rot and suggests we may one day soon begin marching again on the path toward a more perfect union.

Whether a second progressive era can take root depends on many factors to which I will return. But first, let me offer a word in response to Balkin's argument that it is easier to rebound from rot than from crisis. Imagine a married couple that has been traveling a loving but bumpy path over many years. One spouse then receives an attractive job offer in a distant city. In scenario one (crisis), the other spouse's initial reaction is: "go if you want, but if you do, we are through." In scenario two (rot), the two sit down and agree that they are getting much less out of the marriage than before and that the physical separation really shouldn't be a problem. Which of these two marriages would you bet on succeeding over the long run? My money would be on the pair facing a really tough crisis from which they might move on and recover. The couple whose marriage had slowly deteriorated might plow on from a distance, but the handwriting of a split appears to be clearly on the wall.

The same walk-the-plank potential of rot strikes me as prevailing in our current political moment. Consider how quickly things went back to seeming normal after we came to the brink of crisis during the hotly contested 2000 presidential election. This high-stakes struggle went unresolved for more than a month until, on December 11th, the Supreme Court of the United States ordered a halt to the Florida recount that left George W. Bush in the lead in the Sunshine State by only 537 votes. Vice President Gore accepted the Supreme Court's decision, and the potential "crisis" was averted. But the constitutional system succeeded due to forbearance from

16 Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, Pew Rsch. Ctr. (Jan. 9, 2020), https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/; *Partisan Antipathy: More Intense, More Personal*, Pew Rsch. Ctr. (Oct. 10, 2019), https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/.

the losing side and a lack of any non-violent alternatives and not because Vice President Gore's supporters had confidence that he or they had been treated fairly.

So while the crisis was dodged, the rot grew deeper. The newly elected President George W. Bush fueled the polarization and lack of trust, which Professor Balkin highlights,[17] by governing as if he had won in a landslide. Were we then in an era of mutual forbearance and trust of the kind Balkin prizes, Bush might have openly acknowledged the evenly divided nation and the uncertainty of the election's outcome. He might have made half his cabinet Democrats and perhaps even worked on a way to have Joseph Lieberman become Vice President. Instead, in almost a parody of the well-worn slogan that "elections have consequences," he ran his administration, with the help of hard-right conservative Dick Cheney, as if he had a mandate.

Of course, it's tendentious to pinpoint the 2000 election or any particular moment as the origin of constitutional rot. Income inequality and increased polarization had begun long before the 2000 election, with the defeat of Robert Bork's Supreme Court nomination, the confirmation of Justice Thomas despite Anita Hill's testimony, and the partisan impeachment of President Clinton being just the most prominent examples. But the years since, including the peddling of birtherism, government shutdowns, budget sequestration, the battle over the Affordable Care Act, the elimination of the filibuster for judicial nominees, another partisan impeachment, the stonewalling of Merrick Garland, and now a dysfunctional government being swamped by COVID-19, leave us wondering whether our nation can sustain itself as a constitutional democracy. We now face an election in which the battle to persuade voters is taking second fiddle to the struggle over how we will count the votes, and many worry that we have gone well beyond partisan cycles that eventually resolve themselves and plunged into a spiral from which we will not recover.

It is at precisely this point of despair that Professor Balkin hopes to come to the rescue.[18] He wants those of us transfixed by daily assaults on law, norms, and traditions to look back through broader lenses to note how the nation's democracy has waxed and waned over more than two centuries. He notes that our founding framers well understood that the thirst for power would often tempt political leaders to subvert constitutional norms in favor of immediate political advantage. The constitutional design, which staggers election for federal office across different election cycles, helps place a check

17 BALKIN, *supra* note 3, at 49–50.

18 *Id.* at 62–65, 161–74.

on the immediate entrenchment of a potentially dangerous regime. The 1994, 2010, and 2018 elections, for example, all featured an immediate change of direction in which control of the House of Representatives switched from one party to the other, and in all three cases away from the party of the President who had prevailed just two years earlier. Thus, from the moment a new President takes the oath of office, fear of mid-term rebuke at the polls serves to temper unwarranted grabs for executive power that might prove unacceptable to the public.

Each year constitutional law professors across the country begin their courses with the standard story. The Constitution relies principally on two basic strategies for protecting citizens against an excessively powerful national government. First, the Constitution goes to great lengths to divide power. This is accomplished through our nation's commitment to federalism, a division of authority between the states and the federal government. Power is then further divided within the federal government among the three branches, legislative, executive, and judicial, to establish our well-known system of checks and balances. Second, the Constitution spells out fundamental individual rights that government cannot infringe, such as the rights to free speech, to bear arms, to free exercise of religion, to equal protection of the law, and many more. Yet, as Professor Balkin emphasizes, the system of staggered elections is an underappreciated constitutional feature. House members must stand for office during off-year elections with no presidential race, making it significantly harder for a policy program to be enacted and implemented without the public having the chance to weigh its merits free from the issues of personal popularity that often dominate campaigns for the White House. And Senators' six-year terms provide some protection for Senators against being swept away during temporary fervor that might be stirred by a charismatic presidential candidate. I plan to add Balkin's emphasis on election cycles to my course each year from now on; indeed, Balkin's emphasis on this kind of cycle represents perhaps his book's greatest contribution.

But, of course, Balkin draws his book's title not from election cycles but from the deeper political cycles that provide grounds for his major thesis. In his re-telling of U.S. political and judicial history, the nation has experienced long periods in which one party or another has dominated the agenda. Balkin builds on the work of Stephen Skowronek to categorize various eras in our history and then to describe distinct roles particular Presidents played within those eras.[19] We had the Federalist period from

19 *Id.* at 12–27 (relying on Stephen Skowronek, The Politics Presidents Make: Leadership from John Adams to Bill Clinton (1997) and Stephen Skowronek, Presidential Leadership in Political Time: Reprise and Reappraisal (2d ed. 2011)).

1789 to 1800, the Jeffersonian period from 1800 to 1828, and the Jacksonian period from 1828 to 1860. Since the Civil War, the country has experienced long domination by Republicans from 1860 through 1932; what Balkin calls the New Deal/Civil Rights period from 1932 to 1980; and the Reagan era that began in 1980. It's the Reagan Era that Balkin speculates might now be coming to an end.

Balkin presents a capsule view of history that provides delightful reading.[20] Within each era, again building on Skowronek's work, Balkin highlights Presidents who cleared the ground for the new regime (Lincoln, F.D. Roosevelt, and Reagan); Presidents who kept on keeping on (Grant, T. Roosevelt, Taft, Truman, Kennedy, Johnson, and George H.W. Bush, though G.W. Bush would fit here too); Presidents, often from the opposite party, who sought to temper the strength of dominant forces (Eisenhower, Nixon, Clinton, and Obama) and Presidents who presided over the dissolution of the regime (Hoover, Carter, and perhaps now Trump). It is very well presented, and this book should be widely adopted in undergraduate courses as a marvelous introduction to political history and its links to developments at the Supreme Court.

There are, however, obvious difficulties in drawing lines between purportedly distinct political periods. Labeling the years between 1932 and 1980 as the New Deal/Civil Rights Era strikes me as somewhat like calling the years between 1955 and 1980 the Rock 'n' Roll/Disco Era. Yes, some of the same record companies may have produced hits throughout the entire period, but the music and culture of the decades varied widely. So, too, while the Democrats may have been the dominant party from 1932 through 1980, attitudes on race shifted dramatically between the New Deal and the emergence of the civil rights movement. One might also argue that Republican dominance began in 1968 rather than 1980 since the Nixon plus Wallace vote in the 1968 election signaled the collapse of the New Deal coalition. Carter's brief interlude was far more a holding action than a return to the Democratic traditions. Despite these nuances, given the long-run vitality of democratic institutions in the United States, the story Balkin tells of political and constitutional cycles is compelling enough.

Balkin insightfully describes how dominant regimes eventually dissolve as different sectors of their constituencies pull them in divergent directions.[21] He deftly explains that as the issues in the nation change, the many constituencies that have united to form a dominant regime may splinter as new issues arise, exposing previously hidden fissures and old solutions

20 *Id.* at 12–29, 69–96.

21 *Id.* at 12–29, 85–91.

prove no longer adequate to confront the problems at hand. For example, in the late 1920s, Republicans had no solutions for the pressures that led to the Great Depression, and therefore lost the public trust, resulting in Democrats prevailing in the next five presidential elections. By analogy, it is easy to make out a case that the Reagan regime, in which Balkin currently situates us, is not built to handle collective threats to public health such as pandemics and, most significantly, climate change; therefore, its era of dominance may be ending. We may indeed be about to witness the dawn of a new, dominant, more progressive political ethos. Or this era may have already begun with the election of Barack Obama, with the Trump catastrophe just a speed bump along the way. The more progressive attitudes of younger voters on issues such as racial equality and same-sex marriage, which Balkin highlights, are certainly evidence of profound shifts.[22]

The question on everyone's mind today, however, is whether the nation's long-term commitment to democracy and the rule of law will withstand the dark forces that President Trump has unleashed. Predicting a political turn based on past cycles is not persuasive unless the conditions that prevailed during earlier cyclical shifts continue to hold. The paramount question Balkin faces is why he believes our current situation sufficiently resembles the past to make a cyclical analysis persuasive. Yet this core problem never assumes prominence in his otherwise compelling account. Yes, our constitutional structure remains in place, although, as noted above, the constitutional rot Balkin describes is serious. Yes, we are about to hold an election, although our President is undermining its legitimacy almost daily. And yes, our national character endures, although our level of civic education seems dangerously on the decline. But what gives us confidence that the center will hold?

Many aspects of contemporary life are strikingly different from any we have previously experienced, in ways that call into question Balkin's prediction that the country is headed for another robust political cycle fueled by popular demands for change. Here are the three current fissures that scare me the most. First, the United States is experiencing a dramatic demographic change in which, for the first time in our history, white Americans are headed for minority status. Balkin certainly sees racial backlash as a major component of Donald Trump's rise. But he offers no reason to suggest that when faced with the choice between respect for democracy and maintaining racial dominance, millions of white Americans won't throw democracy under the bus. The constitutional rot Balkin

22 As Balkin puts it, "the [Republican P]arty's brand is increasingly toxic among the millennial generation and younger voters." *Id.* at 27.

describes has been cheered on by GOP elected officials across the country. The President has built a constituency that loves him far more than it loves our constitutional traditions. This is precisely what Trump himself alluded to when he bragged about being able to shoot someone on Fifth Avenue without losing any votes.[23] He has willfully ignored public health guidelines leading to unnecessary deaths, and yet win or lose on November 3rd, he is certain to garner millions of votes. Balkin never explains how a President Biden is going to woo these voters back into the democratic fold and prevent a spiral into increasing violence and disdain for constitutional traditions.

Second, the economic position of the United States is meaningfully different from what it was during previous cyclical changes. Of course, the nation has gone through many economic downturns. But from the moment the Constitution was ratified until today, we have been a rising nation. The post-World War II Era was unique as we strode mightily across the globe. Throughout our history, each generation had strong reason to believe that the next one would have a higher standard of living. Today, however, Americans have lost faith in the prospects for economic progress, and it seems certain that China will soon outstrip us as the world's largest economy. Climate change looms on the horizon as a daunting challenge to future growth. And the millions of Americans who have not benefited from the gains of globalization may have reason to question their allegiance to a democratic, constitutional system that they feel has left them behind. Balkin pays far too little attention to the effect that diminished economic prospects can have on the capacity of ordinary politics to produce cyclical shifts in governing regimes.

Indeed, the Trump movement is fueled by anger and resentment to the point of ignoring the guardrails—such as keeping the President away from prosecutorial decisions, consulting with the opposition party, respecting congressional directives on the allocation of funds, complying with legitimate oversight hearings, and separating public governance from private business—that have allowed reform within the system. As we approach November 3rd, many of us are hopeful that traditional safeguards will hold, and a free and fair election will take place. But win or lose, Trump and his followers are a powerful force whose primary belief is that if they continue to support the constitutional system, they will continue to get the short end of the economic stick. Joe Biden, as President, will need a creative strategy to turn that resentment around, or the forces of disintegration will

23 Then candidate Trump's comments were widely reported. *See, e.g.*, Jeremy Diamond, *Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters,'* CNN (Jan. 24, 2016), https://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html.

continue spiraling the country into a vortex of conflict, which no ordinary cycle will redeem.

Finally, and this point is one to which Professor Balkin does refer, we live in an unprecedented media environment. Of course, there's nothing new about a polarized, partisan press. But the power of Fox News and social media to create an alternative reality in the minds of viewers is among the scariest aspects of contemporary life.[24] Balkin's entire theory is based on the idea that as the problems facing the country change, voters may adjust to new types of leaders capable of confronting new challenges. But a shockingly high percentage of the electorate is no longer exposed to those new challenges. It is instead fed a diet of lies in which COVID-19 is a hoax, climate change an invention, Russia didn't meddle in the 2016 election, etc. How can we expect the political cycles that have marked our long history to continue to keep turning when the distribution of news is poisoned with what have come to be known as "alternative facts"? The fact that in past eras the truth has perhaps prevailed tells us little about what will happen when such powerful forces are eager to ensure it does not.

Ultimately, the description of political cycles, no matter how astutely observed and compellingly presented, cannot substitute for a more granular analysis of where we can find, in current conditions, the resources to pull back from the constitutional abyss. If the nation is fortunate on November 3rd, and Biden prevails, it will be incumbent on the new President and his capable team, not merely to control the pandemic and build the economy back better, but to discern how to knit together a country confronting unprecedented demographic change, diminished prospects for growth, and media enterprises for whom truth is subservient to power and glory. Should President Trump be re-elected, Professor Balkin offers few persuasive words explaining why more than 200 years of cycles won't spiral into chaos, autocracy, or worse. May the Force be with us.

24 For a particularly powerful demonstration of the influence of right-wing media, see Yochai Benkler et al., Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics 7, 14 (2018).

Introduction to Symposium Articles

On March 19, 2021, the *Northeastern University Law Review* co-hosted a symposium, titled *The Many Faces of Health*, alongside the Northeastern University School of Law's Center for Public Interest Advocacy and Collaboration; Center for Health Law and Policy; and Center for Law, Innovation, and Creativity, to discuss the diversity of public health and law. An ensemble of panelists, impressive both for their contributions to the field and for the diversity of their opinions, participated in the symposium in four separate panels.

Keynote speaker Daniel E. Dawes began the day by discussing how social and political factors unduly influence our public health systems. He provided insight and opinion on the various steps that we must take to get to an equitable and just system of public health. Panel discussions covered the topics of balancing intellectual property rights with access to medication, how the COVID-19 global pandemic has affected the labor market and how we can achieve a Worker's Bill of Rights for individuals whose jobs are essential but have been deemed "non-essential" or have not been adequately protected during the pandemic, how racism is a public health crisis and what policies and steps we need to address racism's lasting effects, and how the COVID-19 pandemic has affected the prison population and the need for activism and policy changes in these areas from an interdisciplinary lens.

The *Northeastern University Law Review* is honored to publish the following two papers which were drafted in response to these discussed topics. We would like to express our sincere appreciation for our co-hosts Shannon Al-Wakeel, Lucy Williams, and the Center for Public Interest Advocacy and Collaboration; Jennifer Huer, Kelsea Davis, and the Center for Health Law and Policy; as well as Toni Morgan and the Center for Law, Innovation, and Creativity for their tremendous help and support. We would also like to thank all the people who have played a behind the scenes role, including the *Northeastern University Law Review* Editorial Board and staff, and Northeastern University School of Law.

Jasmine Brown & Ariana Imbrescia
Symposium Editors
Northeastern University Law Review

HAMSTRINGING THE HEALTH TECHNOLOGY RESPONSE TO COVID-19: THE BURDENS OF EXCLUSIVITY AND POLICY SOLUTIONS

*By Brook K. Baker**

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ABSTRACT

The world was unprepared for COVID-19 despite other recent coronavirus outbreaks and despite multiple warnings from the World Health Organization (WHO) and others. Although there was an initial sharing of research among scientists and an unleashing of significant public, charitable, and private funding to develop, test, and expand manufacturing capacity of new COVID-19-related medicines, vaccines, and diagnostics, the status quo of exclusive rights ownership and commercial control by the multinational biopharmaceutical industry continues unabated. Existing intellectual property rules that allow private entities to maintain monopoly rights over the development, clinical testing, regulatory approval, pricing, supply, and distribution of essential medical products have not been altered. And the determination of rich countries to secure preferential and disproportionate access to proven and promising vaccines, medicines, diagnostics, and personal protective equipment remains unchanged. In place of open science and coordinated clinical trials, scientific rigor in regulatory assessment and broad regulatory approval, low-cost pricing and rational expansion of manufacturing capacity, and equitable global access to all needed COVID-19 health products, we have needlessly high prices, inadequate supplies, and nationalistic hoarding, especially, but not exclusively, by the Global North.

Fortunately, there are multiple initiatives and proposals to counteract exclusivities, commercial prerogatives, and rich countries' preferential access to existing and novel COVID-19 health technologies. These initiatives include more radical proposals to waive recognition and enforcement of COVID-19-related intellectual property rights (IPRs) at the global and national level during the pandemic and to extend the general least developed country transition period for enforcement of IPRs. Other proposals focus on both voluntary and compulsory mechanisms to override IPRs, openly license and facilitate technology transfer of coronavirus vaccines, medicines, and diagnostics. Several global partners have established an accelerator to speed the development and marketing of new COVID-19 tools and secure at least some supplies for low- and middle-income countries. Finally, regional cooperation initiatives have been established.

Although there have been multiple initiatives and proposals to overcome industry's exclusive rights and commercial prerogatives, these efforts have not resulted in the needed paradigm shift in global health such that life-saving and enhancing health products are viewed as global public goods rather than as ordinary consumer products. Similarly, rich countries' hegemonic hoarding of COVID-19 health products and inadequate global coordination mechanisms have left the imperative of equitable distribution

of COVID-19 health products disarrayed, with the risk that twice as many people will die from COVID-19 than if vaccines were to be shared globally. We can hope that this dystopian stasis will be overcome, but it will take far more activism from governments, institutions, and civil society to dislodge the current lethargic response and intellectual property and market fundamentalisms that leave our world fractured in responding to this modern-day plague. This global pandemic needs a global response now and as a proving ground for future threats.

INTRODUCTION

In most respects, the world was unprepared for the COVID-19 pandemic despite multiple warnings from scientists,[1] normative institutions like the World Health Organization (WHO),[2] and even opinion leaders like Bill Gates.[3] Not only was the world relatively underprepared for the pandemic risks of emerging infectious diseases generally, but more specifically, it was underprepared for a coronavirus pandemic despite earlier experiences with SARS-CoV and MERS-CoV.[4] Although the world did have brief flurries of coronavirus research, those minimal efforts dissipated as earlier threats proved to be relatively short-lived or minor.[5] Research that did occur was funded mainly by the U.S. National Institutes of Health (NIH), as the private sector was largely disengaged.[6] On the plus side, the WHO and others became increasingly aware of the need for heightened surveillance of emerging infectious disease threats, establishing the Global Outbreak Alert and Response Network (GOARN) in 2000,[7] strengthening International Health Regulations (IHR) in 2005,[8] jump-starting a Pandemic

1 *See*, *e.g.*, Betsy McKay & Phred Dvorak, *A Deadly Coronavirus Was Inevitable. Why Was No One Ready?*, WALL ST. J. (Aug. 13, 2020), https://www.wsj.com/articles/a-deadly-coronavirus-was-inevitable-why-was-no-one-ready-for-covid-11597325213.

2 WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2007 - A SAFER FUTURE: GLOBAL PUBLIC HEALTH SECURITY IN THE 21ST CENTURY 12–14 (2007).

3 Bill Gates, *The Next Epidemic Is Coming. Here's How We Can Make Sure We're Ready.*, GATESNOTES (Apr. 27, 2018), https://www.gatesnotes.com/health/shattuck-lecture.

4 Stanley Perlman, *Another Decade, Another Coronavirus*, 382 NEW ENG. J. MED. 760, 761 (2020); McKay & Dvorak, *supra* note 1.

5 Helen Branswell & Megan Thielking, *Funding and Flagging Interest Hurt Coronavirus Research, Leaving Crucial Knowledge Gaps*, STAT (Feb. 10, 2020), https://www.statnews.com/2020/02/10/fluctuating-funding-and-flagging-interest-hurt-coronavirus-research/.

6 Zain Rizvi, *Blind Spot – How the COVID-19 Outbreak Shows the Limits of Pharma's Monopoly Model*, PUB. CITIZEN (Feb. 19, 2020), https://www.citizen.org/article/blind-spot/.

7 WORLD HEALTH ORG., WHAT IS GOARN? (2020), https://extranet.who.int/goarn/sites/default/files/GOARN_one_pager_20200424.pdf.

8 WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS 1–2 (2d ed. 2005), https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=1EA9C1883850DC3F9119D785B4FF1F94?sequence=1.

> The purpose and scope of the IHR (2005) are "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade." The IHR (2005) contains a range of innovations, including: (a) a scope not limited to any specific disease or manner of transmission, but covering "illness or medical condition, irrespective of origin or source, that presents or could present significant

Influenza Preparedness Framework in 2011,[9] creating the Coalition for Epidemic Preparedness Innovation (CEPI) in 2017,[10] and establishing the Global Preparedness Monitoring Board (GPMB) in 2018.[11] Despite the GPMB's prescient warning in 2019 concerning the risks of a lethal respiratory pathogen, private and public sectors were caught flat-footed when the COVID-19 pandemic rapidly circled the globe.[12]

Since SARS-CoV-2 exploded into the world's consciousness in early 2020, there have been lofty promises of global solidarity and collaboration, especially with respect to access to existing, repurposed, and novel health

> harm to humans"; (b) State Party obligations to develop certain minimum core public health capacities; (c) obligations on States Parties to notify WHO of events that may constitute a public health emergency of international concern according to defined criteria; (d) provisions authorizing WHO to take into consideration unofficial reports of public health events and to obtain verification from States Parties concerning such events; (e) procedures for the determination by the Director-General of a "public health emergency of international concern" and issuance of corresponding temporary recommendations, after taking into account the views of an Emergency Committee; (f) protection of the human rights of persons and travellers; and (g) the establishment of National IHR Focal Points and WHO IHR Contact Points for urgent communications between States Parties and WHO.

Id.

9 World Health Org., Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits 1 (2011), https://apps.who.int/iris/bitstream/handle/10665/44796/9789241503082_eng.pdf?sequence=1.

10 *Creating a World in Which Epidemics Are No Longer a Threat to Humanity*, CEPI, https://cepi.net/about/whyweexist/ (last visited Oct. 17, 2020).

11 Global Preparedness Monitoring Bd., A World at Risk: Annual Report on Global Preparedness for Health Emergencies 4 (2019), https://apps.who.int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf.

12 In its prescient first report in 2019, the GPMB predicted the world's gross unpreparedness for an infectious respiratory disease like SARS-CoV-2:

> A rapidly spreading pandemic due to a lethal respiratory pathogen *(whether naturally emergent or accidentally or deliberately released)* poses additional preparedness requirements. Donors and multilateral institutions must ensure adequate investment in development of innovative vaccines and therapeutics, surge manufacturing capacity, broad-spectrum antivirals and appropriate non-pharmaceutical interventions. All countries must develop a system for immediately sharing genome sequences of any new pathogen for public health purposes along with the means to share limited medical countermeasures across countries.

Id. at 30; *see Editorial: We Were Caught Flat-Footed by COVID-19. How Can We Do Better?*, L.A. Times (Apr. 12, 2020), https://www.latimes.com/opinion/story/2020-04-12/covid-19-planning-for-the-future.

technologies. The United Nations (UN) General Assembly has twice emphasized that equitable access to COVID-19 related health products is a global priority. The first General Assembly resolution requested the Secretary-General "to identify and recommend options, including approaches to rapidly scaling manufacturing and strengthening supply chains that promote and ensure fair, transparent, equitable, efficient and timely access to and distribution" of health technologies to make them available to all those in need and more particularly in developing nations.[13] UN member states and other stakeholders were also urged to quickly take steps to "prevent, within their respective legal frameworks, speculation and undue stockpiling that may hinder access to safe, effective and affordable essential medicines, vaccines, personal protective equipment, and medical equipment as may be required to effectively address COVID-19."[14] The second resolution, adopted on September 11, 2020, "*[u]rges* Member States to enable all countries to have unhindered, timely access to quality, safe, efficacious and affordable diagnosis, therapeutics, medicines and vaccines, and essential health technologies, and their components, as well as equipment, for the COVID-19 response."[15]

In between these two resolutions, the World Health Assembly adopted a similar resolution recognizing the need for "the universal, timely and equitable access to, and fair distribution of, all quality, safe, efficacious and affordable essential health technologies and products, including their components and precursors, that are required in the response to the COVID-19 pandemic as a global priority."[16] The resolution further called for "urgent removal of unjustified obstacles" to the universal, timely, and equitable access to and fair distribution of health technologies.[17] Speaking in support of the resolution, several global leaders, UN Secretary-General António Guterres, President Xi Jinping of China, President Emmanuel Macron of France, and President Moon Jae-in of South Korea, stated that COVID-19 health products should be treated as "global public goods" available to all in need.[18] Others have critiqued the resolution for its lack of concrete action steps and its failure to support full use of flexibilities permitted under the World Trade Organization (WTO) Agreement on

13 G.A. Res. 74/274, ¶ 2 (Apr. 21, 2020), https://undocs.org/en/A/RES/74/274.

14 *Id.*

15 G.A. Res. 74/306, ¶ 12 (Sept. 11, 2020), https://undocs.org/en/A/RES/74/306.

16 World Health Assembly [WHA], *COVID-19 Response,* WHA Res. 73.1, ¶ 4 (May 19, 2020), https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf.

17 *Id.*

18 *WHO: Leaders Call COVID-19 Vaccines a "Global Public Good,"* THIRD WORLD NETWORK (May 20, 2020), https://twn.my/title2/health.info/2020/hi200511.htm.

Trade-Related Aspects of Intellectual Property Rights (TRIPS).[19]

Sadly, solidarity in rhetoric has not translated into practice. Perhaps the most disappointing aspect of the COVID-19 response to date is the business-as-usual approach that has governments pouring money into biomedical research and product development with no strings attached, the biopharmaceutical industry solidifying its ownership rights with intellectual property (IP) and data/information exclusivities while maintaining rigid control over both supply and price, and rich country governments nationalistically racing to the front of the queue to secure prioritized access to medicines, diagnostics, and promising vaccine candidates rather than acting equitably to ensure global access.[20] This paper will start by delineating the impediments imposed on a more effective response to the pandemic by the perpetuation of IP and market fundamentalism across the entire life-cycle of medicines from benchtop to bedside.

Despite this false start, in Part I, this paper argues that the COVID-19 pandemic gives the world a unique opportunity to recalibrate its biopharmaceutical eco-system to encourage: (1) open science for research and product development; (2) coordinated, collaborative, and comparative clinical trials; (3) regulatory harmonization, speed, and rigor; (4) expedited clinical guidance; (5) suspension of IP, data, and information exclusivities; (6) deployment of voluntary and compulsory mechanisms to accelerate technology transfer to expand biomedical manufacturing capacity; (7) guarantees of low-cost production and low-profit sale of pharmaceuticals and diagnostics and subsidization at point of use; and (8) truly equitable distribution and access for all populations globally. Part II describes a number of initiatives designed to implement some of the alternative approaches detailed above, but many of them are struggling to find traction because of opposition from industry and rich country governments. Accordingly, it is incumbent upon civil society, countries at risk of being left behind, global health institutions, and progressive health policymakers to make common cause to disrupt the status quo and to pave a path to a more efficient, equitable, and urgent response to the COVID-19 pandemic and to set the stage for even better responses to future global pandemics.

19 Nimalya Syam et al., *The 73rd World Health Assembly and Resolution on COVID-19: Quest of Global Solidarity for Equitable Access to Health Products*, South Centre, May 2020, at 9, https://www.southcentre.int/wp-content/uploads/2020/05/PB-78.pdf.

20 Els Torreele, *Business-as-Usual Will Not Deliver the COVID-19 Vaccines We Need*, 63 Development 191 (2020).

I. THE BURDENS OF EXCLUSIVITY AND POLICY ALTERNATIVES

A. *Closed Science with Siloes and Secrecy vs. Collaborative and Open Science*

The initial phase of collaboration between scientists in sharing the SARS-CoV-2 genome and other early scientific knowledge became compartmentalized once knowledge showed commercial potential. Instead of massive public investments resulting in open science, free sharing of knowledge, findings, and data, and coordination and collaboration between scientists and product developers to optimize innovation and discovery, the innovation ecology reverted to the status quo.[21] Thus, the world experienced a return to siloed, secretive research, premature touting of preliminary findings, a wild-west race for first discovery, and enclosure of knowledge with patents, data exclusivities, trade secrets, and informational dark holes.[22]

Chinese and Australian scientists shared the genetic code of COVID-19 within weeks of the Wuhan outbreak,[23] which triggered an initial scientific spring of data sharing,[24] open-source publishing,[25] and early open science. At the same time that early research findings were being shared, the fundamental aspirations of open biomedical science—collaboration to speed the discovery of the best prevention, treatment, and

21 *Id.* at 7–8. For a different critique focusing on inefficient data sharing, see generally J. Homolak et al., *Preliminary Analysis of COVID-19 Academic Information Patterns: A Call for Open Science in the Times of Closed Borders*, 124 SCIENTOMETRICS 2687 (2020).

22 *See* Torreele, *supra* note 20, at 2, 4; *see infra* notes 29, 31–32 and accompanying text.

23 Jon Cohen, *Chinese Researchers Reveal Draft Genome of Virus Implicated in Wuhan Pneumonia Outbreak*, SCIENCE (Jan. 11, 2020), https://www.sciencemag.org/news/2020/01/chinese-researchers-reveal-draft-genome-virus-implicated-wuhan-pneumonia-outbreak; Roujian Lu et al., *Genomic Characterisation and Epidemiology of 2019 Novel Coronavirus: Implications for Virus Origins and Receptor Binding*, 395 LANCET 565, 565 (2020).

24 Ian Le Guillou, *Covid-19: How Unprecedented Data Sharing Has Led to Faster-than-Ever Outbreak Research*, HORIZON (Mar. 23, 2020), https://horizon-magazine.eu/article/covid-19-how-unprecedented-data-sharing-has-led-faster-ever-outbreak-research.html.

25 *See* Cohen, *supra* note 23; Matt Apuzzo & David D. Kirkpatrick, *Covid-19 Changed How the World Does Science, Together*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/01/world/europe/coronavirus-science-research-cooperation.html. For the United States's response to open-source publishing, see Virginia Barbour, *Scientific Publishing Has Opened Up During the Coronavirus Pandemic. It Won't Be Easy to Keep It That Way*, CONVERSATION (July 27, 2020), https://theconversation.com/science-publishing-has-opened-up-during-the-coronavirus-pandemic-it-wont-be-easy-to-keep-it-that-way-142984; Olatz Arrizabalaga et al., *Open Access of COVID-19-Related Publications in the First Quarter of 2020: A Preliminary Study Based in PubMed*, F1000RESEARCH (Aug. 12, 2020), https://f1000researchdata.s3.amazonaws.com/manuscripts/28399/2bdb944d-aaba-4ae9-aa04-1f1c067c25de_24136_-_olatz_arrizabalaga_v2.pdf.

cure options—were repeatedly espoused.[26] The resulting initial scientific sharing allowed translational researchers to quickly develop diagnostic tests, identify therapeutic and vaccine targets, map COVID-19 proteins, and use advanced computation methods to screen existing and new compounds for use against COVID-19.[27] One promising example of such cooperation was the Coronavirus Immunotherapy Consortium established at La Jolla Institute for Immunology.[28]

On the other hand, the flurry of non-peer-reviewed studies created a cacophony of confusing results that were often exaggerated by authors and over-hyped and misreported in the press.[29] Moreover, as soon as early scientific sharing produced commercially valuable information, the imperative to share was fractured. Researchers embedded in academic institutes and spin-off companies turned to commercial alliances with major pharmaceutical companies, like Oxford with AstraZeneca.[30] Those researchers and start-

26 Henry Chesbrough, *To Recover Faster From Covid-19, Open Up: Managerial Implications from an Open Innovation Perspective*, 88 Indust. Mktg. Mgmt. 410, 412–13 (2020); Press Release, Wellcome, Sharing Research Data and Findings Relevant to Novel Coronavirus (COVID-19) Outbreak (Jan. 31, 2020), https://wellcome.org/coronavirus-covid-19/open-data; Jonathan Alan King, *Protecting Public Health Requires COVID-19 Treatments to Be Patent-Free*, Truthout (May 19, 2020), https://truthout.org/articles/protecting-public-health-requires-covid-19-treatments-to-be-patent-free/; Christopher J. Morten et al., *To Help Develop the Safest, Most Effective Coronavirus Tests, Treatments, and Vaccines, Ensure Public Access to Clinical Research Data*, Health Affs. Blog (Mar. 26, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200326.869114/.

27 *See* Edwin G. Tse et al., *Open Science Approaches to COVID-19*, F1000Research (Aug. 25, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7590891.1/pdf/f1000research-9-28785.pdf; Mark Zastrow, *Open Science Takes On the Coronavirus Pandemic*, 581 Nature 109 (2020); Org. for Econ. Co-operation & Dev., Why Open Science Is Critical to Combatting COVID-19 (May 12, 2020), https://read.oecd-ilibrary.org/view/?ref=129_129916-31pgjnl6cb&title=Why-open-science-is-critical-to-combatting-COVID-19 (documenting progress to date and future steps needed); *Why Share Scientific Data During a Pandemic?*, UK Rsch. & Innovation (May 15, 2020), https://coronavirusexplained.ukri.org/en/article/vdt0011/.

28 *La Jolla Institute for Immunology to Host Coronavirus Immunotherapy Clearinghouse*, La Jolla Inst. for Immunology, https://www.lji.org/news-events/news/post/la-jolla-institute-for-immunology-to-host-coronavirus-immunotherapy-clearinghouse/ (last visited Mar. 21, 2021).

29 Lonni Besançon et al., Open Science Saves Lives: Lessons from the COVID-19 Pandemic 11 (Oct. 30, 2020) (unpublished preprint), https://www.biorxiv.org/content/10.1101/2020.08.13.249847v2.full.pdf; Homolak, *supra* note 21, at 2677–701.

30 Christopher Garrison, Meds. L. & Pol'y, How the "Oxford" Covid-19 Vaccine Became the "AstraZeneca" Covid-19 Vaccine 7–8 (2020), https://medicineslawandpolicy.org/wp-content/uploads/2020/10/How-the-Oxford-Covid-19-Vaccine-became-the-AstraZeneca-Covid-19-Vaccine-Final.pdf; Jenny Strasburg & Stu Woo, *Oxford Discovered Covid Vaccine, Then Scholars Clashed Over Money*, Wall St. J. (Oct. 21, 2020), https://www.wsj.com/articles/oxford-developed-covid-vaccine-then-

ups, and certainly Big Pharma players, pivoted to the status quo of secrecy,[31] the pursuit of commercial advantage,[32] and the locking up of valuable research findings, data, chemical entities, recipes, biological resources, and know-how in an elaborate web of IP protections, including patents[33] and trade secrets.[34] For example, 3M and others have hundreds of patents on N95 masks,[35] and trade secret protections confound the effort to mass-produce equivalent masks.[36] Gilead reportedly has dozens of patents on its COVID-19 antiviral, remdesivir, many of which fail to acknowledge the role of U.S. federal funding of their research and development (R&D) efforts.[37] Similarly, Regeneron, relying on funding support from the Biometrical Advanced Research and Development Authority, has filed a patent on its

scholars-clashed-over-money-11603300412.

31 *See* Rob Copeland, *The Secret Group of Scientists and Billionaires Pushing a Manhattan Project for Covid-19*, WALL ST. J. (Apr. 27, 2020), https://www.wsj.com/articles/the-secret-group-of-scientists-and-billionaires-pushing-trump-on-a-covid-19-plan-11587998993.

32 *See* Kamran Abbasi, *Covid-19: Suppression of Science*, 371 BRIT. MED. J. 307 (2020).

33 Aude S. Peden & Antoinette F. Konski, *Coronavirus Innovation Guideposts on the Eve of the COVID-19 Pandemic*, NAT'L L. REV. (July 30, 2020), https://www.natlawreview.com/article/coronavirus-innovation-guideposts-eve-covid-19-pandemic.

34 Access to trade-secret-protected information, know-how, and biologic resources is essential to the technology transfer needed to allow other manufacturers to make vaccines and biologic medicines, including monoclonal antibodies. W. Nicholson Price II et al., *Knowledge Transfer for Largescale Vaccine Manufacturing*, 369 SCIENCE 912, 912 (2020) (arguing that "massive, rapid production" of adequate quantities of COVID-19 vaccines "will require firms to share know-how not just about what to make but how to make it"); CHRISTOPHER GARRISON, MEDS. LAW & POL'Y, WHAT IS THE 'KNOW-HOW GAP' PROBLEM AND HOW MIGHT IT IMPACT SCALING UP PRODUCTION OF COVID-19 RELATED DIAGNOSTICS, THERAPIES AND VACCINES? 8 (2020), https://medicineslawandpolicy.org/wp-content/uploads/2020/12/The-Know-how-gap-problem-Medicines-Law-Policy.pdf; David S. Levine, *COVID-19 Trade Secrets and Information Access: An Overview*, INFOJUSTICE (July 10, 2020), http://infojustice.org/archives/42493; Yanif Heled, *The Case for Disclosure of Biologics Manufacturing Information*, 47 J.L. MED. & ETHICS 54 (2019).

35 Susan Decker & Christopher Yasieko, *World War II-Style Mobilization Order May Carry Risks*, BLOOMBERG (Mar. 23, 2020), https://www.bloomberg.com/news/articles/2020-03-20/world-war-ii-style-production-may-carry-legal-risks-for-patriots (reporting that "[t]here are hundreds of patents on things related to N95 respirators . . . [owned by] the U.S. government, 3M Co., paper and health-care companies," and others).

36 *See* Jessica Contrera, *The N95 Shortage America Can't Seem to Fix*, WASH. POST (Sept. 21, 2020), https://www.washingtonpost.com/graphics/2020/local/news/n-95-shortage-covid/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most.

37 KATHRYN ARDIZZONE, ROLE OF THE FEDERAL GOVERNMENT IN THE DEVELOPMENT OF REMDESIVIR 6–8 (2020), https://www.keionline.org/wp-content/uploads/KEI-Briefing-Note-2020_1GS-5734-Remdesivir.pdf.

promising monoclonal antibody treatment,[38] as has Moderna, jointly with the NIH, on its mRNA vaccine candidate.[39] Multiple other novel and repurposed medicines are now likely to be surrounded by patent thickets, though many such patent applications have not yet been published.

A puzzling piece of this rush to enclose the COVID-19 research commons is the laissez-faire role played by major public and private investors that have invested billions of dollars in COVID-19 research, product development, clinical trials, and manufacturing but have imposed almost no strings on the money they committed to de-risk industry's parallel efforts. With the power of the purse, public funders, especially the U.S., have squandered their leverage, imposing few, if any, restrictions on their grantees and licensees who remain free to exploit their IP monopolies.[40] Other investors, like the Bill and Melinda Gates Foundation and the Coalition of Epidemic Preparedness Initiative (CEPI), have adopted some equitable access safeguards but appear reluctant to use them so as to challenge IP prerogatives.[41] Government

38 Luis Gil Abinader, Regeneron Failed to Disclose BARDA Funding in Their REGN-COV2 Patent 1 (2020), https://www.keionline.org/wp-content/uploads/rn-2020-4.pdf.

39 Zain Rizvi, Public Citizen, The NIH Vaccine 4 (2020), https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/NIH-vaccine-final.pdf; Selam Gebrekidan & Matt Apuzzo, *Rich Countries Signed Away a Chance to Vaccinate the World*, N.Y. Times (Mar. 25, 2021), https://www.nytimes.com/2021/03/21/world/vaccine-patents-us-eu.html.

40 Rizvi, *supra* note 39 at 4; Rizvi, *supra* note 6, at 13; Gebrekidan & Apuzzo, *supra* note 39; James Love, *Three Areas in Section 202 of the Bayh-Dole Act that Require Action to Ensure Sufficient Rights in Patents on Coronavirus Relevant Inventions*, Knowledge Ecology Int'l (Mar. 14, 2020), https://www.keionline.org/32364; Kathryn Ardizzone & James Love, Other Transaction Agreements: Government Contracts that May Eliminate Protections for the Public on Pricing, Access and Competition, Including in Connection with COVID-19 *passim* (2020), https://www.keionline.org/wp-content/uploads/KEI-Briefing-OTA-29june2020.pdf; *see* Luis Gil Abinader, *Foundational mRNA Patents Are Subject to the Bayh-Dole Act Provisions*, Knowledge Ecology Int'l (Nov. 30, 2020), https://www.keionline.org/34733.

41 Rohit Malpani et al., *Corporate Charity – Is the Gates Foundation Addressing or Reinforcing Systemic Issues Raised by COVID-19?*, Health Pol'y Watch (Oct. 31, 2020), https://healthpolicy-watch.news/gates-foundation-address-systemic-covid-19/ (analyzing the Gates Foundation's pro-IP policies); Zain Rizvi, Public Citizen, COVAX's Choices 8–24 (Nov. 16, 2020), https://www.citizen.org/wp-content/uploads/Covax-choices-embargoed-Nov-16.pdf?eType=EmailBlastContent&eId=fb342c47-08be-4f8c-9bc6-9812e6767fb1 (analyzing several CEPI contracts with vaccine manufacturers with respect to their equitable access provisions governing transparency about production supply, pricing, sales, and cost; early and equal availability in low- and middle-income countries; reasonable pricing; contract manufacturing, and equitable licensing in certain circumstances); Coalition for Epidemic Preparedness Innovations, Enabling Equitable Access to COVID-19 Vaccines: Summary of Equitable Access Provisions in CEPI's COVID-19 Vaccine Development Agreements *passim* (2021), https://

and other funders could have demanded transparency, collaboration, and sharing; they could have demanded commitments to open licensing and deep technology transfer; they could have imposed obligations to ensure early market entry and equitable distribution to all populations instead of national favorites. Alas, these golden opportunities were wasted, leaving scientific discovery, prioritization, and commercialization to the vagaries of commercial advantage and avarice.

Solution: There should be incentives for open-science research and collaboration, including by pooling and open-source publication of research findings and data. There should be much greater funding of biopharmaceutical R&D by governments, with a greater focus on neglected and emerging diseases. Government funding should come with strings attached with respect to maximizing transparency, minimizing exclusive rights, prioritizing open licensing and technology transfer, and requiring a commitment to equitable access.

B. *Clinical Trial Chaos vs. Clinical Trial Coordination, Comparative Studies, and Inclusion of Key Populations*

The demise of open science was followed by a helter-skelter of underpowered and uncoordinated clinical trials[42] designed to burnish scientific reputations and to secure individual commercial advantage rather than to develop robust, reproducible evidence of clinical safety and efficacy and to compare candidate products and combination products against each other to discover the best detection, prophylactic, and treatment outcomes.[43] Although there have been some efforts toward better planning and coordination of trials and proposals for data sharing, including the WHO Solidarity Trial,[44] the U.K. Recovery trial,[45] and the U.S. ACTIV project,[46] by and large, there has been a huge wastage of research potential

cepi.net/wp-content/uploads/2020/12/Enabling-equitable-access-to-COVID19-vaccines-v4-18Mar2021.pdf (detailing CEPI's assessment of its contractual equitable access provisions).

42 *See generally* Rafael Da-Re & Ignacio Malillo-Fernandez, *Waste in COVID-19 Clinical Trials in Western Europe*, 81 EUR. J. INTERNAL MED. 91 (July 7, 2020).

43 Huseyin Naci et al., *Producing and Using Timely Comparative Evidence on Drugs: Lessons from Clinical Trials for COVID-19*, 371 BRIT. MED. J. 279, 279–81 (2020).

44 *"Solidarity" Clinical Trial for COVID-19 Treatments*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/solidarity-clinical-trial-for-covid-19-treatments (last visited Oct. 23, 2020).

45 *This National Clinical Trial Aims to Identify Treatments that May Be Beneficial for People Hospitalised with Suspected or Confirmed COVID-19*, RECOVERY, https://www.recoverytrial.net (last visited Oct. 23, 2020).

46 Lawrence Corey et al., *A Strategic Approach to COVID-19 Vaccine R&D*, 368 SCIENCE 948 (2020); Francis S. Collines & Paul Stoffels, *Accelerating COVID-19 Therapeutic Interventions*

that confounds efforts to identify and prioritize the best biopharmaceutical and diagnostic interventions[47] and to simplify product adaption and further improvements. This wastage is particularly egregious with respect to clinical trial research relating to COVID-19 vaccines, where the lack of comparative standards for assessment[48] and the lack of comparative trials undermines efforts to identify the best vaccine candidates.[49] The lack-of-coordination trend is apparent in the race for monoclonal antibody treatments.[50] The chaos in uncoordinated and underpowered COVID-19 studies reinforces the need for research collaborations, pooling of research findings, and more direct comparisons between competing products so that the best clinical options can be identified.[51]

Paradoxically, some of the populations most at risk of COVID-19 have been disproportionately under-represented in clinical trials. Historic concerns about under-representation of diverse populations in clinical trials have extended to COVID-19, where trials have under-enrolled participants of color, older people, and pregnant women,[52] though some trials, for example,

and Vaccines, 323 JAMA 2455, 2455 (2020).

47 Krishna Pundi et al., *Characteristics and Strength of Evidence of COVID-19 Studies Registered on ClinicalTrials.gov*, 180 JAMA Internal Med. 1398 (2020); Paul P. Glasziou et al., *Waste and Harm in Covid-19 Research*, 369 Brit. Med. J. 312, 312 (2020); Matthew Herper & Erin Riglin, *Data Show Panic and Disorganization Dominate the Study of Covid-19 Drugs*, STAT (July 6, 2020), https://www.statnews.com/2020/07/06/data-show-panic-and-disorganization-dominate-the-study-of-covid-19-drugs/; *see generally* Philip Krause et al., *For the World Health Organization Solidarity Vaccines Trial Expert Group, COVID-19 Vaccine Trials Should Seek Worthwhile Efficacy*, 396 Lancet 741 (2020).

48 Jeremy Kahn, *Scientist to Wall Street: You Don't Really Understand How COVID Vaccine Tests Work*, Fortune (Aug. 24, 2020), https://fortune.com/2020/08/24/scientists-question-wall-street-vaccines-antibodies/.

49 Peter B. Bach, *We Can't Tackle the Pandemic Without Figuring Out Which Covid-19 Vaccines Work the Best*, STAT (Sept. 24, 2020), https://www.statnews.com/2020/09/24/big-trial-needed-determine-which-covid-19-vaccines-work-best/.

50 *See* Jon Cohen, *The Race Is On for Antibodies that Stop the New Coronavirus*, 368 Science 564, 564–66 (2020).

51 *See* Krause et al., *supra* note 47, at 741–43; Crystal M. North et al., *Improving Clinical Trial Enrollment — In the Covid-19 Era and Beyond*, 383 New Eng. J. Med. 1406 (2020); Eva Petkova et al., *Pooling Data from Individual Clinical Trials in the COVID-19 Era*, 324 JAMA 543 (2020).

52 Daniela B. Chastain et al., *Racial Disproportionality in COVID Clinical Trials*, 383 New Eng. J. Med. e59(1) (Aug. 27, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2021971; Hala T. Borno et. al., *COVID-19 Disparities: An Urgent Call for Race Reporting and Representation in Clinical Research*, 19 Contemp. Clinical Trials Commc'ns 10,0630 (Sept. 2020), https://www.sciencedirect.com/science/article/pii/S2451865420301149; Oliver Milman, *COVID-19: Lack of Diversity Threatens to Undermine Vaccine Trials, Experts Warn*, Guardian (Aug. 7, 2020), https://www.theguardian.com/world/2020/aug/07/coronavirus-diversity-vaccine-trial-moderna; Melanie M. Taylor

Moderna, recognized the importance of more proportionate representation and took steps to address it.[53] An equally vexed form of discrimination arises from the under-enrollment of low- and middle-income country populations in COVID-19 clinical trials to investigate clinical efficacy and safety in varied human populations with different disease burdens and differential health systems resources.[54]

Solution: Clinical trials should be better planned and coordinated both to detect comparative safety and efficacy and to weigh plausible combination regimens and should be inclusive to require participation by historically excluded or under-represented groups including women, pregnant people, people with disabilities, racial minorities, and people from low- and middle-income countries (LMICs).

C. *Reckless and Politicized Product Authorizations vs. Assurance of Product Safety, Efficacy, and Built-In Quality*

Commercial motivations have and continue to prompt companies to lobby for over-accelerated regulatory pathways, particularly emergency use authorizations and listings, conditional approvals, and the like.[55] Some of these efforts have also been advanced in response to political pressure from government leaders intent on seeming proactive and in charge rather than being guided by science.[56] Other, more behind-the-scenes regulatory

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et al., *Inclusion of Pregnant Women in COVID-19 Treatment Trials: A Review and Global Call to Action*, 9 LANCET GLOB. HEALTH e366, e366, e368 (2020); Ruth Farrell et al., *Pregnant Women in Trials of Covid-19: A Critical Time to Consider Ethical Frameworks of Inclusion in Clinical Trials*, 42 ETHICS & HUM. RSCH., July–Aug. 2020, at 17–19; Benjamin K.I. Helfand et al., *The Exclusion of Older Persons from Vaccine and Treatment Trials for Coronavirus Disease 2019—Missing the Target*, 180 JAMA INTERNAL MED. 1546–47 (2020).

53 Meg Tirrell & Leanne Miller, *Moderna Slows Coronavirus Vaccine Trial Enrollment to Ensure Minority Representation, CEO Says*, CNBC (Sept. 4, 2020), https://www.cnbc.com/2020/09/04/moderna-slows-coronavirus-vaccine-trial-t-to-ensure-minority-representation-ceo-says.html.

54 COVID-19 Clinical Research Coalition, *Global Coalition to Accelerate COVID-19 Clinical Research in Resource-Limited Settings*, 395 LANCET 1322, 1322–23 (2020); Maina Waruru, *Africa Lagging in COVID-19 Clinical Trials as Global Studies Cross 1000 Mark*, HEALTH POL'Y WATCH (Sept. 18, 2020), https://healthpolicy-watch.news/africa-lagging-in-covid-19-clinical-trials-as-global-studies-cross-1000-mark/.

55 *See* Caroline Chen, *FDA Repays Industry by Rushing Risky Drugs to Market*, PROPUBLICA (June 26, 2018), https://www.propublica.org/article/fda-repays-industry-by-rushing-risky-drugs-to-market; Priti Patnaik, *Regulatory Discoherence: The Case of Remdesivir*, GENEVA HEALTH FILES (Dec. 3, 2020), https://genevahealthfiles.wordpress.com/2020/12/03/regulatory-discoherence-the-case-of-remdesivir/.

56 *See, e.g.*, Lindsey R. Baden et al., *Editorial: The FDA and the Importance of Trust*, 383 NEW ENG. J. MED. e148(1) (Sept. 30, 2020); Michael S. Saag, *Misguided Use of Hydroxychloroquine for COVID-19: The Infusion of Politics Into Science*, 324 JAMA 2161 (2020).

pressures seem to be pure examples of cronyism.[57] To counteract this trend on the global front, the WHO has undertaken separate analyses of diagnostic tests and vaccines before allowing emergency use listings or prequalification.[58]

Over recent years, biopharmaceutical and diagnostics companies have put increasing pressure on regulators to expedite marketing approval and to relax rigorous assessment of safety and efficacy before granting market approval. Instead of awaiting longer-term safety and efficacy readouts, companies recommend greater reliance on post-marketing studies and clinical experience, thereby putting patients at increased risk for little proven benefit.[59] Similarly, in the COVID-19 era, we have seen lax and politicized emergency use authorizations for hydroxychloroquine and convalescent plasma, even in the absence of reliable clinical evidence.[60] Even more concerning, Russia and China are rolling out COVID-19 vaccines without any large-scale studies proving efficacy and safety,[61] and former President

57 *See, e.g.*, Jonathan Swan, *Trump Eyes New Unproven Coronavirus "Cure*," Axios (Aug. 16, 2020), https://www.axios.com/trump-covid-oleandrin-9896f570-6cd8-4919-af3a-65ebad113d41.html.

58 *See Regulation and Prequalification: Emergency Use Listing*, World Health Org., https://www.who.int/diagnostics_laboratory/EUL/en/ (last visited Oct. 23, 2020); *First Invitation to Manufacturers of Vaccines Against Covid-19 to Submit an Expression of Interest (EOI) for Evaluation by the WHO (Prequalification and/or EUL)*, World Health Org. (Oct. 1, 2020), https://www.who.int/news-room/articles-detail/1-EOI-Covid-19-Vaccines.

59 Jeremy Puthumana et al., *Clinical Trial Evidence Supporting FDA Approval of Drugs Granted Breakthrough Therapy Designation*, 320 JAMA 301, 302 (2018); Thomas Hwang et al., *Efficacy, Safety, and Regulatory Approval of Food and Drug Administration-Designated Breakthrough and Nonbreakthrough Cancer Medicines*, 36 J. Clinical Oncology 1805, 1809–11 (2018); Aaron S. Kesselheim et al., *Trends in Utilization of FDA Expedited Drug Development and Approval Programs, 1987-2014: Cohort Study*, 351 Brit. Med. J. 11, *passim* (2015) Peter Loftus, *Fast-Track Drug Approval, Designed for Emergencies, Is Now Routine*, Wall St. J. (July 5, 2019), https://www.wsj.com/articles/fast-track-drug-approval-designed-for-emergencies-is-now-routine-11562337924.

60 Joshua Sharfstein, *How the FDA Should Protect Its Integrity from Politics*, 585 Nature 161, 161 (2020); Elisabeth Mahase, *Covid-19: US Approves Emergency Use of Convalescent Plasma Despite Warnings over Lack of Evidence*, 370 Brit. Med. J. m3327 (2020); *see* Mike Z. Zhai et al., *Need for Transparency and Reliable Evidence in Emergency Use Authorizations for Coronavirus Disease 2019 (COVID-19) Therapies*, 180 JAMA Internal Med. 1145, 1145–46 (2020).

61 Eskild Petersen et al., *Advancing COVID-19 Vaccines – Avoiding Different Regulatory Standards for Different Vaccines and Need for Open and Transparent Data Sharing*, 98 Int'l. J. Infectious Diseases 501–02 (2020); Elisabeth Mahase, *Russia Approves Vaccine Before Large Scale Testing*, 370 Brit. Med. J. 216, 216 (2020); Eva Dou & Isabelle Khurshudyan, *China and Russia Are Ahead in the Global Coronavirus Vaccine Race, Bending Long-Standing Rules as They Go*, Wash. Post (Sept. 18, 2020), https://www.washingtonpost.com/world/asia_pacific/china-and-russia-are-ahead-in-the-global-coronavirus-vaccine-race-bending-long-standing-rules-as-they-go/2020/09/18/9bfd4438-e2d4-11ea-82d8-5e55d47e90ca_story.html.

Trump was reported to have pressured the FDA to expedite emergency use authorization of vaccines before the November 2020 election.[62] Relaxed standards and inadequate assessment of longer-term safety and efficacy violate regulatory responsibilities of countries and ethical duties of companies to only market medicines based on reliable scientific evidence.

Solution: It is appropriate to have accelerated regulatory pathways, but there is a baseline need to balance the benefits of the medical product against known and anticipated risks. The guidance for emergency use needs to be strengthened for riskier interventions used by larger populations, such as vaccines. There also needs to be rigorous post-marketing surveillance requirements.

D. *Commercial Prerogatives in Seeking Marketing Approval vs. Duty to Register Quickly and Broadly in All Countries*

Both originators and generic companies frequently postpone or neglect to register their medical products in poorer and smaller markets, leaving people in those countries without the medicines they need.[63] Part of the problem is capacity deficits, inefficiencies, corruption, pluralistic regulatory requirements, and other barriers to registration that countries must redress.[64] But an equal part of the problem is that commercial entities have no imperative to seek marketing approval by any other metric than a commercial advantage.[65] Even where originators do register their products, in some countries, they have monopoly control over the use of their regulatory data via what is known as "data exclusivity."[66] This exclusivity and its related regulatory exclusivity, patent-registration linkage, can prevent regulatory approval of generic and bio-similar medicines and vaccines that could otherwise rely upon or reference the originator's regulatory data or the fact of prior registration.[67]

"Regrettably, states have no viable mechanism [under existing

62 *See* Owen Dyer, *Covid-19: Pharma Companies Promise Not to Bow to Political Pressure to Rush Vaccine Production*, 370 BRIT. MED. J. m3512 (2020).

63 SUZANNE HILL & KENT JOHNSON, EMERGING CHALLENGES AND OPPORTUNITIES IN DRUG REGISTRATION AND REGULATION IN DEVELOPING COUNTRIES 9, 42 (2004); Brook K. Baker, Registration Related Issues in Voluntary Licenses 6 (May 29, 2018) (unpublished manuscript) (on file with the author) [hereinafter Baker, Registration Related Issues].

64 Baker, Registration Related Issues, *supra* note 63, at 6, 9–11.

65 *Id.* at 6–7.

66 *See* Srividhya Ragavan, *Data Exclusivity: A Tool to Maintain Market Monopoly*, 8 JINDAL GLOB. L. REV. 241, 241 (2017).

67 Brook K. Baker, *Ending Drug Registration Apartheid: Taming Data Exclusivity and Patent/Registration Linkage*, 34 AM. J.L. & MED. 303, 306–07 (2008) [hereinafter Baker, *Ending Drug Registration Apartheid*].

law] to force" an originator or a generic licensee to enter their market.[68] Moreover, where a comparator originator product has not yet been registered, registration of a generic equivalent is significantly harder,[69] meaning that the generic licensee might have to conduct costly, time-consuming, and potentially unethical repeat clinical trials to gain the data needed for marketing approval. The most immediate work-around would be for countries to adopt registration rules allowing them to rely on the fact of registration elsewhere to register a generic product domestically.[70] Comparable efforts could speed up WHO prequalification[71] of COVID-19 medicines, vaccines, and diagnostics and make better and broader use of WHO Collaborative Registration procedures to accelerate national registration or emergency use authorization efforts.[72] Efforts to harmonize regulatory submissions, procedures, and standards on a regional level will also help, like the effort at regulatory harmonization underway within the African Union, which has even greater urgency now in the context of the COVID-19 pandemic.[73]

Solution: The risk of needlessly delayed registration of COVID-19 health technologies is terrifying. Efforts to increase reliance on, recognition of, and reference to trustworthy regulatory decisions in other countries and WHO prequalification and emergency use listings need to be intensified. Policymakers need to pursue contracting and other rules that require both originator and generic companies to register their COVID-19 health products broadly to ensure supply in all countries.

68 Brook K. Baker, *Campaigning for Both Innovation and Equitable Access to COVID-19 Medicines*, *in* COVID-19, Human Rights, and What's Next (Morten Kjaerum et al. eds., forthcoming 2021) (manuscript at 18–19) (on file with author).

69 *See* Catherine Tomlinson, *Breakthrough Hepatitis C Medicines Remain in Regulatory Limbo*, Spotlight (Aug. 4, 2020), https://www.spotlightnsp.co.za/2020/08/04/breakthrough-hepatitis-c-medicines-remain-in-regulatory-limbo/.

70 Nat'l Academies of Sciences, Engineering, & Medicine, Regulating Medicines in a Globalized World: The Need for Increased Reliance Among Regulators 2, 11 (2020); World Health Org. [WHO], *Good Reliance Practices in Regulatory Decision-Making for Medical Products: High-Level Principles and Considerations* 9–10, 30, (World Health Org., Working Doc. No. QAS/20.851, 2020), https://www.who.int/medicines/areas/quality_safety/quality_assurance/QAS20_851_Rev_1_Good_Reliance_Practices.pdf?ua=1.

71 *See Prequalification*, World Health Org., https://www.who.int/medicines/regulation/prequalification/en/ (last visited Oct. 23, 2020).

72 *See Collaborative Procedure for Accelerated Registration*, World Health Org., https://extranet.who.int/prequal/content/collaborative-procedure-accelerated-registration (last visited Oct. 23, 2020).

73 Sara Jerving, *African Union Needs More Country Support to Launch the African Medicines Agency*, Devex (July 7, 2020), https://www.devex.com/news/african-union-needs-more-country-support-to-launch-the-african-medicines-agency-97624.

E. *Trial and Error vs. Informed Clinical Guidance*

The initial stages of treating COVID-19 required clinicians to conduct trial disease management based largely on hype from commercial researchers and anecdotal evidence from fellow clinicians and without the benefit of informed clinical guidance.[74] Reliance on non-peer-reviewed studies and social media for rumors of effective treatment must now be met with faster clinical guidance based on sound clinical assessment that remains open to revision based on rapidly accumulating medical knowledge.[75]

Solution: The WHO, in particular, needs to expedite its guidance while still maintaining scientific rigor, fully admitting where evidence is weak or contested, but nonetheless giving signals to the market and to patients and clinicians on detection, treatment, and prevention. A positive example of WHO's potential to issue treatment guidelines more quickly was its release of guidance on the use of dexamethasone and other corticosteroids for critically ill COVID-19 patients.[76] For WHO's global guidance to be actionable, countries will also have to move with increased speed to adopt guidance at the national level.

F. *Exclusive Rights, High Prices, and Limited Supply vs. Open Licensing and Full Technology Transfer, Low Prices, and Expanded Supply*

Patent tickets, data exclusivities, and trade secret protections enclose the COVID-19 innovation commons and lead to higher prices and false scarcity. As previously discussed, both major transnational biopharmaceutical companies and start-ups have raced to the patent office and locked up crucial know-how and biologic resources in trade-secret vaults. Having gained control of the "geese that lay the golden eggs," IP rightsholders thereafter entered into lucrative acquisition,[77] partnership,[78]

74 *See* Tara Vijayan et al., *Trusting Evidence over Anecdote: Clinical Decision Making in the Era of Covid-19*, BMJ OP. (July 23, 2020), https://blogs.bmj.com/bmj/2020/07/23/trusting-evidence-over-anecdote-clinical-decision-making-in-the-era-of-covid-19/.

75 *See* Robert M. Califf et al., *Weighing the Benefits of Proliferating Observational Assessments: Observational Cacophony, Randomize Harmony*, 324 JAMA 625, 625–26 (2020).

76 *See generally* WORLD HEALTH ORG., CORTICOSTEROIDS FOR COVID-19 (2020).

77 *See, e.g.*, Nick Paul Taylor, *Merck Inks $425M OncoImmune Buyout to Bag COVID-19 Drug*, FIERCE BIOTECH (Nov. 23, 2020), https://www.fiercebiotech.com/biotech/merck-inks-425m-oncoimmune-buyout-to-bag-covid-19-drug.

78 *See, e.g.*, Joseph Walker, *Regeneron Enlists Swiss Rival Roche to Help Make Covid-19 Drug*, WALL ST. J. (Aug. 19, 2020), https://www.wsj.com/articles/regeneron-enlists-swiss-rival-roche-to-help-make-covid-19-drug-11597813202; Fraiser Kansteiner, *AstraZeneca, Lilly, GSK and More Will Share COVID Antibody Secrets to Speed Manufacturing Scale-Up*, FIERCE PHARMA (July 24, 2020), https://www.fiercepharma.com/manufacturing/az-lilly-amgen-and-more-score-justice-department-nod-for-monoclonal-antibody-scale-

manufacturing,[79] and distribution agreements[80] that maintain tight control over manufacturing and artificially limit supply that could meet the needs of the entire global population.[81] The race to the finish line by bigger players risks leaving many promising products short on capital and without paths to commercialization, meaning the COVID-19 response will be weaker than it should be. The companies with the biggest purses entered into agreements with other companies and contract manufacturing organizations, which will reduce manufacturing capacity options for competitor products or for true generic competition.

Historically, access-to-medicines campaigns have focused on affordability with efforts to reduce the number of patents on medicines and to promote generic competition.[82] This competition has reduced the

up.

79 *See, e.g.*, Cormac O'Sullivan et al., McKinsey & Co., Why Tech Transfer May Be Critical to Beating COVID-19, at 2 (2020), https://www.mckinsey.com/~/media/McKinsey/Industries/Pharmaceuticals%20and%20Medical%20Products/Our%20Insights/Why%20tech%20transfer%20may%20be%20critical%20to%20beating%20COVID%2019/Why-tech-transfer-may-be-critical-to-beating-COVID-19-vF.pdf; Matthew Dalton & Joseph Walker, *Covid-19 Vaccine Makers Tap Contractors to Produce Billions of Doses*, Wall St. J. (Dec. 19, 2020), https://www.wsj.com/articles/covid-19-vaccine-makers-tap-contractors-to-produce-billions-of-doses-11608373800; Hannah Balfour, *COVID-19 Is Benefiting Contract Manufacturing Services, Suggests Reports*, Eur. Pharm. Rev. (Nov. 18, 2020), https://www.europeanpharmaceuticalreview.com/news/133825/covid-19-is-benefiting-contract-manufacturing-services-suggest-reports/ ("[P]harma companies [had] publicly disclosed 42 contract manufacturing service agreements for 26 unique pipeline COVID-19 vaccines."); Kristin Jensen, *AstraZeneca Broadens Coronavirus Vaccine Manufacturing Deal with Catalent*, BioPharmaDive (Aug. 26, 2020), https://www.biopharmadive.com/news/astrazeneca-broadens-coronavirus-vaccine-manufacturing-deal-with-catalent/584186/.

80 Anthony D. So & Joshua Woo, *Reserving Coronavirus Disease 2019 Vaccines for Global Access: Cross Sectional Analysis*, 371 Brit. Med. J. m4750 (2020), https://doi.org/10.1136/bmj.m4750 (providing an overview of how high income countries have secured highly disproportionate future supplies of COVID-19 vaccines while access for the rest of the world remains uncertain).

81 "Inefficiencies of the current patent system, which enables pharmaceutical corporations to artificially restrict supplies and inflate prices of life-saving medicines and vaccines, are already in the limelight." Muhammad Zaheer Abbas, Practical Implications of 'Vaccine Nationalism': A Short-Sighted and Risky Approach in Response to COVID-19, at 13 (2020), https://www.southcentre.int/wp-content/uploads/2020/11/RP-124.pdf; *see* Carlos Correa, *Lessons from COVID-19: Pharmaceutical Production as a Strategic Goal*, S. Ctr.: SouthViews (July 17, 2020), https://www.southcentre.int/wp-content/uploads/2020/07/SouthViews-Correa.pdf (providing a trenchant explanation of the need for expanded manufacturing capacity).

82 Brook K. Baker, *Access to Medicines Activism: Collaboration, Conflicts, and Complementarities*, *in* Intellectual Property Law and the Right to Health: A History of TRIPs and Access to Medicine (Srividhya Ragavan & Amaka Vanni eds., 2020) (forthcoming

price of antiretrovirals in most low- and many middle-income countries by 99+%, which has been key to the enormous expansion of treatment from the hundreds of thousands in 2000 to over 25 million in 2020.[83] There are some indications of price moderation in the pricing of COVID-19 vaccines, including by Johnson & Johnson, which has offered a non-profit price of $10 for its single-dose vaccine; unfortunately, other vaccine innovators are announcing significantly higher prices for a double-dose vaccination: Sinopharm, $145; NIH/Moderna, $74; BioNTech/Pfizer, $39; Novovax, $32; and Oxford/AstraZeneca, $74.[84] Similarly, Gilead's remdesivir, a repurposed antiviral, which has shown only limited benefit shortening hospital stays and easing moderate infection, is priced between $2,340 and $3,120 for a five-day course of treatment.[85] Promising monoclonal antibody therapies from Regeneron and Eli Lilly have recently been announced, but estimates for a course of Regeneron treatment negotiated by the U.S. result in a price range from $1,500 to $6,428.[86] Given the billions of people who will need COVID-19 vaccines and the tens of millions who will require access to therapeutics, the implications of high-priced medicines are staggering.

The COVID-19 pandemic, however, is also teaching new and hard lessons about the negative impacts of exclusivities on the supply of vaccines, medicines, and diagnostics. Not only do innovators' exclusivities lead to

2021) (manuscript at 1–3) (on file with author).

83 *Id.* at 10; John Elflein, *Access to Antiretroviral Therapy (ART) Among HIV-Infected People Worldwide from 2000 to 2019*, STATISTA (Aug. 4, 2020), https://www.statista.com/statistics/265921/access-to-art-for-hiv-treatment-in-low-and-middle-income-countries/ (reporting that the number of people receiving antiretroviral therapy in 2000 was approximately 570,000); *Global HIV & AIDS Statistics — 2020 Fact Sheet*, UNAIDS, https://www.unaids.org/en/resources/fact-sheet (last visited Feb. 24, 2021) (reporting that roughly 26 million people were receiving antiretroviral therapy as of June 2020).

84 Mark Terry, *Updated: Comparing COVID-19 Vaccines: Timelines, Types and Prices*, BIOSPACE (Feb. 8, 2021), https://www.biospace.com/article/comparing-covid-19-vaccines-pfizer-biontech-moderna-astrazeneca-oxford-j-and-j-russia-s-sputnik-v/; Angus Liu, *Sinopharm Chief Says COVID-19 Vaccine Will Cost Less Than $145 for 2-Dose Regimen*, FIERCE PHARMA (Aug. 18, 2020), https://www.fiercepharma.com/vaccines/china-sinopharm-chief-narrows-down-covid-19-vaccine-price-to-within-145-for-2-dose-regimen.

85 Matthew Herper, *Gilead Announces Long-Awaited Price for Covid-19 Drug Remdesivir*, STAT (June 29, 2020), https://www.statnews.com/2020/06/29/gilead-announces-remdesivir-price-covid-19/; Patnaik, *supra* note 55.

86 Josh Nathan-Kazis, *The U.S. Is Buying $450M of Regeneron's Experimental Covid-19 Antibody. Its Stock Is Jumping*, BARRON'S (July 7, 2020), https://www.barrons.com/articles/us-buys-450m-regeneron-experimental-covid-19-antibody-51594130963; Matthew Herper, *Eli Lilly Says Its Monoclonal Antibody Prevented Covid-19 Infections in Clinical Trial*, STAT (Jan. 21, 2021), https://www.statnews.com/2021/01/21/eli-lilly-says-its-monoclonal-antibody-prevented-covid-19-in-clinical-trial/.

supra-competitive prices, but they also lead to artificially restricted supplies.[87] Although biopharmaceutical manufacturers are investing in expanded production capacity and negotiating with each other[88] and with contract manufacturing organizations[89] to meet demand in rich countries, they are studiously avoiding efforts to more broadly license their medicines with full technology transfer to all qualified generic and biosimilar producers.

In response to the risk of high prices, inadequate supplies, and inequitable access, access-to-medicines campaigners and human rights proponents have reacted vigorously to promote open licensing and technology transfer of COVID-related IPRs, data, and information rights and to ensure that sufficient supplies of affordable medicines and vaccines are equitably distributed.[90] Even mainstream media is echoing this call in their op-eds,[91]

87 *See* Samuel Lovett, *Pfizer Vaccine: Over 80% of Doses Already Sold to World's Richest Countries*, Independent (Nov. 13, 2020), https://www.independent.co.uk/news/health/covid-pfizer-vaccine-doses-latest-uk-supplies-b1721162.html (quoting Heidi Chow, "We need to break the monopoly over this vaccine so that more manufacturers can make it, . . . [o]therwise, we are heading towards an artificially created scarcity which is completely unacceptable during a global pandemic and will cost even more lives.").

88 Katie Thomas, *The Vaccines Will Probably Work. Making Them Fast Will Be the Hard Part.*, N.Y. Times (Dec. 7, 2020), https://www.nytimes.com/2020/11/17/health/coronavirus-vaccine-operation-warp-speed.html; Lovett, *supra* note 87.

89 *Supra* note 79 and sources cited.

90 *See, e.g.*, *WTO COVID-19 TRIPS Waiver Proposal: Myths, Realities and an Opportunity for Governments to Protect Access to Lifesaving Medical Tools in a Pandemic*, Medicins Sans Frontieres Access Campaign (Dec. 3, 2020), https://msfaccess.org/wto-covid-19-trips-waiver-proposal-myths-realities-and-opportunity-governments-protect-access; Zain Rizvi, *Leading COVID-19 Vaccine Candidates Depend on NIH Technology*, Pub. Citizen (Nov. 10, 2020), https://www.citizen.org/article/leading-covid-19-vaccines-depend-on-nih-technology/; U.N. Office of the High Commissioner for Human Rights, Statement by UN Human Rights Experts Universal Access to Vaccines Is Essential for Prevention and Containment of COVID-19 Around the World (Nov. 9, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E; Hum. Rts. Watch, "Whoever Finds the Vaccine First Must Share It": Strengthening Human Rights and Transparency Around Covid-19 Vaccines 4, 14 (2020), https://www.hrw.org/sites/default/files/media_2020/10/globalvaccine1020_web.pdf; Amnesty Int'l, A Fair Shot: Ensuring Universal Access to COVID-19 Diagnostics, Treatments, and Vaccines 4–5 (2020), https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF; Int'l Comm'n of Jurists, Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses, 39–40 (2020), https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf; Nuffield Council on Bioethics, Fair and Equitable Access to COVID-19 Treatments and Vaccines 5–6 (2020), https://www.nuffieldbioethics.org/assets/pdfs/Fair-and-equitable-access-to-COVID-19-treatments-and-vaccines.pdf.

91 "With control over the production of these vaccines, these companies will largely

as are prominent politicians.[92] This call has a new urgency, given evidence that death rates will be two times higher if vaccines are hoarded rather than shared globally.[93] Some of these initiatives are discussed at length in Part II.

Solution: Instead of privately-owned exclusive rights, there should be open-licensing and voluntary or mandatory technology transfer of all new approved COVID-19 medical technologies to allow and incentivize supply by diverse manufacturers globally and to allow for production at efficient economies of scale and sale at affordable prices. To the maximum extent possible, these medical products need to be free at the point of use, most certainly for poor people and people living in LMICs.

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provide them on their own schedule, using their own factories or licensed producers – while other facilities around the world sit idle. Governments will almost certainly order more of the approved vaccines in the weeks and months to come, but the production capacity for each company is limited. Companies should not only pledge to waive their patents but to also share all their technical knowledge so that other manufacturers can help produce the much-needed vaccines." Stephen Buranyi, *Big Pharma Is Fooling Us*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/opinion/covid-vaccine-big-pharma.html?smid=tw-share; Achal Prabhala et al., *Want Vaccines Fast? Suspend Intellectual Property Rights*, N.Y. TIMES (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/opinion/covid-vaccines-patents.html; Arnab Acharya & Sanjay G. Reddy, *It's Time to Use Eminent Domain on the Coronavirus Vaccines*, FOREIGN POL'Y (Dec. 29, 2020), https://foreignpolicy.com/2020/12/29/its-time-to-use-eminent-domain-on-the-coronavirus-vaccines/?utm_source=PostUp&utm_medium=email&utm_campaign=28865&utm_term=Editors%20Picks%20OC&?tpcc=28865.

92 *E.g.*, Clive Lewis, *Rich Countries Should Scale Up Production of the Coronavirus Vaccine, Not Stockpile It*, INDEPENDENT (Dec. 10, 2020), https://www.independent.co.uk/voices/coronavirus-vaccine-distribution-patents-pharma-b1769212.html; Lloyd Doggett & Charles Duan, *How to Protect Taxpayers' Investments in COVID-19 Vaccines*, USA TODAY (Dec. 18, 2020), https://www.usatoday.com/story/opinion/2020/12/17/why-patents-covid-19-vaccines-treatments-should-lifted-column/3919600001/?fbclid=IwAR0i47Yk1cO-3TNoxyP7ocaM_uiM6QAgXJ0vzDh0xiI7jfrmnCpQor_MJSg; *MSPs Call on Westminster to Back Suspension of Patents on Covid-19 Vaccines*, GLOB. JUST. NOW (Dec. 9, 2020), https://www.globaljustice.org.uk/news/2020/dec/9/msps-call-westminster-back-suspension-patents-covid-19-vaccines; Hugo Gye, *Covid Vaccines: Poor Countries Will Miss Out Unless the Global Patent Rules Are Changed, MPs Warn Government*, I (Nov. 24, 2020), https://inews.co.uk/news/politics/covid-vaccines-poor-countries-miss-out-global-patent-rules-771046; Global Justice Now, *Politicians from the Global South Call for Support to Suspend Patents on Covid-19 Vaccines*, YOUTUBE (Dec. 8, 2020), https://www.youtube.com/watch?v=qOehyKq_WhA&feature=youtu.be.

93 Matteo Chinazzi et al., *Estimating the Effect of Cooperative Versus Uncooperative Strategies of COVID-19 Vaccine Allocation: A Modeling Study*, NE. UNIV. NETWORK SCI. INST. 5 (2020), https://www.mobs-lab.org/uploads/6/7/8/7/6787877/global_vax.pdf; Emily Arntsen, *If Rich Countries Monopolize COVID-19 Vaccines, It Could Cause Twice as Many Deaths as Distributing Them Equally*, NEWS@NORTHEASTERN (Sept. 14, 2020), https://news.northeastern.edu/2020/09/14/if-rich-countries-monopolize-covid-19-vaccines-it-could-cause-twice-as-many-deaths-as-distributing-them-equally/.

G. *Nationalistic Hoarding and Commercial Control over Distribution vs. Fair and Equitable Access*

Biopharmaceutical companies typically sell their products at higher prices in rich countries,[94] leaving them with less profit incentive to sell to LMICs. Not only does the current economic regime leave price and supply volumes in the hands of private, profit-maximizing companies, it also gives them near-total control over which customers to prioritize.[95] Particularly in periods of scarcity, this can lead to bidding wars,[96] which certainly occurred with respect to global supplies of personal protective equipment, and to export controls as well.[97]

In the wake of anticipated supply shortages, the world is experiencing an explosion of vaccine and therapeutics nationalism[98] by the U.S., U.K., European Union (E.U.), Canada, Japan, and other countries that have entered into preferential advance purchase agreements.[99] Researchers at Duke University are updating information on vaccine nationalism and grossly disproportionate supply to rich countries and, as of March 19, 2021, reported that 8.6 billion doses of vaccines had been purchased and

94 Judith L. Wagner & Elizabeth McCarthy, *International Differences in Drug Prices*, 25 Ann. Rev. Pub. Health 475, 483–84 (2004); *2019 Medicine Price Index*, Medbelle, https://www.medbelle.com/medicine-price-index-usa/ (last visited Feb. 24, 2021).

95 *See High Drug Prices and Monopoly*, Open Mkts., https://www.openmarketsinstitute.org/learn/drug-prices-monopoly (last visited Feb. 24, 2021) (stating that big pharmaceutical companies operate as monopolies and this practice allows them the ability to charge high drug prices).

96 Shawn Tully, *Inside the Surreal 'Mask Economy': Price-Gouging, Bidding Wars, and Armed Guards*, Fortune (Apr. 14, 2020), https://fortune.com/2020/04/14/coronavirus-face-masks-n95-respirators-price-gouging-ppe-medical-supplies-covid-19/.

97 *Id.*; WTO Secretariat, *Export Prohibitions and Restrictions* (Apr. 23, 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf (noting such restrictions in 80 countries).

98 Brook K. Baker, *U.S.-, China- and EU-First Nationalism and COVID-19 Technology Hoarding Push the Rest of the World to the End of the Line*, Health GAP (June 5, 2020), https://healthgap.org/u-s-china-and-eu-first-nationalism-and-covid-19-technology-hoarding-push-the-rest-of-the-world-to-the-end-of-the-line/ [hereinafter Baker, *U.S.-, China- and EU-First Nationalism*]; David P. Fidler, *Vaccine Nationalism's Politics*, 369 Science 749, 749 (2020); Alexandra L. Phelan et al., *Legal Agreements: Barriers and Enablers to Global Equitable COVID-19 Vaccine Access*, 396 Lancet 800, 800–802 (2020).

99 Grace Ren, *Scramble to Preorder COVID-19 Vaccines May Leave Poorer Countries Behind*, Health Pol'y Watch (Aug. 14, 2020), https://healthpolicy-watch.news/scramble-to-preorder-covid-19-vaccines-may-leave-poorer-countries-behind-threatening-global-response/; Mohga Kamal-Yanni, *Solidarity or Nationalism?*, Access 2 HealthCare https://www.access2healthcare.net/post/solidarity-or-nationalism (last updated Sept. 22, 2020).

6.3 billion are under negotiation or reserved[100]: "High-income countries currently hold a confirmed 4.6 billion doses, upper-middle-income countries hold 1.5 billion doses, lower-middle-income countries hold 703 million doses, and low-income countries hold 670 million;" the COVAX Facility has reserved 1.1 billion confirmed doses, the majority of which will go to ninety-two lower-income and concessionary loan eligible countries.[101] As a consequence, "[m]any high-income countries have hedged their bets by advance purchasing enough doses to vaccinate their population several times over," whereas middle- and lower-middle-income countries do not "have enough [doses] to vaccinate their entire populations" and may not until 2023 or 2024.[102]

Similarly, the U.S. sequestered initial supplies of Gilead's remdesivir. First, Gilead increased its initial donation "to the federal government from 607,000 to around 940,000," and then 90+% of Gilead's initial commercial sales through July, August, and September of 2020 were secured by the Trump Administration.[103] The U.S. has also contracted to receive up to 300,000 doses of Regeneron's antibody treatment if used for sick patients or up to 1.3 million doses as a preventive treatment, and another 300,000 doses of Eli Lilly's monoclonal antibody with an option for an additional 650,000 doses.[104] This sad state of affairs results from the perverse synergy of IP and market fundamentalism, whereby governments grant and protect exclusive rights, at the same time that they leave commercialization decisions entirely in the hands of IP rightsholders, who thereafter give preferential market access to rich countries that race to the front of the line and can afford premium prices. Once again, the risk is that the Global South will be left behind, and the human right of every global citizen to equitable access to

100 Duke Glob. Health Innovation Ctr., *Vaccine Procurement*, LAUNCH & SCALE SPEEDOMETER, https://launchandscalefaster.org/covid-19/vaccineprocurement (last visited Mar. 22, 2021) (providing data visualizations of inequitable distribution of COVID-19 vaccines, including advance market commitments for COVID-19 vaccines).

101 Duke Glob. Health Innovation Ctr., *COVID-19*, LAUNCH & SCALE SPEEDOMETER, https://launchandscalefaster.org/COVID-19 (last visited Mar. 22, 2021).

102 *Id.*

103 Eric Boodman, *Gilead Ups Its Donation of the COVID-19 Drug Remdesivir for U.S. Hospitals*, STAT (May 18, 2020), https://www.statnews.com/2020/05/18/coronavirus-gilead-ups-remdesivir-donation/; *Trump Administration Secures New Supplies of Remdesivir for the United States*, U.S. DEP'T HEALTH & HUM. SERVS. (June 29, 2020), https://www.hhs.gov/about/news/2020/06/29/trump-administration-secures-new-supplies-remdesivir-united-states.html.

104 Nathan-Kazis, *supra* note 86; Press Release, Eli Lilly, Lilly Announces Agreement with U.S. Government to Supply 300,000 Vials of Investigational Neutralizing Antibody Bamlanivimab (LY-CoV555) in an Effort to Fight COVID-19 (Oct. 28, 2020), https://investor.lilly.com/node/43881/pdf.

lifesaving and life-enhancing vaccines and medicines will be eviscerated.

Solution: Governments, under the direction of a global framework, need to take control over the distribution of essential global public goods like COVID-19 health products. The market alone cannot be allowed to organize distribution on a profit-maximization basis. Truly global mechanisms must be established to ensure that COVID-19 health products are equitably distributed and ethically allocated to every country in the world and within each country. It is simply indefensible that "America First" or "U.K. First" or "Europe First" would result in everyone else being last. Rational pooled procurement mechanisms need to be established whereafter truly equitable distribution to all global populations must occur. Priorities may and should be established for early supplies according to disease vulnerability and essential job functions. COVID-19 health products are truly global public goods, essential to the realization of the right to health and to the benefits of scientific progress and its applications, and therefore must be equitably accessed.

II. PROMISING INITIATIVES AND PROPOSALS

To mobilize a more effective and solidarity-based response to this unprecedented global pandemic, there have been a number of global initiatives and proposals to override the business-as-usual approach to COVID-19. Some of these responses are pending resolution and will demand advocacy and political will, whereas others are more nascent as they reside as mere proposals with uncertain prospects of being taken forward.

A. *TRIPS Waiver Proposal*

One of the most far-reaching proposals is a request from India and South Africa to the World Trade Organization (WTO) that it adopt a waiver to the enforcement of relevant international IP obligations. These obligations arise under the TRIPS Agreement,[105] which establishes minimum global requirements relating to the recognition and enforcement of IP rights. The waiver proposal provides that the obligations of members to implement or apply designated IP rights on COVID-19-related health technologies be waived "until widespread vaccination is in place globally, and the majority of the world's population has developed immunity."[106] The waiver proposal relies on Article IX of the Marrakesh Agreement Establishing the WTO, which allows waivers of obligations under the Agreement in exceptional circumstances for a set period of time.[107] Although decision by consensus is preferred, if the waiver request comes to vote, it could pass with a three-quarter majority of a Ministerial Council or General Council meeting of the WTO.

In paragraph three, the waiver seeks to ensure that "patents, industrial designs, copyright and protection of undisclosed information do not create barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development,

105 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

106 Council for Trade-Related Aspects of Intellectual Prop. Rights, *Waiver from Certain Provisions of the TRIPS Agreement for Prevention, Treatment and Containment of COVID-19, Communication from India and South Africa*, WTO Doc. IP/C/W/669, at 1–2 (Oct. 2, 2020), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True; *see* Ann Danaiya Usher, *South Africa and India Push for COVID-19 Patents Ban*, 396 LANCET 1790 (2020).

107 Marrakesh Agreement Establishing the World Trade Organization, art. IX § 3(a)–(b), Apr. 15, 1994, 1867 U.N.T.S. 154, 159–60; *Waiver from Certain Provisions of the TRIPS Agreement for Prevention, Treatment and Containment of COVID-19*, *supra* note 106, at 3.

manufacturing and supply of medical products essential to combat COVID-19."[108] In paragraph twelve, the proponents "request that the Council for TRIPS recommends, as early as possible, to the General Council a waiver from the implementation, application and enforcement of Sections 1 [copyright and related rights], 4 [industrial designs], 5 [patents], and 7 [protection of undisclosed information] of Part II of the TRIPS Agreement in relation to prevention, containment, or treatment of COVID-19."[109] In paragraph thirteen, they specify that "[t]he waiver should continue until widespread vaccination is in place globally, and the majority of the world's population has developed immunity hence we propose an initial duration of [x] years from the date of the adoption of the waiver."[110]

The waiver request received a mixed reaction from the TRIPS Council meeting in mid-October 2020.[111] South Africa and India spoke forcefully in favor of the waiver request.[112] The vast majority of countries that supported the waiver request were least developed and developing countries, including Tanzania on behalf of the African Group, Chad on behalf of the least developed countries (LDC) members, and Bangladesh, Sri Lanka, Pakistan, Venezuela, Honduras, Nepal, Nicaragua, Egypt, Indonesia, Argentina, Tunisia, Mali, Mauritius, and Mozambique.[113] A number of other countries welcomed the proposal, including Nigeria, the Philippines, Turkey, Ecuador, China, Thailand, Senegal, Jamaica, Colombia, Costa Rica, Chile, and El Salvador, but some requested clarifications and expressed a need to consult with their capitals.[114]

It was predominantly rich countries that expressed their opposition to the request: the E.U., U.S., Switzerland, Norway, Australia, Canada,

108 *Waiver from Certain Provisions of the TRIPS Agreement for Prevention, Treatment and Containment of COVID-19*, *supra* note 106, at 1.

109 *Id*. at 2.

110 *Id.*

111 For a verbatim transcript of countries' positions, see WTO Council on Trade Related Aspects of Intellectual Property Rights, *Advance Minutes of Agenda Item 15*, WTO Doc. JOB/IP/41 (Nov. 5, 2020) (on file with author) [hereinafter WTO Waiver Minutes Oct 2020].

112 Thiru, *WTO TRIPS Council (October 2020): South Africa Issues Clarion Call Urging Support for TRIPS Waiver Proposal*, Knowledge Ecology Int'l (Oct. 16, 2020), https://www.keionline.org/34235; Communication from India and South Africa, *Proposal for a Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, WTO Doc. IP/C/W/669 (Oct. 16, 2020), https://pmindiaun.gov.in/public_files/assets/pdf/TRIPS_Agreemnet.pdf; D. Ravi Kanth, *South Africa, India Strongly Rebut Arguments Against TRIPS Waiver*, Third World Network (Oct. 20, 2020), https://www.twn.my/title2/wto.info/2020/ti201021.htm.

113 WTO Waiver Minutes Oct. 2020, *supra* note 111; *see* Kanth, *supra* note 112.

114 WTO Waiver Minutes Oct. 2020, *supra* note 111; *see* Kanth, *supra* note 112.

Japan, and the U.K.; they were also joined by Brazil.[115] The E.U. expressed a "commit[ment] to work with all Members on this global challenge," pointing to "[r]esearchers and [the] pharmaceutical industry, supported by public funding, [that] have put extraordinary efforts into the development of future treatments and vaccines against COVID-19."[116] The E.U. argued that "[a] well-functioning intellectual property rights system is crucial to ensure that [industry's R&D] efforts are adequately incentivized and rewarded."[117] Further, the E.U. stated that "[t]here is no indication that IPR issues have been a genuine barrier in relation to COVID-19-related medicines and technologies."[118] The E.U. noted that while "maintaining continued supply of such medicines and technologies is a difficult task[,] . . . non-efficient and underfunded healthcare and procurement systems, spike in demand and lack of manufacturing capacity or materials are much more likely to have an impact on the access to those medicines and technologies."[119] It concluded that "[a] well-functioning IPRs system, including its wide range of exceptions and flexibilities" under the TRIPS Agreement, "is part of the solution rather than an obstacle." [120]

The U.S. confirmed its goal of "ensur[ing] the swift delivery of potential COVID-19 therapeutics and vaccines around the globe," stating a belief that providing "incentives for innovation . . . respecting intellectual property rights, and supporting industry-led collaboration and voluntary knowledge sharing, will best achieve [the] shared objective."[121] For the U.S., "IP is important, but, ultimately, it is only one piece of addressing access to potential therapies."[122] The U.S. also noted that "IP has not been an obstacle in addressing the pandemic, but rather has incentivized global efforts to find treatments and cures."[123] It went on, saying that "[l]imits to manufacturing capacities and supply chain issues . . . are of much greater concern, especially for vaccines, given the need to provide access to the

115 WTO Waiver Minutes Oct. 2020, *supra* note 111; *see* Thiru, *WTO TRIPS Council (October 2020): European Union Dismisses Concerns that IPRs Are a Barrier to COVID-19 Medicines and Technologies*, KNOWLEDGE ECOLOGY INT'L (Oct. 20, 2020), https://www.keionline.org/34275.

116 WTO Waiver Minutes Oct. 2020, *supra* note 111. (For more on the European Union's assertion that "[t]here is no indication that IPR issues have been a genuine barrier in relation to COVID-19-related medicines and technologies, see Thiru, *supra* note 115.)

117 WTO Waiver Minutes Oct. 2020, *supra* note 111.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

entire global population."[124]

Because of the range of positions at the October 2020 meeting, the Council chair said that "the item would remain suspended as members continue to consider the proposal."[125] An informal meeting to further discuss the waiver proposal was held on November 20, 2020, with many developed countries raising multiple questions, opposing the waiver, or both.[126] Most of the questions raised had arguably been addressed or rebutted in the pre-meeting briefing document[127] and were rebutted by South Africa.[128] An additional TRIPS Council meeting was held on December 10, 2020, with some increased support from developing countries but little apparent change of developed country positions, which prompted a wide range of critical commentary.[129] The resulting factual report was delivered at a meeting of the WTO General Council that took place December 16–17, 2020; additional consultations were to take place back at the TRIPS Council in early 2021, followed by additional discussions at the General Council as

124 *Id*.

125 *Members Discuss Intellectual Property Response to the COVID-19 Pandemic*, World Trade Org. (Oct. 20, 2020), https://www.wto.org/english/news_e/news20_e/trip_20oct20_e.htm.

126 D. Ravi Kanth, *Developed Countries Continue to Block TRIPS Waiver Proposal*, Third World Network (Nov. 24, 2020), https://www.twn.my/title2/intellectual_property/info.service/2020/ip201108.htm; Priti Patnai, *TRIPS Waiver: The Needle Has Moved, but the Fight Is On*, Geneva Health Files (Nov. 26, 2020), https://genevahealthfiles.substack.com/p/trips-waiver-discussions-moving-the.

127 *India and South Africa Proposal for WTO Waiver from Intellectual Property Protections for COVID-19-Related Medical Technologies: Briefing Document*, Medecins Sans Frontieres (updated Nov. 18, 2020), https://msfaccess.org/sites/default/files/2020-11/COVID_Brief_WTO_WaiverProposal_ENG_v2_18Nov2020.pdf.

128 Thiru, *WTO TRIPS Council – 20 November 2020 – South Africa's Defense of TRIPS Waiver*, Knowledge Ecology Int'l (Nov. 21, 2020), https://www.keionline.org/34708.

129 Andrew Green, *At WTO, A Battle for Access to COVID-19 Vaccines*, Devex (Dec. 15, 2020), https://www.devex.com/news/at-wto-a-battle-for-access-to-covid-19-vaccines-98787; D. Ravi Kanth, *TRIPS Waiver Gains More Support Despite Efforts to Stall Its Passage*, Third World Network (Dec. 14, 2020), https://www.twn.my/title2/health.info/2020/hi201208.htm; *see* James Hacker et al., *WHO Calls on World Leaders to "Honor Their Pledge" to Fund COVID-19 Vaccines; South Africa Raises Spectre of "Vaccine Apartheid,"* Health Pol'y Watch (Nov. 12, 2020), https://healthpolicy-watch.news/who-honor-pledge-south-africa/; Ed Silverman, *World Trade Council Fails to Act on Proposal to Waive IP Rights to COVID-19 Drugs and Vaccines*, STAT (Dec. 11, 2020), https://www.statnews.com/pharmalot/2020/12/11/wto-patents-covax-who-south-africa-india/?utm_campaign=stat_plus_today&utm_medium=email&_hsmi=102714445&_hsenc=p2ANqtz-_Z_pp6Obra-vERjN0baE5DP8YBd-WDtBXuNSpnMXDgEr3RvKfEE3p6jSU5wo30d4OcY68TaNfkEMD0QTziIatDPmcmQw&utm_content=102714445&utm_source=hs_email; Priti Patnaik, *Countries Fail to Reach Consensus on TRIPS Waiver Proposal*, Geneva Health Files (Dec. 10, 2020), https://genevahealthfiles.substack.com/p/no-consensus-on-trips-talks-who-foundation.

needed.[130]

Given that the waiver could provide a dramatic opening in the battle against COVID-19, civil society and other advocates should push for a quick three-fourths vote at the WTO and eschew the illusory consensus option since it seems clear that the majority of rich countries are content with their own preferred access to COVID-19 vaccines, medicines, diagnostics, and other health supplies and that they remain indifferent to the inferior and delayed access in developing countries. However, developing countries should also be reminded that they will need to take steps to implement any eventual TRIPS waiver into their national legal regime—the waiver will not be self-effectuating at the national level.[131]

B. *LDC Extended Transition Period*

WTO LDC Members have requested a further extension of their general TRIPS transition period for each LDC Member until they no longer are an LDC plus an additional twelve years.[132] This waiver relieves LDC Members of the obligations to adopt or enforce any IP protections whatsoever except with respect to most favored nation and national treatment protections for any IP rights they do recognize. The LDC general transition period under Article 66.1 of the TRIPS Agreement has been previously extended on two occasions, first in 2005 until 2013 and then in 2013 until 2021.[133] On each of those occasions, LDCs had sought an extension for LDC Members for as long as they were LDCs.[134] Even though Article 66.1 states that requested extensions "shall" be granted upon well-motivated requests, LDCs were granted time-limits for relatively shorter periods of time only.[135] This time, LDCs have more forcefully articulated their need for an extension as long as an LDC Member retains that status, but they also argued that they

130 *Members to Continue Discussion on Proposal for Temporary IP Waiver in Response to COVID-19*, WORLD TRADE ORG. (Dec. 10, 2020), https://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm.

131 Brook Baker, *South Africa and India's Proposal to Waive Recognition and Enforcement of COVID-19 Intellectual Property Rights for COVID-19 Medical Technologies Deserves Universal Support, but Countries Also Have to Take Domestic Measures*, HEALTH GAP (Oct. 10, 2020), https://healthgap.org/south-africa-and-indias-proposal-to-waive-recognition-and-enforcement-of-intellectual-property-rights-for-covid-19-medical-technologies-deserves-universal-support-but-countries-also-have-to/.

132 Council for Trade-Related Intellectual Property Rights, *Extension of the Transition Period Under TRIPS Article 66.1 for Least Developed Country Members: Communication from Chad on Behalf of the LDC Group*, 3, 5 WTO Doc. IP/C/W/668 (Oct. 1, 2020).

133 *Id.* at 2.

134 *See id.*

135 *Id.* at 3.

need a further transition period of twelve years before needing to enforce TRIPS IP protections.[136] In paragraphs four and five of their request, LDCs draw special attention to the additional challenges they face from COVID-19.[137] One thing they could have perhaps made clearer is that the general waiver will be needed for them to have IP-free access to COVID-19 health products other than "pharmaceuticals," which are already covered by their 2033 pharmaceutical-product transition period under Article 66.1. Even though the LDC general transition-period extension request was not acted upon at the October 2020 TRIPS Council meeting, it too requires urgent passage before July 1, 2021, when the existing transition period expires.

C. *TRIPS Article 73 Security Waiver*

South Centre, an international organization of developing nations, has proposed that WTO members use the national security provisions of Article 73 of the TRIPS Agreement to suspend recognition and enforcement of IP protections on COVID-19 health technologies for the duration of the pandemic.[138] Article 73 of the TRIPS Agreement reads: "*Nothing in this Agreement shall be construed . . . (b) to prevent a member from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations*."[139] It should be remembered as well that the Doha Declaration on the TRIPS Agreement and Public Health assures member states that the TRIPS Agreement *"can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose*."[140] Similarly, Articles 7 and 8 of the TRIPS Agreement provide further support for the argument that member

136 *Id.* at 4–5.

137 *Id.*

138 Carlos Correa, *COVID-19 Pandemic: Access to Prevention and Treatment Is a Matter of National and International Security,* S. Ctr. (Apr. 4, 2020), https://www.southcentre.int/wp-content/uploads/2020/04/COVID-19-Open-Letter-REV.pdf; *see* Frederick Abbott, S. Ctr., The TRIPS Agreement Article 73 Security Exception and the COVID-19 Pandemic (Sept. 2020), https://www.southcentre.int/wp-content/uploads/2020/08/RP-116.pdf (concluding that the COVID-19 pandemic provides a sufficient basis for WTO nations to invoke art. 73 of the TRIPS Agreement to override intellectual property rights).

139 TRIPS Agreement, *supra* note 105, at art. 73.

140 World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

states can act to promote public health and to prevent abuse of IPRs, like that which occurs when biopharmaceutical companies refuse to voluntarily license their life-saving medicines, vaccines, and diagnostics.[141] Countries will have to effectuate the permission granted by Article 73 through proper means established in national law. For some countries, resort to executive action in the form of emergency declarations might suffice, but in other countries, national legislative or parliamentary action might be needed on an expedited basis.

D. *Compulsory Licenses*

At the national level, multiple countries have explored or already expanded their policy space and willingness to use TRIPS public health flexibilities, including issuance of compulsory licenses. For example, Israel issued a compulsory license to import generic versions of lopinavir/ritonavir while legislatures in Germany, Canada, France, and Indonesia have adopted new easier-to-use compulsory licensing rules, and Chile, Ecuador, Brazil, and even the U.S. are considering proposals for the issuance of compulsory licenses to address COVID-19.[142] On November 25, 2020, the European Commission issued an IP plan of action that includes EU-wide adoption of accelerated compulsory licensing rules to expedite access to COVID-19 products if the need arises.[143] Countries have historically faced political and trade threats arising from resort to compulsory licenses even though such measures are fully legal under Articles 31, 31b, and 44.2 of the TRIPS Agreement.[144] Moreover, product-by-product, country-by-country licenses can be time-delayed and ineffective in creating a market incentive for generic entry. A recent proposal by Abbott and Reichman advocates for the

141 TRIPS Agreement, *supra* note 105, at arts. 7–8.

142 *The TRIPS Agreement and COVID-19: Information Note*, WORLD TRADE ORG. 9 (Oct. 15, 2020), https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf; *People Over Patents: How Governments are Preparing to Make COVID-19 Medicines Available*, PUB. CITIZEN (Aug. 10, 2020), https://www.citizen.org/wp-content/uploads/Global-survey-of-IP-and-COVID-final.pdf.

143 *Making the Most of the EU's Innovative Potential – An Intellectual Property Action Plan to Support the EU's Recovery and Resilience*, at 12, COM (2020) 760 final; Thiru Balasubramaniam, *The European Commission Action Plan on Intellectual Property – Of COVID-19, TRIPS, EU BARDA, March-in Rights, Patent Pools, and Compulsory Licensing*, KNOWLEDGE ECOLOGY INT'L EUROPE (Nov. 25, 2020), https://keieurope.org/2020/11/24/leaked-eu-action-plan-on-intellectual-property-covid-19-of-trips-eu-barda-march-in-rights-patent-pools-and-compulsory-licensing/.

144 *See* TRIPS Agreement, *supra* note 105, at art. 31, 31b, 44.2; Jerome H. Reichman, *Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options*, 37 J.L. MED. & ETHICS 249 (2009).

establishment of global or regional platforms for coordinated issuance of compulsory licenses and for procurement of resulting generic products.[145] It does seem clear that countries will need to act more proactively on their own behalf—including by establishing mandatory, automatic, or presumptive compulsory licenses for COVID-19 health products—if they want to overcome pricing and supply constraints.

E. *People's Vaccine Campaign*

The People's Vaccine campaign was launched by 140 global luminaries and organizations in May 2020 and has been calling for vaccines to be freely and equitably distributed globally.[146] The campaign has five principal goals: (1) governments and pharmaceutical companies must make vaccines free of patents and other monopolies and companies should freely transfer their technology; (2) vaccines should be produced at low cost and distributed to all, with those most at risk receiving early preference; (3) politics should stay out of the process of assessing safety and efficacy of vaccines; (4) there should be transparency about the cost of production, vaccines should be sold close to the cost of production, and they should be free of charge in the public in both rich and poor countries; and (5) the people's vaccine should be used to fight poverty and inequality, including that arising from the pandemic itself.[147] The campaign had a day of action, and a demand letter was sent to the CEOs of major COVID-19 vaccine manufacturers on December 14, 2020.[148]

F. *COVID-19 Technology Access Pool*

Costa Rica sent a letter to the WHO dated March 23, 2020, advocating for the establishment of a voluntary IP pool for "technologies

145 Frederick M. Abbott & Jerome H. Reichman, *Facilitating Access to Cross-Border Supply of Patented Pharmaceuticals: The Case of COVID-19*, 23 J. Int'l Econ. L. 535 (2020).

146 *Uniting Behind a People's Vaccine Against COVID-19*, UNAIDS (May 14, 2020), https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter.

147 *What's a People's Vaccine, and How Can We Get One?*, Oxfam (Sept. 17, 2020), https://www.oxfamamerica.org/explore/stories/whats-a-peoples-vaccine-and-how-can-we-get-one/.

148 *Global Day of Action for a #PeoplesVaccine*, Glob. Just. Now, https://www.globaljustice.org.uk/join-peoples-vaccine-day-action (last visited Apr. 7, 2021); *100 Signature Letter to CEOs of Vaccine Companies*, Health Gap, https://healthgap.org/wp-content/uploads/2020/12/100-signature-letter-to-CEOs-of-vaccine-companies.pdf (last visited Feb. 21, 2021).

that are useful for the detection, prevention, control and treatment of the COVID-19 pandemic."[149] Subsequently, thirty-seven countries and the WHO jointly issued The Solidarity Call to Action on May 29, 2020,[150] which established the COVID-19 Technology Access Pool (C-TAP),[151] a platform for sharing IP on COVID-19 treatments, vaccines, and health technologies. C-TAP finally announced its implementation plan on October 27, 2020.[152] In addition to the Medicines Patent Pool expanding its mandate to address COVID-19,[153] other initiatives to pool IPRs and to facilitate more open science, more supply, and lower prices, include the early Open COVID Pledge,[154] the university-based COVID-19 Technology Access Framework,[155]

149 Carlos Alvardo Quesada, President, Costa Rica, & Daniel Salas Peraza, Minister of Health, Costa Rica, to Dr. Tedro Adhanom Ghebreyesus, Dir. Gen. of the World Health Org. (Mar. 23, 2020), https://www.keionline.org/wp-content/uploads/President-MoH-Costa-Rica-Dr-Tedros-WHO24March2020.pdf.

150 *Medicines Law & Policy Welcomes WHO's Solidarity Call to Action to Realise Equitable Global Access to COVID-19 Health Technologies Through Pooling of Knowledge, Intellectual Property and Data*, MEDS. L. & POL'Y (May 29, 2020), https://medicineslawandpolicy.org/2020/05/medicines-law-policy-welcomes-whos-solidarity-call-to-action-to-realise-equitable-global-access-to-covid-19-health-technologies-through-pooling-of-knowledge-intellectual-property-and-data/; *Solidarity Call to Action*, WORLD HEALTH ORG., https://www.who.int/initiatives/covid-19-technology-access-pool/solidarity-call-to-action (last visited Apr. 7, 2021).

151 *COVID-19 Technology Access Pool*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool (last visited Oct. 21, 2020).

152 *Operationalising the COVID-19 Technology Access Pool (C-TAP)*, WORLD HEALTH ORG. (Oct. 27, 2020), https://cdn.who.int/media/docs/default-source/essential-medicines/intellectual-property/who-covid-19-tech-access-tool-c-tap.pdf?sfvrsn=1695cf9_36&download=true.

153 *Governance Board Resolution on Temporarily Expanding MPP's Remit to Include Any Health Technology That Could Contribute to the Global Response to COVID-19*, MEDS. PAT. POOL (Mar. 31, 2020), https://medicinespatentpool.org/uploads/2020/04/Governance-Board-Resolution-31-March-2020_final.pdf; *The Medicines Patent Pool and Unitaid Respond to Access Efforts for COVID-19 Treatments and Technologies*, MEDS. PAT. POOL (Mar. 31, 2020), https://medicinespatentpool.org/news-publications-post/the-medicines-patent-pool-and-unitaid-respond-to-access-efforts-for-covid-19-treatments-and-technologies/.

154 OPEN COVID PLEDGE, https://opencovidpledge.org (last visited Oct. 21, 2020); Jorge L. Contreras et al., *Pledging Intellectual Property for COVID-19*, 38 NATURE BIOTECH. 1146, 1146–49 (2020), ("[V]oluntary pledges to make IP broadly available to address urgent public health crises can overcome administrative and legal hurdles faced by more elaborate legal arrangements such as patent pools and achieve greater acceptance than governmental compulsory licensing.").

155 *COVID-19 Technology Access Framework*, STAN. UNIV., https://otl.stanford.edu/covid-19-technology-access-framework (last visited Oct. 21, 2020); *COVID-19 Technology Access Framework*, NAT'L ACADS. SCI. ENG'G & MED. (Apr. 29, 2020), https://www.nationalacademies.org/event/04-29-2020/covid-19-technology-access-framework (webinar explaining the Framework).

Japanese Open COVID-19 Declaration,[156] and the COVID-19 Clinical Research Coalition.[157]

Civil society and academics quickly advocated for the establishment and utilization of C-TAP to enable faster and higher quality open-science research and product development.[158] More significantly, open licensing of all rights needed to allow full technology transfer would greatly expand supply beyond the limitations of single-source suppliers.[159] Allowing licensed manufacturers to expand production would help counteract the impulse to hoard and would also accelerate equitable distribution globally while assuring more affordable pricing.[160] Although C-TAP is promising in theory, it is disappointing that no biopharmaceutical company has contributed to the pool.[161] It is not surprising that the multinational drug industry banded together at the launch of the technology pool to condemn even voluntary efforts geared towards global access.[162] Industry and rich countries may warm to the idea of voluntary efforts if countries become more resolute in

156 Hirohisa Suzuki, *Japanese Companies' Contribution Against COVID-19 by IPs*, Mondaq (July 13, 2020), https://www.mondaq.com/patent/964756/japanese-companies39-contribution-against-covid-19-by-ips.

157 COVID-19 Clinical Research Coalition, *supra* note 54, at 234–35.

158 James Love, *Open Letter to the World Health Organization (WHO) and Its Member States on the Proposal by Costa Rica to Create a Global Pool for Rights in the Data, Knowledge and Technologies Useful in the Prevention, Detection and Treatment of the Coronavirus/COVID-19 Pandemic*, Knowledge Ecology Int'l (Mar. 27, 2020), https://www.keionline.org/32599.

159 *Id.* ("Such a pool would allow for competitive and accelerated production of needed COVID-19 technologies, and expand our capacity to address the need for affordable products for all.").

160 Brook Baker, *Rationale for Supporting Costa Rica's Proposal for Emergency COVID-19 Technology IP Pool for All Countries*, Health GAP (Mar. 25, 2020), https://healthgap.org/rationale-for-supporting-costa-ricas-proposal-for-emergency-covid-19-technology-ip-pool-for-all-countries/; Ellen 't Hoen, *Protect Against Market Exclusivity in the Fight Against COVID-19*, 26 Nature Med. 813, 813 (2020); Luca Li Bassi & Lenias Hwenda, *COVID-19: Time to Plan for Prompt Universal Access to Diagnostics and Treatments*, 8 Lancet Glob. Health e756, e756 (2020); Muhammad Zaheer Abbas, *Treatment of the Novel COVID-19: Why Costa Rica's Proposal for the Creation of a Global Pooling Mechanism Deserves Serious Consideration?*, 7 J.L. & Biosciences (forthcoming 2020) (manuscript at 1, 4), https://doi.org/10.1093/jlb/lsaa049; *see* Katrina Perehudoff & Jennifer Sellin, *COVID-19 Technology Access Pool (C-TAP): A Promising Human Rights Approach*, Health & Hum. Rts. J. (June 4, 2020), https://www.hhrjournal.org/2020/06/covid-19-technology-access-pool-c-tap-a-promising-human-rights-approach/.

161 Grace Ren, *Progress on COVID-19 Technology Access Pool Inches Along as Sister Initiative to Pool Vaccine Procurement Accelerates*, Health Pol'y Watch (Sept. 25, 2020), https://healthpolicy-watch.news/progress-on-covid-19-technology-pool-inches-along-as-sister-initiative-to-pool-vaccine-procurement-accelerates/.

162 *See* Ed Silverman, *Pharma Leaders Shoot Down WHO Voluntary Pool for Patent Rights on COVID-19 Products*, STAT (May 28, 2020), https://www.statnews.com/pharmalot/2020/05/28/who-voluntary-pool-patents-pfizer/.

seeking IP waivers and use of compulsory licensing mechanisms.

G. *ACT-Accelerator*

The initiative that has received the most fanfare to date is the Access to COVID-19 Tools Accelerator (ACT-Accelerator), which has committed to the repurposing or development of novel vaccines, therapeutics, and diagnostics and equitable global access to those tools, including in LMICs.[163] The ACT-Accelerator, relying on a partnership framework, "is organized into four pillars of work: diagnostics, treatment, vaccines and health system strengthening."[164] With respect to vaccines, the ACT-Accelerator has pre-established goals of accelerating the development of safe and efficacious new vaccines, establishing a broad portfolio of vaccines to mitigate risk, and securing access to 2 billion doses of vaccines by the end of 2021, to be split equitably between (1) low-income and lower-middle-income countries, and (2) upper-middle-income and upper-income countries.[165] Its ambitions for therapeutics were initially to identify more effective treatments and catalyze manufacturing, procurement, and delivery of safe, effective, and quality assured therapeutics for 245 million courses of treatment within its first year.[166] For diagnostics, its goals were to identify game-changing diagnostic tests and bring high quality, rapid diagnostic tests (RDTs) to scale, hoping to procure 125 million molecular tests and 375 million antigen RDTs for LMICs.[167] The health systems connector was to be principally focused on enabling the effective deployment of COVID-19 tools and delivery of essential health services, including supplying personal protective equipment and oxygen to those in need.[168] WHO was specifically tasked with adopting

163 *See ACT Accelerator, Status Report & Plan September 2020 – December 2021*, WORLD HEALTH ORG. (Sept. 25, 2020), https://www.finddx.org/wp-content/uploads/2021/03/Status-Report-Plan-FINAL-v2.pdf; *The Access to COVID-19 Tools (ACT) Accelerator*, WORLD HEALTH ORG., https://www.who.int/initiatives/act-accelerator (last visited Dec. 30, 2020).

164 *What Is the ACT-Accelerator*, WORLD HEALTH ORG., https://www.who.int/initiatives/act-accelerator/about (last visited Dec. 30, 2020).

165 Seth Berkley, *COVAX Explained*, GAVI (Sept. 3, 2020), https://www.gavi.org/vaccineswork/covax-explained.

166 ACT Accelerator Therapeutics P'ship, *COVID-19 Therapeutics Investment Case*, UNITAID, https://unitaid.org/assets/Therapeutics-Partnership-Investment-Case.pdf (last visited Feb. 21, 2021).

167 Access to COVID-19 Tool (ACT) Accelerator Diagnostics P'ship, *Investing in Diagnostics to Manage the Course of the COVID-19 Pandemic*, FIND (May 2020), https://www.finddx.org/wp-content/uploads/2020/05/ACT-A-Dx_Investment-Case_FINAL.pdf.

168 ACT Accelerator, *Status Report & Plan: September 2020 – December 2021*, *supra* note 163, at 14–15, 20, 21, 23.

a framework and guidelines for equitable access and fair allocation of COVID-19 tools.[169]

The ACT-Accelerator, conceptualized by the WHO, European Commission, France, and The Bill & Melinda Gates Foundation,[170] was launched in April 2020, "bring[ing] together governments, health organizations, scientists, businesses, civil society, and philanthropists[.]"[171] The vaccine pillar is led by Gavi, the Vaccine Alliance (Gavi) and the Coalition for Epidemic Preparedness Innovation (CEPI), both of which were founded by the Gates Foundation to focus on vaccine distribution and vaccine development, respectively.[172] CEPI's work focuses on identifying and supporting promising vaccine candidates and reserving manufacturing capacity for proven vaccines.[173] Gavi's COVAX Facility and its Advance Market Commitment for COVID-19 Vaccines (Gavi COVAX AMC) aims at incentivizing vaccine manufacturers to produce sufficient quantities of COVID-19 vaccines and to ensure at least partial access for ninety-two developing countries via the Gavi COVAX AMC.[174] Although Gavi COVAX

169 *See id*. at 15, 24–26; *Fair Allocation Mechanism for COVID-19 Vaccines Through the COVAX Facility*, World Health Org. at 9 (Sept. 9, 2020), https://www.who.int/publications/m/item/fair-allocation-mechanism-for-covid-19-vaccines-through-the-covax-facility (click "Download (929.7 kB)").

170 *The ACT-Accelerator Frequently Asked Questions*, World Health Org., https://www.who.int/initiatives/act-accelerator/faq (last visited Feb. 21, 2021). For more information on the ACT Accelerator, *see* White Paper on COVID-19 Product Needs and Response: Vaccines, Diagnostics, and Therapeutics 8 (2020) (detailing the basic architecture and proposed strategy for the Access to COVID-19 Tools Accelerator) (on file with the author).

171 *The ACT-Accelerator Frequently Asked Questions*, *supra* note 170; *see* World Health Org. et al., Commitment and Call to Action (2020), https://www.who.int/publications/m/item/access-to-covid-19-tools-(act)-accelerator (click "Download (204.1 kB)").

172 *The Bill and Melinda Gates Foundation*, Gavi (last updated July 29, 2020), https://www.gavi.org/operating-model/gavis-partnership-model/bill-melinda-gates-foundation (reporting that the Gates Foundation pledged $750 million in 1999 to set up Gavi and has invested over $4 billion to date); *Responding to COVID-19*, Gavi, https://www.gavi.org/covid19 (last updated Dec. 2, 2020); *Coalition for Epidemic Preparedness Innovations (CEPI)*, Devex, https://www.devex.com/organizations/coalition-for-epidemic-preparedness-innovations-cepi-72733 (last visited Jan. 10, 2021) (reporting that "CEPI was founded in 2016 by the Government of Norway, the Bill & Melinda Gates Foundation, the Wellcome Trust, the World Economic Forum, and India's Department of Biotechnology"); *see What Is the ACT-Accelerator*, *supra* note 164; CEPI, https://cepi.net (last visited Feb. 21, 2021).

173 *See COVAX: CEPI's Response to COVID-19*, CEPI, https://cepi.net/COVAX/ (last visited Oct. 25, 2020).

174 Berkley, *supra* note 165; Seth Berkley, *The Gavi COVX AMC Explained*, Gavi, https://www.gavi.org/vaccineswork/gavi-covax-amc-explained (last visited Oct. 13, 2020); *COVAX Facility Explainer: Participation Arrangement for Self-Financing Economies*, Gavi, https://www.

AMC was initially slow in reserving needed doses and was projected to fail,[175] it announced major new supply deals on December 18, 2020.[176]

One promising development is that some rich countries may be willing to donate or transfer excess vaccine doses to Gavi COVAX AMC, and they are encouraged to do so in accordance with five criteria.[177] Within the therapeutics pillar, a second project was a proposed multimillion-dollar capacity reservation by the Gates Foundation with Fuji Films to manufacture doses of a novel monoclonal antibody being developed by Eli Lilly.[178] Likewise, within the diagnostics pillar, the Gates Foundation executed a volume guarantee for 120 million rapid diagnostic antigen tests.[179] Despite its ambition, the ACT-Accelerator is grossly under-resourced to achieve its goals. Out of an estimated budget need of $33.2 billion by the end of 2021, the ACT-Accelerator had raised only $11 billion as of March 4, 2021.[180] A more recent analysis still shows a $28 billion funding shortfall after several

gavi.org/sites/default/files/covid/covax/COVAX_Facility_Explainer.pdf (last visited Feb. 21, 2021).

175 Francesco Guarascio, *Exclusive–WHO Vaccine Scheme Risks Failure, Leaving Poor Countries with No COVID Shots Until 2024*, REUTERS (Dec. 16, 2020), https://www.reuters.com/article/health-coronavirus-who-vaccines-exclusiv-idUSKBN28Q1LF; Peter Beaumont, *Scheme to Get Covid Vaccine to Poorer Countries at 'High Risk' of Failure*, GUARDIAN (Dec. 16, 2020), https://www.theguardian.com/world/2020/dec/16/scheme-to-get-covid-vaccine-to-poorer-countries-at-high-risk-of-failure; Maria Cheng & Anniruddha Ghosal, *Poor Countries Face Long Wait for Vaccines Despite Promises*, ASSOCIATED PRESS (Dec. 15, 2020), https://apnews.com/article/poorer-countries-coronavirus-vaccine-0980fa905b6e1ce2f14a149cd2c438cd.

176 CEPI et al., *COVAX Announces Additional Deals to Access Promising COVID-19 Vaccine Candidates; Plans Global Rollout Starting Q1 2021* (Dec. 18, 2020), https://www.gavi.org/news/media-room/covax-announces-additional-deals-access-promising-covid-19-vaccine-candidates-plans (announcing agreements in place to access nearly two billion doses of several promising COVID-19 vaccine candidates, and laying the groundwork for further doses to be secured through contributions from donors).

177 COVAX, *Principles for Sharing COVID-19 Vaccine Doses with COVAX*, GAVI (Dec. 18, 2020), https://www.gavi.org/sites/default/files/covid/covax/COVAX_Principles-COVID-19-Vaccine-Doses-COVAX.pdf.

178 Eli Lilly, *Lilly Announces Arrangement* for *Supply* of *Potential COVID-19 Antibody Therapy* for *Low- and Middle-Income Countries*, CISION PR NEWSWIRE (Oct. 8, 2020), https://www.prnewswire.com/news-releases/lilly-announces-arrangement-for-supply-of-potential-covid-19-antibody-therapy-for-low--and-middle-income-countries-301148217.html.

179 *Global Partnership to Make Available 120 Million Affordable, Quality COVID-19 Tests for Low- and Middle-Income Countries*, WORLD HEALTH ORG. (Sept. 28, 2020), https://www.who.int/news/item/28-09-2020-global-partnership-to-make-available-120-million-affordable-quality-covid-19-rapid-tests-for-low--and-middle-income-countries.

180 ACT Accelerator, *ACT-Accelerator Prioritized Strategy and Budget for 2021*, WORLD HEALTH ORG. 26–29 (Mar. 12, 2021), https://www.who.int/publications/m/item/act-a-prioritized-strategy-and-budget-for-2021.

months of intensive resource mobilization.[181]

Although the ACT-Accelerator represents an important effort to achieve access to safe and effective COVID-19 vaccines, therapeutics, and diagnostics for LMICs, its ambition is actually quite limited. For example, the ACT-Accelerator was established to address the so-called acute phase of the pandemic and to prevent hospitals from being swamped with COVID-19 patients.[182] Thus, for example, the Accelerator limits its ambition to facilitating supply sufficient to meet only 20% of projected vaccine need in LMICs and similar proportions of short-term needs for therapeutics and diagnostics. The ACT-Accelerator apparently assumes that ordinary market forces will normalize equitable supply and affordable access to COVID-19 health products thereafter, but as discussed previously, such supply and access cannot be assured by profit-driven companies that remain free to raise prices, limit manufacturing capacity, and serve preferred buyers first. The ACT-Accelerator is also using a very small toolbox of market interventions to secure COVID-19 health products—mainly advance market commitments, volume guarantees, and capacity reservations—none of which disrupt the status quo. Similarly, the ACT-Accelerator has not placed conditions on the companies it supports, such as requiring them to greatly expand supply capacity by requiring or incentivizing open licensing and full technology transfer of proven vaccines, medicines, and diagnostics. Instead, companies can go it alone—even though none have anywhere near sufficient capacity to meet global need—or they can enter into limited contract manufacturing agreements with a small subset of qualified producers. The foreseeable consequence of not focusing on the imperative of expanded supply is that global supply needs cannot and will not be met. The net result of all these false steps is that even if the ACT-Accelerator "succeeds" and gets all the resources it needs to fulfill its goals, only a fraction of medical supply needs in LMICs will be met.

Focusing more specifically on COVAX, there have been too many concessions to rich countries that get four bites at the vaccine apple: (1) they can secure up to 50% of their population need instead of the 20% maximum for the ninety-two countries covered by the Advance Market Commitment;

181 ACT Accelerator, *A Financing Framework for the 2021 Act-A Funding Gap*, World Health Org. (Dec. 14, 2020), https://www.who.int/publications/m/item/a-financing-framework-for-the-2021-act-a-funding-gap (click "Download (820 kB)"); *see* ACT Accelerator, *Urgent Priorities and Funding Requirements at 10 November 2020*, World Health Org. (Nov. 12, 2020), https://www.who.int/publications/m/item/urgent-priorities-financing-requirements-at-10-november-2020 (click "Download (1.3 MB)"); ACT Accelerator, *supra* note 180.

182 ACT Accelerator, *supra* note 180.

(2) they can secure vaccines doses from COVAX without any accounting for the bilateral advance purchase agreements they already may have with multiple vaccine producers; (3) they can choose to exercise "options" whereby they can select their preferred, presumably more effective and safe vaccines from COVAX while rejecting other vaccines; and (4) they can trade or exchange unwanted or inferior vaccines—including those sourced bilaterally—within COVAX for preferred vaccines.[183] Although not all of the ACT-Accelerator's narrow assumptions and false steps can be corrected, it could use the reality of insufficient funds to pivot from procuring COVID-19 health products to working more intensely on pricing, supply, and equitable distribution issues.

H. *Regional Solidarity Efforts*

In addition to these global efforts, regional mechanisms have also been established to promote collaboration and sharing. For example, the Association of Southeast Asian Nations (ASEAN) announced a Declaration on COVID-19 at their special summit on April 14, 2020, promising cooperation on health, trade, and supply of essential medical tools (including diagnostics, PPE, and medicines).[184] Member states agreed to share scientific information, to cooperate in developing vaccines and antiviral medicines, to allow the free flow of essential medicines and medical supplies, to encourage adequate supplies and establish a regional emergency reserve, and to provide emergency assistance via a COVID-19 ASEAN Response Fund.[185] Similarly, within the WHO South-East Asia region, the Health Ministers issued a Declaration on Collective Response to COVID-19 focusing on strengthening health systems and collaboration within the region and agreeing to engage in global discussions on equitable allocation of vaccines, medicines, and diagnostics.[186] Subsequently, in June, African Union ministers of health

183 *See* Priti Patnaik, *COVAX in 2021: Will the Pieces Come Together?*, GENEVA HEALTH FILES: COVAX 2021: THE GAVI BOARD DOSSIERS (Dec. 25, 2020), https://genevahealthfiles.substack.com/p/covax-2021-the-gavi-board-dossiers?token=eyJ1c2VyX2lkIjoxNzE0ODUyNiwicG9zdF9pZCI6MjgwMDQ2MDAsIl8iOiJqalFSZSIsImlhdCI6MTYwOTM2NDYxMSwiZXhwIjoxNjA5MzY4MjExLCJpc3MiOiJwdWItNzkzOTYiLCJzdWIiOiJwb3N0LXJlYWN0aW9uIn0.uvVY7oO0ALL7zMCs06UN_QxC_IhBlseT85pxyJ5DFvA.

184 *Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19)*, ASEAN (Apr. 14, 2020), https://asean.org/storage/2020/04/FINAL-Declaration-of-the-Special-ASEAN-Summit-on-COVID-19.pdf.

185 *Id.*

186 World Health Org. Comm. For S.E. Asia Res. SEA/RC73/R1 (Sept. 10, 2020), https://apps.who.int/iris/bitstream/handle/10665/334243/sea-rc73-r1-eng.pdf?sequence=1&isAllowed=y.

committed to pursuing local manufacturing of COVID-19 vaccines using flexibilities in the TRIPs Agreement.[187] In addition, the African Union Centre for Disease Control has been quite proactive in organizing regional distribution of scarce supplies. Regrettably, the Latin America/Caribbean region has been less proactive in mounting a coherent regional response to COVID-19 because of intraregional disputes, though some progress has been made for pooled procurement and distribution of COVID-19 medical products.[188]

187 *Communiqué from Africa's Leadership in COVID-19 Vaccine Development and Access Virtual Conference*, Africa CDC (June 30, 2020), https://africacdc.org/news-item/covid-19-vaccine-development-and-access-virtual-conference/.

188 *Cooperation in Latin America: Responses to COVID-19 Expose Existing Cracks in Regional Infrastructure*, Pol. Settlements Rsch. Program (July 16, 2020), https://www.politicalsettlements.org/2020/07/16/cooperation-in-latin-america-responses-to-covid-19-expose-existing-cracks-in-regional-infrastructure/.

CONCLUSION

IPRs, research findings, clinical trial data, trade secrets, and other exclusivities interfere with all phases of the global system for researching and accessing needed COVID-19 health products. Research silos, commercial ownership of research data, and delayed publication of research findings interfere with the collaborative and open-science approach needed to develop the best medical products at the fastest pace. Exclusive rights in some countries prevent reliance on or reference to earlier clinical trial data establishing the safety and efficacy of medicines and devices can delay or even block marketing approval of generic equivalents. Not only do exclusive rights give biopharmaceutical companies and testing and device manufacturers the power to set exorbitant, monopoly prices, they also limit options for governments and competitors to expand manufacturing capacity to meet global need for billions of doses of medicines and vaccines, billions of diagnostic tests, and billions of pieces of personal protective equipment. Faced with inadequate supply and high prices, rich country governments have rushed to the front of the line and entered into advance purchase agreements with profit-maximizing companies to stockpile supplies, crowding out fair sharing and equitable access to people in need elsewhere. Instead of mobilizing, coordinating, and maximizing the global response to COVID-19, the monopoly-based system results in research wastage and delay, fewer sources of supply, higher prices, insufficient quantities, and inequitable distribution.

Although there have been multiple initiatives and proposals to overcome industry's exclusive rights and commercial prerogatives, these efforts have not resulted in the needed paradigm shift in global health such that life-saving and enhancing health products are viewed as global public goods rather than as ordinary consumer products. Similarly, rich countries' hegemonic hoarding of COVID-19 health products and inadequate global coordination mechanisms have left the imperative of equitable distribution of COVID-19 health products disarrayed, with the risk that twice as many people will die from COVID-19 than if vaccines were to be shared globally. We can hope that this dystopian stasis will be overcome, but it will take far more activism from governments, institutions, and civil society to dislodge the current lethargic response and IP/ market fundamentalisms that leave our world fractured in responding to this modern-day plague. This global pandemic needs a solidarity-based global response now and as a proving ground for responding to inevitable future health threats.

PANDEMIC PREEMPTION: LIMITS ON LOCAL CONTROL OVER PUBLIC HEALTH

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INTRODUCTION

As COVID-19 silently spread across the globe, the earliest effective responses in the United States were driven by localities. However, as the pandemic progressed, many of the most impacted cities were barred from taking comprehensive action in response to the pandemic. The broader trend of state preemption of local public health interventions accelerated as a result of COVID-19 and left many localities effectively defenseless against an invisible enemy.

As the earliest known outbreak in the United States took hold in Washington state, King County encouraged workers to telecommute and dramatically reduced mobility via public transportation within the county.[1] In the Bay Area, several counties joined together to issue the nation's first stay-at-home order in an effort to try and curb community transmission in the early stages of the pandemic.[2] While many states allowed localities to take the initiative in the early stages of the pandemic, subsequently, there was a preemption pivot. Over time, more governors issued executive orders that prevented localities from taking further action.[3] As a result, many of the nation's largest cities and most major cities in the Sunbelt and the Midwest regions were blocked from taking action to confront the rising number of cases and deaths in their communities. While many scholars have pointed to the lack of a uniform national response to this crisis, few have recognized that the uniformity of statewide preemption played a significant role in the high level of mortality.

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1 Sandi Doughton, *New Analysis May Rewrite the History of Washington State's Coronavirus Outbreak*, SEATTLE TIMES (May 27, 2020), https://www.seattletimes.com/seattle-news/health/genetic-analysis-raises-more-questions-about-the-history-of-washington-states-coronavirus-outbreak/; Meredith Li-Vollmer, *New Public Health Recommendations to Slow the Spread of Coronavirus*, PUB. HEALTH INSIDER (Mar. 5, 2020), https://publichealthinsider.com/2020/03/04/new-public-health-recommendations-to-slow-the-spread-of-coronavirus/; Heidi Groover & Mike Lindblom, *King County Metro Will Reduce Bus Service Amid Coronavirus Outbreak*, SEATTLE TIMES (Mar. 18, 2020), https://www.seattletimes.com/seattle-news/transportation/king-county-metro-reportedly-plans-to-cut-bus-service-amid-coronavirus-outbreak/.

2 Press Release, Cnty. of San Mateo, Seven Bay Area Jurisdictions Ord. Residents to Stay Home, (Mar. 16, 2020), https://www.smcgov.org/press-release/march-16-2020-seven-bay-area-jurisdictions-order-residents-stay-home. *See generally* Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement–United States, March 1–May 31*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198–99, 1202 (2020) (discussing California as the first state with a stay-at-home order).

3 *See* Brentin Mock, *These States Are Sowing Confusion About Cities' Power to Fight Covid-19*, BLOOMBERG CITYLAB (Apr. 8, 2020), https://www.bloomberg.com/news/articles/2020-04-08/how-much-power-do-cities-have-to-fight-covid-19.

Perhaps no issue highlighted the nature of pandemic preemption more than the limits on mask mandates imposed by many states. Iowa, Georgia, and Nebraska are among the most dramatic examples of statewide limits on local action. In Iowa, as local governments sought to implement a mask mandate, Governor Kimberly Reynolds claimed they could not do so without her permission, citing informal advisory opinions by the State Attorney General's office.[4] In Georgia, Governor Brian Kemp issued an executive order sharply limiting any local action in response to the pandemic.[5] He later responded to local mask mandates by bringing litigation against the city of Atlanta.[6] Cities across Georgia opposed the governor's lawsuit, and the Georgia Municipal Association, with many member-municipalities having already adopted mask policies in public buildings, submitted an amicus brief arguing that the Georgia Constitution prohibited the governor from exercising such legislative or judicial powers in a time of emergency and that local mask mandates were a "consistent supplementation of the governor's executive orders."[7] In Nebraska, Governor Pete Ricketts threatened to withhold federal stimulus funding from any locality which imposed a mask mandate.[8]

In a pandemic, there is a strong argument that a uniform response is more likely to be effective. However, in a country as diverse and widespread as the United States, there are good reasons to allow cities with denser populations to respond differently than rural and more sparsely populated areas. In prior pandemics, local action was central to reducing overall levels of mortality. Strong public health data around the impact of mask usage in reducing the rate of transmission suggests that this intervention was among the most important local responses to COVID-19.[9]

4 Clark Kauffman, *Attorney General Casts Doubt on Legality of Local COVID-19 Orders*, Iowa Cap. Dispatch (July 7, 2020), https://iowacapitaldispatch.com/2020/07/07/attorney-general-casts-doubt-on-legality-of-local-covid-19-orders/.

5 Ga. Exec. Order No. 07.15.20.01, at 1, 32, 40 (July 15, 2020).

6 *See* Complaint at 1, 5–7, Kemp v. Bottoms, No. 2020-CV-338387 (Ga. Super. Ct. July 16, 2020) [hereinafter Kemp Complaint].

7 Brief of Georgia Municipal Ass'n, Inc. & International Municipal Lawyers Ass'n as Amici Curiae in Opposition to Plaintiff's Motion for Emergency Interlocutory Injunction and Complaint for Declaratory and Injunctive Relief at 1, 6, 7, 9, 12, Kemp v. Bottoms, No. 2020-CV-338387 (Ga. Super. Ct. July 21, 2020) [hereinafter Brief of Amici Curiae].

8 Joseph Zeballos-Roig, *A Republican Governor Is Threatening to Withhold $100 Million in Federal Relief Funds from Cities if Local Officials Mandate Wearing Masks in Public Buildings*, Bus. Insider (June 18, 2020), https://www.businessinsider.com/republican-governor-nebraska-pete-ricketts-federal-relief-funds-cities-2020-6.

9 Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, U.C.S.F. (July 11, 2020), https://www.ucsf.edu/news/2020/06/417906/

As of early December 2020, with cases reaching unprecedented rates in the United States, thirty-eight states, plus the District of Columbia and Puerto Rico, had imposed statewide mask mandates.[10] Among these states, at least five of them adopted the policy after November 2020, nearly a year after the beginning of the pandemic.[11] Several other states, including Iowa, aggressively sought to prevent localities from adopting local mask mandates.[12] Of the remaining twelve states without a statewide mask mandate, Florida Governor Ron DeSantis preempted local governments from imposing fines for violators of local mask mandates.[13] Florida surpassed one million COVID-19 infections as of December 1, 2020.[14] Governors in other states, including Georgia and Nebraska, previously sought to preempt or impose fiscal penalties on localities that required masks.[15] More than 500,000 Georgia residents contracted COVID-19 without any statewide approach to requiring masks.[16]

Local leaders throughout major population centers and diverse counties generally led the effort to encourage universal masking during the pandemic, and in the twelve states without mask mandates, they are the only authority requiring such a response.[17] In Alaska, for example, a mayoral

still-confused-about-masks-heres-science-behind-how-face-masks-prevent; Jeremy Howard et al., *An Evidence Review of Face Masks Against COVID-19*, PROC. NAT'L ACAD. SCIS., Jan. 2021, at 1; Heesoo Joo et al., *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates – 10 States, March-October 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 212 (2021); Wei Lyu & George Webby, *Community Use of Face Masks and COVID-10: Evidence from a Natural Experiment of State Mandates in the US*, 38 HEALTH AFFS. 1419 (2020).

10 Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Mar. 16, 2021), https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html.

11 *Id.*

12 *See, e.g.*, David Pitt, *Local Control Dispute Brewing Over Iowa Mask Mandates*, AP NEWS (Aug. 9, 2020), https://apnews.com/article/iowa-health-local-governments-kim-reynolds-virus-outbreak-e8e439daf0941a6b2edfc86d2262d1eb.

13 *See* Fla. Exec. Order No. 20-244 (Sept. 25, 2020); *see also* Fla. Exec. Order No. 20-92 (Apr. 1, 2020) (providing that Governor Ron DeSantis' executive orders supersede conflicting local orders).

14 *Florida Surpasses 1 Million COVID-19 Cases*, AP NEWS (Dec. 1, 2020), https://apnews.com/article/florida-coronavirus-pandemic-ron-desantis-cc761f945a8a32f4db240cc3fdd0abf9.

15 *See* Ga. Exec. Order No. 07.15.20.01 (July 15, 2020); *see also* Zeballos-Roig, *supra* note 8.

16 Jeff Amy, *COVID-19 Cases Keep Soaring in Georgia as Hospitals Fill*, AP NEWS (December 7, 2020), https://apnews.com/article/atlanta-georgia-coronavirus-pandemic-6e4ad3e7abe160b200cbbd8c89999a21; *see* Markowitz, *supra* note 10.

17 *See* Markowitz, *supra* note 10 (discussing cities and counties in Idaho, Arizona, South Carolina, Nebraska, Oklahoma, Missouri, Tennessee, Georgia, Florida, and Alaska); *see also, e.g.*, Kobee Vance, *Cities and Counties Continue Mask Mandates as Statewide Order Expires*,

order requires people in Anchorage to wear face coverings in public.[18] In Arizona, major cities, such as Phoenix and Tucson, require masks, as do some counties in the state.[19] In Georgia, major cities, including Atlanta and Savannah, as well as a number of counties, have mask mandates.[20] In South Carolina, Charleston and Columbia both have mask mandates.[21]

In most states, local governments also led early efforts to impose stay-at-home orders or temporarily close non-essential businesses. However, by April, most states had adopted a similar approach, and these statewide orders often included preemption of local action. Nearly half of the forty-three stay-at-home orders included preemption language.[22] In some of these states, the stay-at-home orders set a floor, below which no locality could go, while others set a ceiling, forcing localities to refrain from creating policies that went further than the states, and many others were entirely restrictive of local government action.[23] With at least eight states adopting a pure ceiling

Miss. Pub. Broad. (Oct. 8, 2020), https://www.mpbonline.org/blogs/news/cities-and-counties-continue-mask-mandates-as-statewide-order-expires/ (discussing Mississippi); Jeremy Fugleberg, *South Dakota Cities Tackle COVID-19 Mask Mandates*, Mitchell Republic (Nov. 21, 2020), https://www.mitchellrepublic.com/newsmd/coronavirus/6771465-South-Dakota-cities-tackle-COVID-19-mask-mandates (discussing South Dakota); Ethan Bakuli, *Coronavirus in Vermont: What Towns and Businesses Require Face Masks? Here Are Answers.*, Burlington Free Press (June 17, 2020), https://www.burlingtonfreepress.com/story/life/2020/06/08/covid-19-vermont-what-towns-and-businesses-require-face-masks-covid-19/5317789002/ (discussing Vermont); Scott Bauer, *3 Cities Enact[] Mask Mandates; Evers Resists Statewide Order*, AP News (July 22, 2020), https://apnews.com/article/5857b586ad2613043676a9967107249e (discussing Wisconsin).

18 Aubrey Wieber & Morgan Krakow, *Anchorage Mayor Berkowitz Orders Mask Wearing in Indoor Public Spaces*, Anchorage Daily News (June 27, 2020), https://www.adn.com/alaska-news/anchorage/2020/06/26/anchorage-mayor-berkowitz-issues-indoors-mask-mandate/.

19 Bob Christie, *Many Arizona Cities Back Masks to Slow Virus, Others Say No*, AP News (June 18, 2020), https://apnews.com/article/c37cee0b11d8abd65fc50808330616ce; Vanessa Romo, *Phoenix Passes Face Mask Mandate Amid Arizona Coronavirus Surge*, NPR (June 19, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/06/19/881079527/phoenix-passes-face-mask-mandate-amid-arizona-coronavirus-surge.

20 Brittany Crocker, *Fact Check: Florida, Georgia, Idaho, South Dakota, Tennessee Don't Require Masks Statewide*, USA Today (Oct. 28, 2020), https://www.usatoday.com/story/news/factcheck/2020/10/27/fact-check-florida-georgia-tennessee-idaho-s-d-arent-mask-free/6045575002/.

21 Tim Scott, *South Carolina Among 22 States Without Some Sort of Face-Mask Ordinance*, ABC Columbia (July 20, 2020), https://www.abccolumbia.com/2020/07/20/south-carolina-among-22-states-without-some-sort-of-face-mask-ordinance/.

22 Katherine Hoops et al., *Stay-at-Home Orders and Firearms in the United States During the COVID-19 Pandemic*, 141 Preventive Med. 1, 2–3 (2020).

23 Kim Haddow et al., *Preemption, Public Health, and Equity in the Time of COVID-19*, *in* Assessing Legal Responses to COVID-19, at 71, 72–73 (Scott Burris et al. eds., 2020).

approach to preemption, many local governments lost the ability to act rapidly to counteract the effects of the pandemic.[24]

This article will focus on analyzing the role of pandemic preemption in the case of one non-pharmaceutical intervention adopted by many localities—the requirement that facial coverings be worn to prevent the transmission of the virus. Although the exact form of the so-called mask mandates has varied from locality to locality, these policies generally require those over a certain age to wear a face covering in public spaces, particularly indoors, or when social distancing is not possible. The controversy generated by this public health intervention is not new, as the anti-mask leagues of the 1918 flu pandemic demonstrate,[25] but the response by state governments to prevent localities from adopting such a response is essentially new and reveals much about the constraints on local action designed to protect public health. Part I analyzes the local role in responding to COVID-19 with a particular focus on policies and research related to the use of masks. Part II offers a broader perspective on the ways in which state-level preemption constrains local approaches to public health. Part III introduces case studies of pandemic preemption in the context of COVID-19 by looking at statewide limits on local mask requirements. Finally, the Conclusion assesses the dynamics of pandemic preemption and its relationship to the trend toward wider statewide preemption in the realm of public health.

24 *Id.* at 71–73.

25 Kiona N. Smith, *Protesting During a Pandemic Isn't New: Meet the Anti-Mask League of 1918*, FORBES (Apr. 29, 2020), https://www.forbes.com/sites/kionasmith/2020/04/29/protesting-during-a-pandemic-isnt-new-meet-the-anti-mask-league/?sh=575ee40112f9.

I. COVID-19 and Pandemic Response

In a global pandemic, locally driven responses are not necessarily optimal given the likelihood of viral spillover from other localities, other states, and other countries. However, in the absence of coordinated global, national, or even state responses, local action can be essential to reducing the exponential growth of cases and ultimately saving lives. Voluntary action by citizens is critical to the response to the current pandemic. Yet, as with state governments that are reluctant to take public health actions, citizens who decide not to take measures to prevent the spread of the virus can ultimately become super spreaders of the virus to others and generate enormous externalities.

In this context, growing scientific evidence demonstrates that facial coverings can dramatically reduce the transmission of COVID-19.[26] The efficacy of masks, of course, depends on the percentage of the population that adopts the practice of wearing them.[27] Substantial peer effects shape these individual-level decisions. Most people take cues from their environment. So, if people see others wearing a mask, they are much more likely to wear one themselves. This suggests that getting a threshold percentage of the population to wear facial coverings can alter the behavior of others and create a tipping point or norm cascade.

As of early December 2020, the federal Centers for Disease Control and Prevention urged "universal mask use" to prevent COVID-19 infections and deaths.[28] Updated guidance from the World Health Organization (WHO) similarly recommended the use of facial coverings indoors and outdoors: "[w]hen indoors with others, people should wear a mask unless ventilation has been assessed to be adequate. At home, people should wear

26 *See* Catherine M. Clase et al., *Forgotten Technology in the COVID-19 Pandemic: Filtration Properties of Cloth and Cloth Masks—A Narrative Review*, 95 Mayo Clinic Proc. 2204, 2214–15, 2221 (2020). *See generally* Joo, *supra* note 9; Benjamin Rader et al., *Mask-Wearing and Control of SARS-CoV-2 Transmission in the USA: A Cross-Sectional Study*, 3 Lancet Digital Health e148 (2021); Sharoda Dasgupta et al., *Differences in Rapid Increases in County-Level COVID-19 Incidence by Implementation of Statewide Closures and Mask Mandates – United States, June 1-September 30, 2020*, Annals Epidemiology, May 2021, at 46; Miriam E. Van Dyke et al., *Trends in COVID-19 Incidence in Counties with and Without a Mask Mandate – Kansas, June 1-August 23*, 2020, 69 Morbidity & Mortality Wkly. Rep. 1777 (2020).

27 Steffen E. Eikenberry et al., *To Mask or Not to Mask: Modeling the Potential for Face Mask Use by the General Public to Curtail the COVID-19 Pandemic*, 5 Infectious Disease Modeling 293, 295 (2020).

28 Teylor Telford, *CDC Recommends People Wear Masks Indoors When Not at Home*, Wash. Post (Dec. 4, 2020), https://www.washingtonpost.com/health/2020/12/04/cdc-mask-guidance-indoors/.

a mask when receiving visitors if they cannot maintain distance or assess that ventilation is good."[29]

Moreover, the former White House Coronavirus Response Coordinator, Dr. Deborah Birx, attributed the stabilization of cases in Iowa to the belated adoption of a mask mandate in November 2020.[30] In Kansas, a statewide mask mandate in early July allowed for counties to opt-out.[31] Among counties that adopted the mandate, new cases dropped 6%, while in those counties that opted out, new cases jumped by 100%.[32] Research suggests that the use of masks has already prevented 1.4 million new infections in the Tampa Bay region.[33] In October 2020, a study projected that the universal adoption of facial coverings could prevent 130,000 deaths by the end of February 2021 in the United States.[34] In June 2020, an economic study estimated that a universal, national mask mandate could generate $1 trillion in economic benefit by preventing future lockdown measures.[35]

In Germany, the city of Jena adopted a mask mandate in early April 2020, and within a few weeks, new infections were close to zero.[36] As a result

29 *WHO Updates Guidance on Mask Use in the Context of COVID-19*, HEALTHCARE PURCHASING NEWS (Dec. 2, 2020), https://www.hpnonline.com/infection-prevention/disposables-kits-drapes-ppe-instruments-textiles-etc/article/21164834/who-updates-guidance-on-mask-use-in-the-context-of-covid19; WORLD HEALTH ORG., MASK USE IN THE CONTEXT OF COVID-19: INTERIM GUIDANCE 8, 10 (2020), https://apps.who.int/iris/handle/10665/337199.

30 *See* Rachel Droze, *'Mandates Work': Dr. Birx Says Iowa's Stabilizing Case Counts Prove Mask Requirements Help Slow Spread*, WE ARE IOWA (Dec. 5, 2020), https://www.weareiowa.com/article/news/health/coronavirus/dr-deborah-birx-says-masks-should-be-mandated-at-iowa-schools-all-indoor-locations-covid-19-coronavirus-pandemic/524-649b9bfc-b275-4384-889b-45bba5a7f0fe.

31 Kan. Exec. Order No. 20-52 (July 2, 2020).

32 Jonathan Shorman, *CDC Report: COVID-19 Cases Dropped in Kansas Counties with Mask Orders, Rose in Others*, KAN. CITY STAR (Nov. 20, 2020), https://www.kansascity.com/article247315954.html.

33 C.T. Bowen, *Face Masks Reduced Tampa Bay Coronavirus Cases by 1.4 Million, Says USF Professor*, TAMPA BAY TIMES (Dec. 2, 2020), https://www.tampabay.com/news/health/2020/12/02/face-masks-reduced-tampa-bay-coronavirus-cases-by-14-million-says-usf-professor/.

34 Eric Boodman, *Universal Mask Use Could Save 130,000 U.S. Lives by the End of February, New Study Estimates*, STAT (Oct. 23, 2020), https://www.statnews.com/2020/10/23/universal-mask-use-could-save-130000-lives-by-the-end-of-february-new-modeling-study-says/.

35 Sarah Hansen, *A National Mask Mandate Could Save the U.S. Economy $1 Trillion, Goldman Sachs Says*, FORBES (June 30, 2020), https://www.forbes.com/sites/sarahhansen/2020/06/30/a-national-mask-mandate-could-save-the-us-economy-1-trillion-goldman-sachs-says/?sh=5ea2e89e56f1.

36 Disha Shetty, *German Study Finds Face Masks Reduce New Covid-19 Infections by 45%*, FORBES (Dec. 6, 2020), https://www.forbes.com/sites/dishashetty/2020/12/06/

of this experience, every federal state in Germany made facial coverings mandatory by the end of April.[37] A study of the German model found that within twenty days of mask mandates, the number of new infections declined between 15% and 75%, with the greatest reduction for those over age sixty, who are generally more vulnerable to severe outcomes.[38] In Jena, the adoption of the mask mandate reduced new cases by 75% overall and by 90% for those over age sixty.[39] The average reduction in the number of new cases was 45% within three weeks with virtually no economic cost.[40]

Statewide approaches to requiring masks seem to be more effective than local mask mandates, but both can significantly alter individual behavior and case growth. One major difference between statewide and local approaches seems to be that statewide mandates stimulate economic activity in a way that is not evident with local ones.[41] A study by the University of Utah found that mask mandates reduced new cases by 10 per 100,000 per day.[42] It also determined that state mask mandates lead to increased consumer spending, with 51% of respondents more likely to go into a store if everyone is wearing a mask.[43] Statewide mandates are also more effective at increasing consumer confidence in a way that was not evident for local requirements.[44]

Nonetheless, local responses can have a major impact in reducing cases, particularly if they are coordinated. In Arizona, local mask mandates in mid-June 2020, covering 85% of the state's population, contributed to a stabilization of cases by early July and a 75% decline in cases by early August.[45] Yet, by July 2020, a minimal number of states required facial

german-study-finds-face-masks-reduce-new-covid-19-infections-by-45/.

37 *Id.*

38 *Id.*

39 Timo Mitze et al., *Face Masks Considerably Reduce COVID-19 Cases in Germany*, 117 Proc. Nat'l Acad. Scis. 32293, 32293 (2020).

40 *Id.*

41 Alison Durkee, *Statewide Mask Mandates Are Better for Economy than Local Ones, Study Finds*, Forbes (Nov. 24, 2020), https://www.forbes.com/sites/alisondurkee/2020/11/24/statewide-mask-mandates-are-better-for-economy-than-local-ones-study-finds/?sh=2ec8b384498d.

42 Nathan Seegert et al., Information Revelation of Decentralized Crisis Management: Evidence from Natural Experiments on Mask Mandates 4 (Nov. 23, 2020) (unpublished preprint), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736407.

43 *Id.* at 24.

44 *Id.* at 12–13.

45 M. Shayne Gallaway et al., *Trends in COVID-19 Incidence After Implementation of Mitigation Measures — Arizona, January 22–August 7, 2020*, 69 Morbidity & Mortality Wkly. Rep. 1460, 1460–61 (2020) ("Updated guidance from state officials provided local governments the authority to implement mask policies (June 17) and enforcement measures tailored to local public health needs (local policies were applicable to

coverings as part of a statewide pandemic response.[46] Several of the twelve states without mask mandates as of December 2020 still encourage local approaches.[47] However, many of these states, a few of which have since adopted statewide mandates, have demonstrated much less support for local innovation with respect to facial coverings and other pandemic responses.[48] In Iowa and Georgia, among other states, the governors directly challenged the authority of local governments to implement mask requirements.[49] In Nebraska, the governor threatened to withdraw pandemic-related federal funding from localities requiring masks.[50] In Florida, the governor reversed course in September 2020 after initially allowing local approaches and declared that localities lacked the authority to enforce mask mandates.[51] Of these states, only Iowa subsequently adopted a statewide mask requirement, although it is more limited than in most other states.[52] Laredo, Texas, was among the first localities in the United States to require the wearing of

approximately 85% of the total Arizona population). Before June 17, mask wearing had not been widely mandated or enforced.").

46 Markowitz, *supra* note 10. As of July 1, 2020, only eight states, and one territory, required face masks in public: California, Connecticut, Illinois, New Mexico, Nevada, New York, Rhode Island, Washington, and Puerto Rico. *Id.*

47 *Id.*; Adrian Mojica, *Tennessee Governor Won't Change Position on Mask Mandate Regardless of Who's President*, FOX17 WZTV NASHVILLE (Nov. 10, 2020), https://fox17.com/news/local/tennessee-governor-wont-change-position-on-mask-mandate-regardless-of-whos-president-donald-trump-joe-biden-john-cooper-bill-lee-coronavirus (statement of Tennessee Governor's press secretary) ("The governor strongly believes statewide, one-size-fits-all government mandates are not the best way to achieve sustainable compliance from individuals, as they are more likely to trust local leaders and that local leaders know the unique needs of their communities best."); *see also* Keith Ridler, *Idaho Governor Pleads for Mask-Wearing to Protect Veterans*, U.S. NEWS & WORLD REP. (Nov. 9, 2020), https://www.usnews.com/news/best-states/idaho/articles/2020-11-08/idaho-keeps-breaking-new-coronavirus-case-records (quoting a spokesperson for the governor of Idaho: "Idahoans value local control . . . .").

48 *See, e.g.*, Maeve Sheehey, *Americans' Aversion to Mask-Wearing Is Holding Back the Economy*, BLOOMBERG (July 11, 2020), https://www.bloomberg.com/news/articles/2020-07-11/americans-aversion-to-mask-wearing-is-holding-back-the-economy.

49 Kauffman, *supra* note 4; Markowitz, *supra* note 10; *see also* ANNA PRICE & LOUIS MYERS, LAW LIBRARY OF CONGRESS, UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 10–13 (2020), https://www.loc.gov/law/help/covid-19-responses/federal-state-local-responses.pdf.

50 Jason Silverstein, *Nebraska Governor Threatens to Withhold Coronavirus Relief Funds from Counties that Require Masks*, CBS NEWS (June 19, 2020), https://www.cbsnews.com/news/nebraska-governor-pete-ricketts-withhold-coronavirus-relief-funds-face-masks/.

51 Markowitz, *supra* note 10; Josh Rojas, *Florida Mayors Push DeSantis to Put COVID Restrictions Back in Place*, BAY NEWS 9 (Nov. 18, 2020), https://www.baynews9.com/fl/tampa/coronavirus/2020/11/18/florida-mayors-push-desantis-to-put-covid-restrictions-back-in-place.

52 Markowitz, *supra* note 10.

facial coverings in early April 2020.[53] Yet Laredo and other Texas cities were challenged by state officials over their local authority to implement them.[54]

53 *See* Miles Moffeit et al., *Texas Leaders Say You Should Wear a Mask, but You Don't Have To, Muddling Public Health Message*, Dallas Morning News (May 9, 2020), https://www.dallasnews.com/news/politics/2020/05/09/texas-leaders-say-you-should-wear-a-mask-but-you-dont-have-to-muddling-public-health-message/.

54 *Id.*

II. PREEMPTION AND PUBLIC HEALTH

Local preemption was significant in the area of public health even before the COVID-19 pandemic.[55] Pandemic preemption, therefore, is an outgrowth of a broader trend with respect to state-local government relations in recent years. Referred to by some scholars as the "new preemption," the approach by state governments to local regulation in a wide range of areas is increasingly preemptive of local action.

The baseline rules with respect to local preemption vary significantly by state and even by the local jurisdiction. Those states that retain the approach known as "Dillon's Rule" only offer localities those powers which are exclusively granted by the state constitution or by state statute.[56] In many states, some localities have what is known as "home rule," under which either the state constitution or a state statute outlines an arena in which localities can act without state interference.[57] Promoting the health and safety of residents is among the core authorities preserved under local control in most home rule jurisdictions.[58] However, action by the state government can restrict the scope of home rule, and, in many of these states, governors have sought to do so by asserting that their emergency powers supersede local control.[59]

The broader trend of local preemption arguably has its own independent effect on the capacity and willingness of local governments

55 *See* David Gartner, *States, Localities and Public Health*, 122 W. VA. L. REV. 965, 967 (2020). *See generally* James G. Hodge, Jr. et al., *Public Health Preemption: Constitutional Affronts to Public Health Innovations*, 79 OHIO ST. L.J. 685 (2018).

56 *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129 n.99 (2012) (stating that eight states adhere strictly to Dillon's Rule: Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, West Virginia, and Wyoming); *see also* Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECON. POL'Y INST. (Aug. 26, 2017), https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/ (asserting that unless there is no doubt about the authority of local government to act, courts in Dillon's Rule states generally rule against local governments).

57 Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 269–70 (1968).

58 *See generally* Gartner, *supra* note 55, at 967 ("[M]any cities around the country have had significant power to regulate, especially in matters of local concern, such as public health."); Hodge, Jr. et al., *supra* note 55, at 693 ("Sweeping removals of local regulatory or home rule authority proliferate across multiple public health areas, including nutrition-based regulation.").

59 Vanlandingham, *supra* note 57, at 280; *see* Kauffman, *supra* note 4; Markowitz, *supra* note 10; Moffeit et al., *supra* note 53; Rojas, *supra* note 51; Sheehey, *supra* note 48; Silverstein, *supra* note 50; PRICE & MYERS, LAW LIBRARY OF CONGRESS, *supra* note 49, at 13–15.

to intervene to protect public health.[60] An analysis by the Urban Institute sought to understand how the background conditions of local preemption shaped the response to COVID-19.[61] States with greater preemption adopted fewer COVID-19-related policies at both the local and state level.[62] By contrast, states with less preemption of local laws generally demonstrated a more comprehensive response to the pandemic, including efforts to prevent transmission and lower the growth of new cases such as mask requirements.[63] Overall, local-level executive action was much less likely in states with more generalized state preemption of localities.

State preemption, especially in the area of public health, faces opposition by large majorities of people across the spectrum. A recent poll found that 58% of likely voters, including majorities of those in both major political parties, believe that local governments should have the power to establish health standards that are stricter than those of the state in an emergency.[64]

60 *See* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 Yale L.J. 954, 958, 966–67, 995 (2019); Nestor M. Davidson & Laurie Reynolds, *The New State Preemption, the Future of Home Rule, and the Illinois Experience*, 4 Ill. Mun. Pol'y J. 19, 19–20 (2019).

61 Mark Treskon & Benjamin Docter, *Preemption and Its Impact on Policy Responses to COVID-19*, Urb. Inst. 1 (Sept. 2020), https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf.

62 *E.g.*, Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, Geo. Project on St. & Loc. Gov't Pol'y & L., https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/ (last visited Jan. 8, 2021) ("In the absence of state action, local governments that have Home Rule authority can exercise that authority to put in place orders that protect the health, safety and welfare of their residents. In other words, cities can step into the breach before state authorities exercise their authority in an emergency. However, once the state has acted and set the terms of a statewide response, local governments must essentially step aside."); Treskon & Docter, *supra* note 61, at 1.

63 Treskon & Docter, *supra* note 61, at 1.

64 Richard Schragger & Dilini Lankachandra, How Cities Can Protect Public Health When States Stand in the Way 3–4 (2020), https://30glxtj0jh81xn8rx26pr5af-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/20.09_COVID-Preemption-in-the-South-1.pdf.

III. PANDEMIC PREEMPTION

With pandemic preemption, this general trend toward greater statewide preemption is made explicit in the emergency orders of governors across the United States.[65] In the context of the pandemic, local preemption took a variety of forms. Some states adopted ceiling preemption, whereby localities could not adopt policies more protective than the statewide standard.[66] Other states adopted floor preemption, under which localities had to meet the minimum standard based on state guidelines but could go further with local regulation.[67] Many states adopted both ceiling and floor preemption approaches, thereby creating a "regulatory vacuum" where localities could not create any policies.[68] Finally, some states utilized total local preemption prohibiting local governments from adopting any response to the pandemic.[69]

With respect to the response to COVID-19, by mid-April 2020, 864 counties around the country had already issued emergency declarations.[70]

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65 *See* Haddow et al., *supra* note 23, at 72–73.

66 *Id.* at 72.

> In many states—Arizona, Florida, Georgia, Mississippi, South Carolina, Tennessee, Texas, and West Virginia, among others—the statewide stay-at-home orders established a regulatory ceiling . . . prevent[ing] local governments from imposing stricter requirements than the state. For example, Arizona's governor issued an executive order prohibiting any county, city, or town from issuing any order or regulation 'restricting persons from leaving their home due to the COVID-19 public health emergency.' Similarly, the Texas attorney general warned officials in Austin, Dallas, and San Antonio to roll back 'unlawful' local emergency orders that imposed stricter COVID-19 restrictions—and hinted that litigation would ensue if they did not.

Id.

67 *Id.* Maryland's governor issued a statewide stay-at-home order, but allowed local governments to implement additional restrictions based on local conditions, establishing a regulatory floor.

68 *Id.*

69 *Id.* "On March 26, 2020, the governor of Arkansas issued an executive order prohibiting local stay-at-home requirements, arguing that such regulations would interfere with essential operations and commerce." HUNTER BLAIR ET AL., ECON. POL'Y INST., PREEMPTING PROGRESS 27 (Sept. 30, 2020), https://files.epi.org/pdf/206974.pdf. Although Iowa did not implement a stay-at-home order, the Governor and Attorney General told local officials that they lacked the authority to pass such orders as well. *See* Kauffman, *supra* note 4.

70 *See* Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, *in* ASSESSING LEGAL RESPONSES TO COVID-19, at 10, 18 (Scott Burris et al. eds., 2020).

By July, more than 500 cities had issued policies related to the pandemic.[71] Many of the same states that engaged in broad local preemption before the pandemic utilized specific pandemic preemption approaches in 2020.[72] Some of the earliest uses of this specific preemption approach were related to the regulation of businesses within the states, including Mississippi in March 2020.[73] Subsequent executive orders in Arizona and Arkansas similarly limited the ability of localities to issue stay-at-home orders.[74] In April, Florida clarified that state-level orders superseded local ones, but the governor also suggested that local officials could still act, leading to confusion about the scope of local authority.[75] Later, executive orders in states such as Texas explicitly prohibited localities from requiring residents to wear masks.[76]

With respect to facial covering requirements, states generally followed the same three approaches as with pandemic preemption overall. While a few states subsequently reversed policies on ceiling preemption that barred localities from issuing mask mandates, these restrictions were in place in many of the states that experienced the worst surge in cases in the summer of 2020.[77]

71 *See id.*

72 Blair et al., *supra* note 69, at 27.

73 *Id.* ("A Mississippi executive order issued on March 24, 2020, forbade political subdivisions (including cities and counties) from imposing social distancing regulations or business shutdowns stricter than the state's . . . ."); *see* Miss. Exec. Order No. 1463 (Mar. 24, 2020).

74 Ariz. Exec. Order No. 2020-12 (Mar. 23, 2020); Ark. Exec. Order No. 20-03 (Mar. 11, 2020) ("The Secretary of Health may issue orders of isolation and/or quarantine as necessary and appropriate to control this disease in the State of Arkansas, and the Secretary of Health, in consultation with the Governor, shall have sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the state.").

75 Steven Lemongello et al., *DeSantis Order Overruling Local Coronavirus Rules Generates Confusion*, S. Fla. Sun Sentinel (Apr. 2, 2020), https://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-desantis-second-order-local-impact-20200403-sipn6s23tfc73motnyoz3j562y-story.html.

76 Tex. Exec. Order No. GA-18 (Apr. 27, 2020) ("Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering."). In a reversal, Texas Governor Greg Abbott instituted a face mandate by Executive Order on July 2, 2020. Tex. Exec. Order No. GA-29 (July 2, 2020).

77 Although the governors of states such as Arizona temporarily reversed state preemption of mandatory local masking orders, Arizona's statewide emergency order included no mask-wearing mandate even as it specifically prohibited local governments from acting independently. *See* Maria Polletta, *Ducey Will Let Arizona Cities Decide on Mandating Mask Wearing, Announces New Rules for Businesses*, Ariz. Republic (June 17, 2020), https://www.azcentral.com/story/news/local/arizona-health/2020/06/17/arizona-gov-doug-

The impact of pandemic preemption can be assessed by analyzing how it operated in some of the regions most affected by the second wave of COVID-19 cases after the initial outbreak subsided in the spring of 2020. The Southeast and the Midwest were each the epicenter of major surges in infections beginning in the Summer of 2020.[78] By analyzing neighboring states in these regions and their respective approaches to pandemic preemption, it is possible to unpack the range of obstacles to local action and the dynamics which shape the contours and impact of such preemption.

Looking at neighboring states is of particular interest because of the peer effect, which often leads neighboring states to adopt similar policies in response to the pandemic.[79] While political variables were important factors associated with the adoption of more or less extensive pandemic response measures, governors also often looked to their neighbors when deciding whether or not to adopt specific policies. When no neighboring states adopted a given policy, a governor was 32% less likely to adopt such a policy than when half or more of its neighbors had adopted that policy.[80] In the case of Nebraska and Iowa, approximately half of their neighboring states adopted statewide mask mandates.[81] Two of five of Nebraska's neighbors, excluding Iowa, adopted such an approach, while three, or half, of Iowa's neighbors did so.[82] One of Florida's two neighboring states adopted a mask mandate, while 40% of Georgia's neighboring states implemented such a policy.[83]

The next several Sections offer case studies of the COVID-19 response in these two pairs of neighboring states: Iowa, Nebraska, Florida, and Georgia. It analyzes the different approaches to pandemic preemption utilized in each state in 2020. While Nebraska initially used funding as a targeted lever to prevent local mask requirements, Iowa embraced a strategy of total statewide preemption of local action. While Georgia engaged in litigation designed to block localities from adopting mask mandates, Florida reversed its early support for local initiative and later prevented localities from effectively enforcing mask requirements.

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78 Matt Stieb, *After an Early Summer Lull, COVID-19 Cases Surge in the Midwest*, N.Y. MAG (Aug. 2, 2020), https://nymag.com/intelligencer/2020/08/after-a-lull-covid-19-cases-surge-in-the-midwest.html.

79 Christopher Adolph et al., *Pandemic Politics: Timing State-Level Social Distancing Responses to COVID-19*, 46 J. HEALTH POL. POL'Y & L. 211, 213 (2021).

80 *Id.*

81 Erin Schumaker, *Which States Have Mask Mandates: Map*, ABC NEWS (Nov. 19, 2020), https://abcnews.go.com/Health/states-mask-mandates-map/story?id=74168504.

82 *Id.*

83 *Id.*

A. *Nebraska: Contingent Funding*

In Nebraska, the fiscal consequences of the new wave of local preemption were central to deterring local governments from implementing mask mandates. Nebraska's Governor Pete Ricketts warned localities in the state that he would block them from receiving emergency federal pandemic funding if they adopted mask mandates or other types of local rules to slow transmission of the virus.[84] The Governor's statements in June 2020, as cases surged in parts of the country, successfully preempted local action.

Leadership within the unicameral state legislature in Nebraska sided with localities, determining that state law gives the authority to "make regulations to prevent the introduction and spread of contagious infectious or malignant diseases into the city."[85] The governor of Nebraska later said he would not interfere with local mask mandates after the Beatrice County Board of Health required the use of masks in indoor public spaces.[86]

Ultimately, seven of the largest ten cities in Nebraska imposed mask mandates amidst rapid growth in the number of cases.[87] As a result, over half of the state's population lived in communities where facial coverings were required, at least in indoor public spaces.[88] Among the cities in Nebraska that adopted such an approach were most of the population centers in the central and eastern parts of the state, such as Omaha, Lincoln, Kearney, Norfolk, and Columbus.[89]

The governor of Nebraska nonetheless resisted adopting a statewide

84 Kelly Mena, *Nebraska Governor Tells Local Officials They Can't Require Face Masks if They Want Federal Coronavirus-Relief Funding*, CNN (June 19, 2020), https://www.cnn.com/2020/06/19/politics/nebraska-governor-no-face-masks-requirement/index.html.

85 Martha Stoddard & Reece Ristau, *Debate Emerges over City Authority to Issue Mask Mandates as Ricketts Resists State Requirement*, Omaha World-Herald (Nov. 16, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/debate-emerges-over-city-authority-to-issue-mask-mandates-as-ricketts-resists-state-requirement/article_6bc9cb4a-9478-5c76-98de-789df323d8a6.html ("State Sen[ator] Justin Wayne . . . chairman of the Legislature's Urban Affairs Committee, said . . . state law gives cities . . . the authority to 'make regulations to prevent the introduction and spread of contagious, infectious or malignant diseases into the city.'").

86 Martha Stoddard, *Ricketts Won't Stop Cities from Requiring Masks*, Omaha World-Herald (Nov. 18, 2020), https://omaha.com/eedition/sunrise/articles/ricketts-wont-stop-cities-from-requiring-masks/article_cf4d435d-73f5-56a4-a3d2-40dff5dc3689.html.

87 *7 of Nebraska's 10 Largest Cities Have Local Mask Mandates*, AP News (Nov. 27, 2020), https://apnews.com/article/pete-ricketts-lincoln-norfolk-omaha-grand-island-ec39dbf18077a19bd9266678a692ecff#:~:text=Most%20cities%20with%20mandates%20are,the%20approach%20Ricketts%20has%20taken.

88 *Id.*

89 *Id.*

mask mandate, arguing that it would create resentment and would not be followed.[90] The state did adopt a mask requirement for a few close contact indoor businesses.[91] However, this statewide mask order covered only barbershops, salons, tattoo parlors, and massage parlors.[92]

Local authorities generally engaged in limited enforcement of these new orders and instead sought voluntary compliance instead. For example, in Norfolk, while the police department was charged with enforcement, police dispatchers received few complaints, and the police chief confirmed that voluntary compliance was the core approach.[93]

B. *Iowa: Total Preemption*

In Iowa, many localities sought to implement mask mandates, but Governor Kim Reynolds claimed that local governments had no such authority under state law.[94] As virus cases surged in the state, county officials in Linn County and elsewhere urged the governor to allow local officials to implement requirements related to facial coverings.[95]

Despite the governor's claims that local officials lacked the authority to issue mask mandates, some localities adopted them, citing the opinion

90 Chris Cillizza, *This Republican Governor's Explanation for Why He Won't Issue a Mask Mandate Is, Uh, Something Else*, CNN (Nov. 19, 2020), https://www.cnn.com/2020/11/19/politics/pete-ricketts-mask-mandates-nebraska/index.html.

91 Alia Conley & Martha Stoddard, *Ricketts Unveils New COVID-19-Related Restrictions, Pleads for People to Take Virus Seriously*, OMAHA WORLD-HERALD (Nov. 9, 2020), https://omaha.com/news/local/ricketts-unveils-new-covid-19-related-restrictions-pleads-for-people-to-take-virus-seriously/article_de943dd2-2f8f-59d5-9b9b-0914ebe86d2c.html.

92 *Id.*

93 *See* Dean Welte, *Norfolk City Council Passes Ordinance Requiring Masks in Public Places*, KTIV4 (Nov. 23, 2020), https://ktiv.com/2020/11/23/norfolk-city-council-passes-ordinance-requiring-masks-in-public-places/; Brett Mayerson, *Norfolk City Officials: Mask Mandate Received Well So Far*, KTIV4 (Dec. 16, 2020), https://ktiv.com/2020/12/16/norfolks-mask-mandate-received-well-so-far.

94 Kauffman, *supra* note 4.

95 Kate Payne, *Linn County Supervisors, Mayors Urge Reynolds to Let Them Issue Local Mask Mandates*, IOWA PUB. RADIO (Aug. 5, 2020), https://www.iowapublicradio.org/ipr-news/2020-08-05/linn-county-supervisors-mayors-urge-reynolds-to-let-them-issue-local-mask-mandates ("Elected leaders across Linn County, including the mayors of Cedar Rapids, Central City, Ely, Fairfax, Hiawatha, Marion, Mount Vernon, Palo, Praireburg, Springville and Robins formally made that request by approving a joint proclamation on Wednesday."); Press Release, Linn Cnty., Iowa, Linn Cnty. Offs. Request Local Control on Use of Face Coverings During Pandemic (Aug. 5, 2020) (announcing a proclamation approved unanimously at a joint meeting between the Linn County Board of Supervisors and the Linn County Board of Health and supported by mayors of eleven of Linn County's eighteen cities).

of their own attorneys who disagreed with the governor.[96] In July, health experts within the state urged a statewide approach to expand the use of masks and reduce levels of transmission.[97] However, the governor disputed the efficacy of mask mandates, citing the experience of other states.[98] The view of state officials successfully deterred local officials from adopting mask mandates in the most populous areas of the state for many months.[99]

Public support for the local authority in Iowa was quite robust, with one poll showing that 73% of voters in the state believed that cities and towns should be allowed to set their own rules with respect to masks.[100] The tension between state and local officials with respect to facial coverings was accentuated by the governor's order that all local school districts needed to resume in-person instruction at least 50% of the time without any accompanying authority for school officials to require masks.[101] Nonetheless, the governor stood by the position that local officials could not issue their own mask mandates.[102] The office of the attorney general offered multiple

96 Payne, *supra* note 95.

97 Soo Kim, *Iowa Gov. Kim Reynolds Ignored COVID Experts for Months over Mask Mandate*, Newsweek (Nov. 17, 2020), https://www.newsweek.com/coronavirus-iowa-mask-mandate-governor-kim-reynolds-ignored-health-experts-1547964 ("Back in late July, the Iowa Medical Society and 14 other health professional groups called for the 'widespread use of cloth masks in public settings [to] dramatically slow the spread of COVID-19 and save lives,' in a letter to the governor.").

98 Elaine Godfrey, *Iowa Is What Happens When Government Does Nothing*, Atlantic (Dec. 3, 2020), https://www.theatlantic.com/politics/archive/2020/12/how-iowa-mishandled-coronavirus-pandemic/617252/; Stephen Gruber-Miller, *'There's Not a Silver Bullet': Iowa Gov. Kim Reynolds Defends Not Ordering a Mask Mandate*, Des Moines Reg. (July 30, 2020), https://www.desmoinesregister.com/story/news/politics/2020/07/30/iowa-governor-kim-reynolds-defends-not-ordering-mask-mandate-theres-not-a-silver-bullet/5545145002/ ("A lot of the states, they've done that, but they've said there's absolutely no enforcement . . . . They've put it right in the declaration [saying]: 'We're going to issue a face mandate, but we're not going to enforce it.' And if you look [at] the cases and the timelines that they actually issued a mandate, the cases are still rising, so it's just, there's not a silver bullet, there's not a single answer.").

99 Brian A. Morelli, *Mayor: Cedar Rapids Stay at Home Order Would Not Be Enforceable*, Gazette (Apr. 7, 2020), https://www.thegazette.com/subject/news/government/cedar-rapids-coronavirus-shelter-in-place-stay-at-home-order-brad-hart-not-enforceable-covid-19-20200407 (Hart said: "This week I spoke directly with the Governor who confirmed her opinion, which is supported by the Iowa Attorney General, that cities and counties in Iowa do not have the authority to close businesses or order people to stay in their homes.").

100 *Close Contests for Prez & Senate*, Monmouth U. Polling Inst. (Aug. 5, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_ia_080520/.

101 David Pitt, *Iowa Governor Overrides Schools, Requires In-Person Classes*, AP News (July 17, 2020), https://apnews.com/article/ecc4a3f87122f943f03fe07e37b2bf1b.

102 Pitt, *supra* note 12 ("Reynolds on Thursday again asserted she believes cities and

legal opinions, which both supported the governor's emergency authority and pointed to the local authority to take actions not clearly inconsistent with the governor's orders.[103]

By August, several localities went forward with local mask mandates despite state assertions that they lacked such authority.[104] Johnson County and the city of Dubuque followed Iowa City and Muscatine in enacting such mandates.[105] In Johnson County, the county attorney suggested that the mandate was enforceable because it was enacted by the county board of health.[106] In Dubuque, the city attorney argued that the city had sufficient authority under the home rule amendment to the Iowa Constitution.[107] The lack of legal action against Muscatine and Iowa City for imposing a mask

counties cannot implement mask orders unless she says they can. 'We don't believe during a public health emergency that the local governments have the authority to supersede what has been put in place at the statewide level by the governor,' she said, adding she's consulted with the attorney general on the matter.").

103 *Id.*

> The attorney general's office in March provided Reynolds with an analysis of home rule in Iowa. "While cities and counties have police powers to protect the health and safety of their citizens, the state has the authority to declare and coordinate the response to a public health disaster," wrote Assistant Attorney General Heather Adams in a message to Reynolds' legal staff. However, in June the attorney general's office wrote an informal advice letter on local mask actions to Sen. Zach Wahls. The letter said that if a local regulation isn't preempted by the governor's proclamation, local jurisdictions could adopt regulations "not inconsistent with law and the rules of the state board, as may be necessary for the protection and improvement of the public health."

Id.

104 Nick Coltrain, *Dubuque City, Johnson County Mandate Masks in Public, Buck Gov. Reynolds' Ban on Local Action*, DES MOINES REG. (Aug. 7, 2020), https://www.desmoinesregister.com/story/news/2020/08/07/dubuque-johnson-county-iowa-require-face-coverings-coronavirus/3319998001/.

105 Zachary Oren Smith, *Johnson County Supervisors Pass Face Mask Requirement; Measure Goes Into Effect Monday*, DES MOINES REG. (Aug. 6, 2020), https://www.desmoinesregister.com/story/news/2020/08/06/johnson-county-iowa-mask-mandate-enacted-covid-face-covering-coronavirus/3308200001/; *see also* Coltrain, *supra* note 104 ("The Johnson County mandate follows Iowa City's lead by making a first offense a simple misdemeanor and carrying a fine of between $105 and $885. In Dubuque, the fine is $10 for a first offense . . . . The mandate will also be enforced by the Dubuque Police Department. The memo specifies that responding officers can enforce it with education or by issuing a warning, but that they can also arrest offenders.").

106 Smith, *supra* note 105.

107 Memorandum from Crenna Brumwell et al., to Mayor Roy D. Buol & Members of City Council of Dubuque, Missouri, on Face Covering Requirement Analysis, Capacity Limitation Restriction (Aug. 5, 2020), www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask- Mandate-Memo-8520.

mandate was cited as a further justification for Dubuque to act as school reopening was imminent.[108] The mayor of Dubuque specifically cited the lack of a controlling legal opinion against local action in defense of the step.[109]

A few other local governments also adopted mask mandates despite the governor's challenge. In Cedar Rapids, the mayor spoke with the governor to urge a statewide mandate and ultimately issued an order for facial coverings in the city, despite notification from the governor's office that he did not have the authority to do so.[110] However, some of the most populous areas in the state continued to defer to state authority despite substantial interest in enacting similar mask mandates. By September 2020, the state's largest city of Des Moines and smaller towns, including Mount Vernon and Cedar Falls, also adopted local requirements.[111]

As Iowa became the epicenter of the pandemic in the United States, the governor faced increasing calls from all levels of government for the adoption of a mask mandate.[112] Nonetheless, the governor characterized

108 Coltrain, *supra* note 104 ("But it was Reynolds' commitment to reopening schools to in-person learning that ultimately spurred the [mask mandate, Dubuque Mayor] Buol said.").

109 *Id.* ("'That is their opinion, and they are very much entitled to that,' Buol said of Reynolds' and the Attorney General's office's stances on local mask mandates. 'But the governor has really failed to perform the necessary analysis as to whether a local face mask mandate is irreconcilable with her emergency management action. Until that analysis is done, or a court settles the question of preemption, then the matter is not settled.'").

110 Sarah Mervosh et al., *How Iowa's Governor Went from Dismissing Mask Mandates to Ordering One Herself*, N.Y. Times (Nov. 18, 2020), https://www.nytimes.com/2020/11/18/us/coronavirus-mask-mandate-iowa-reynolds.html.

111 Marissa Payne, *Cedar Rapids Issues Mask Mandate as Coronavirus Cases Spike*, Gazette (Sept. 2, 2020), https://www.thegazette.com/subject/news/cedar-rapids-mask-mandate-iowa-coronavirus-masks-required-covid- 19-20200902.

112 Mervosh et al., *supra* note 110. White House Coronavirus Response Coordinator Dr. Deborah Birx said face coverings should be required whenever indoors in states that have active COVID-19 cases. Droze, *supra* note 30.

> The crisis led to a significant move last week, when the Iowa State Board of Health, whose members Ms. Reynolds appointed, urged her to issue a mask mandate. The board's vote was itself a sign of how the virus's worsening toll has forced people to change their thinking. Board members, most of whom are Republicans and work in health care, had discussed face coverings at previous meetings but did not come out in favor of a mandate. At the most recent meeting, however, they voted 7 to 2 to encourage the governor to issue the order. "Circumstances have changed enough in Iowa," said Chris Atchison, the board's vice chair, who said he could recall only one other instance in which members had made a recommendation to the governor in his more than three years on the board.

mask mandates as an unenforceable "'feel-good' measure."[113] In November, with Iowa facing the third-highest rate of new cases in the nation and the state facing an urgent crisis of hospital capacity, the governor adopted a limited statewide mandate with respect to masks.[114] Ultimately, the prospect of hospitals being entirely overwhelmed by the pandemic and unable to take any more patients shaped the reversal.[115]

C. *Georgia: Litigation*

Georgia Governor Brian Kemp sued Atlanta Mayor Keisha Lance Bottoms to prevent the city of Atlanta from issuing an order requiring facial coverings.[116] While many state officials challenged the authority of local officials to issue mask mandates and some threatened financial penalties, Georgia brought legal action.[117] Although the suit was ultimately settled in a way that preserved the local mask mandate, it nonetheless reflects a different strategy of pandemic preemption with ongoing significance.

Like Iowa, Georgia is a home rule state where local governments have substantial authority.[118] Atlanta has a charter that was approved by the Georgia state legislature.[119] Under that charter, Atlanta's mayor and council can take actions to preserve health and to respond to emergencies.[120] The authority of the city under home rule can only be limited by the state legislature.[121]

In the litigation brought by the governor, *Kemp v. Bottoms*, the state claimed that several emergency orders by the city of Atlanta were preempted

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Id.

113 Mervosh et al., *supra* note 110.

114 *Id.* ("People must wear a mask in indoor public places, but only if they will be within six feet of another person for at least 15 minutes. Indoor dining is still permitted. School districts are allowed to decide for themselves whether or not to require masks; about one third of Iowa's school districts currently do not require them.").

115 Ryan J. Foley, *Iowa Governor Sees 'Science on Both Sides' on Use of Masks*, AP NEWS (Nov. 17, 2020), https://apnews.com/article/kim-reynolds-iowa-coronavirus-pandemic-iowa-city-7674cd44e7815eafcb4663c10d82644e ("She said she changed course because the state has seen an exponential increase in the number of people hospitalized with the virus this month. She warned that without action, hospitals will be overwhelmed and people will be at risk of not being able to get medical care of any kind.").

116 *See* Kemp Complaint, *supra* note 6.

117 *Id. But see* Mock, *supra* note 3; Zeballos-Roig, *supra* note 8.

118 IOWA CONST. art. III, §§ 38A, 39A; GA. CONST. art. IX, § 2, ¶¶ I–II.

119 *See generally* Charter of the City of Atlanta, 1996 Ga. Laws 4469–4558.

120 *See, e.g.*, *id.* §§ 1-102(b), (c)29, 30, 32, 35, 42, 50, 54–56 (describing powers of the city).

121 *See* Sturm, Ruger & Co. v. City of Atlanta, 560 S.E.2d 525, 528 (Ga. Ct. App. 2002).

by the governor's statewide orders.[122] One of these orders required people in the city limits to wear facial coverings when in businesses or outside.[123]

Like many states, Georgia gives emergency powers to executive officials in times of crisis.[124] The governor can declare a state of emergency, and, if the legislature agrees, then the governor and local officials can issue emergency orders; however, these orders of local governments are barred from being "inconsistent with any orders, rules, or regulations promulgated by the governor."[125] In April 2020, the Governor issued an executive order implementing a statewide response to the pandemic that included language on local preemption.[126]

Amidst a surge in cases in the state of Georgia, the governor issued an order in late June which "strongly encouraged" the use of facial coverings.[127] By early July, the mayor of Savannah issued a mask mandate. Soon thereafter, Clarke County also required facial coverings.[128]

Less than two weeks later, the mayor of Atlanta issued an order

122 Complaint, *supra* note 6, ¶¶ 22–24, 51–55.

123 Thomas Merrill, Kemp v. Bottoms *Unmasked: Emergency Powers and State Preemption*, Network for Pub. Health L. (July 23, 2020), https://www.networkforphl.org/news-insights/kemp-v-bottoms-unmasked-emergency-powers-and-state-preemption/.

124 Ga. Code Ann. § 38-3-51 (2019).

125 *Id.* § 38-3-28.

126 Ga. Exec. Order No. 04.02.20.01.

> That pursuant to Code Section 38-3-51, the powers of counties and cities conveyed in Titles 36 and 38, including those specific powers enumerated in Code Sections 36-5-22.1 and 36-35-3 are hereby suspended to the extent of suspending enforcement of any local ordinance or order adopted or issued since March 1, 2020, with the stated purpose or effect of responding to a public health state of emergency, ordering residents to shelter-in-place, ordering a quarantine, or combatting the spread of coronavirus or COVID-19 that in any way conflicts, varies, or differs from the terms of this Order. Enforcement of all such ordinances and orders is hereby suspended and no county or municipality shall adopt any similar ordinance or order while this Order is in effect, except for such ordinances or orders as are designed to enforce compliance with this Order, IT IS FURTHER ORDERED: That if one or more of the provisions contained in this Order shall conflict with the provisions of any previous Executive Order or Agency Administrative Order, the provisions of this Order shall control. Further, in the event of any conflict, the provisions of any quarantine or isolation Order issued to a specific person by the Department of Public Health shall control.

Id.

127 Ga. Exec. Order No. 06.29.20.02.

128 David A. Graham, *The Battle for Local Control Is Now a Matter of Life and Death*, Atlantic (July 26, 2020), https://www.theatlantic.com/ideas/archive/2020/07/why-states-wont-let-cities-save-themselves/614539/.

requiring residents to wear face coverings when outside.[129] In response, the governor issued a new executive order that "'suspended to the extent they are more restrictive [than state requirements]' any local order 'that requires persons to wear face coverings, masks, face shields or any other kind of Personal Protective Equipment while in places of public accommodation or on public property.'"[130] Although the orders are not precisely identical, there is also not an obvious conflict between the two orders.[131]

The Georgia Municipal Association submitted an amicus brief supporting the city of Atlanta and arguing that the governor's action threatened home rule.[132] Significantly, the amicus brief focused not only on the specific conflict over the mask mandate but also the implications of the governor's claims for home rule on a wide range of issues for localities across the state of Georgia.[133]

Although Governor Kemp sought to block all local mask mandates through an executive order in July, by August, he announced a new order allowing local mask mandates subject to certain criteria.[134] The reversal

129 Merrill, *supra* note 123.

130 Ga. Exec. Order No. 07.15.20.01; *see also* Merrill, *supra* note 123.

131 *See* Merrill, *supra* note 123.

> [The governor's] argument ignores the dual authority that Georgia's emergency management laws give to both the governor and the heads of local governments and that § 38-3-28 is intended to protect health and preserve lives. GA Code § 38-3-6 commands that the statute be liberally construed to effectuate this purpose. Clearly, cities cannot undo or choose not to follow any of the social distancing requirements that Governor Kemp has mandated for the entire state. They prescribe a set of protective directives that Georgia cities at a minimum must require and enforce. Significantly, even Governor Kemp acknowledges that people should wear masks and he encourages them to do so. According to his public statements about face coverings, his opposition to a mandate is based purely on business concerns and not on any belief that mask wearing would not help curb viral spread. Reading § 38-3-28 to prevent Atlanta from imposing an additional mandate that will save lives does not effectuate its purpose. Rather, it should be read to allow Atlanta's local government to require an additional safeguard that, consistent with the social distancing measures required statewide, will help flatten the curve of disease in that city.
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> *Id.*

132 Brief of Amici Curiae, *supra* note 7, at 16.

133 Sarah Fay Campbell, *Governor Can't Usurp Local Power, Court Filing Says*, NEWNAN TIMES-HERALD (July 24, 2020), https://times-herald.com/news/2020/07/governor-cant-usurp-local-power-court-filing-says.

134 *See* Ga. Exec. Order No. 08.15.20.01; *Kemp to Issue New Executive Order After Negotiations Break Down with Mayor Bottoms over Mask Mandate*, WSB-TV ATLANTA 2 (Aug. 13, 2020), https://www.wsbtv.com/news/local/atlanta/kemp-issue-new-executive-

followed a new surge in cases bringing Georgia to 1,000 new cases per 100,000 people with a positivity rate of over 10% in many localities.[135] As a result, the White House Coronavirus Task Force placed Georgia in the "red zone" and recommended a statewide mask mandate.[136] In the wake of the governor's reversal, many cities joined Atlanta and a couple of other major population centers in issuing mask mandates.[137]

D. *Florida: Blocking Enforcement*

Unlike Iowa, Nebraska, and Georgia, Florida initially allowed localities to implement mask mandates, even as the state itself did not implement such an approach.[138] By affording localities the power to individually implement responses to the pandemic, it allowed for their policies to be tailor-made to the varying needs and impact of COVID-19 on each region.[139] However, Florida subsequently engaged in local preemption and, in some areas of the pandemic response, threatened punitive financial sanctions for localities.[140]

order-after-negotiations-break-down-with-mayor-bottoms-over-mask-mandate/FTZ2UUJ2Q5CK7M4633N6VQNYEY/ (permitting local governments in Georgia to impose mask mandates so long as they are not enforced in residences or on private property including businesses).

135 *See Georgia Department of Public Health Daily Status Report*, Ga. Dep't Pub. Health, https://dph.georgia.gov/covid-19-daily-status-report (last visited Jan. 9, 2021) (consistently reporting statistics of 1,000 new cases per 100,000 people and a 10% positivity rate beginning on July 10, 2020).

136 *See* Jason Morris & Jay Croft, *Report: White House Task Force Urged Georgia to Mandate Masks as It Warned of Expanding Covid-19 Spread*, CNN (Aug. 14, 2020), https://www.cnn.com/2020/08/14/us/report-white-house-georgia-mask-mandate/index.html.

137 Beau Evans, *Georgia Cities, Counties Weigh Mask Mandates with More Leeway from Governor*, Savannah Morning News (Aug. 24, 2020), https://www.savannahnow.com/story/news/2020/08/24/georgia-cities-counties-weigh-mask-mandates-with-more-leeway-from-governor/114874238/. Following the Governor's decision to end his challenge to the city of Atlanta's policy, the major cities of Atlanta, Augusta and Savannah each adopted mask mandates and other cities, including Columbus, Milledgeville, Warner Robins, Smyrna and Sandy Springs all required masks on city-owned public property. *Id.*

138 Jacob Ogles, *Beyond the Veil: What Mask Requirements Are in Place in Florida?*, Fl. Pol. (Dec. 11, 2020), https://floridapolitics.com/archives/342364-beyond-the-veil-what-face-mask-requirements-are-in-place-in-florida.

139 Jake Stofan, *Florida Cities Seek More Control over Pandemic Policy*, News4Jax (Nov. 23, 2020), https://www.news4jax.com/news/local/2020/11/23/florida-cities-fight-for-more-control-over-pandemic-policy (detailing the Governor's remarks on the varied nature of the state's pandemic response: "Each region in Florida is very distinct and some of these things may need to be approached a little bit differently[.]").

140 When Hillsborough County planned to open its schools for remote learning, the

By June 2020, many of Florida's largest cities introduced mask mandates.[141] Although the requirement of facial coverings was controversial in some counties, Palm Beach County unanimously approved the new policy and joined major cities, such as Orlando and Tampa, in requiring masks in public.[142] Nearly one-third of Florida counties adopted some form of mask mandate in the wake of reaching some of the highest caseloads in the nation.[143]

In late September, the governor of Florida issued an executive order which barred local governments from collecting fines in the enforcement of local mask mandates.[144] The governor also rejected proposals for a statewide mask requirement.[145] This reversal left many localities with existing mask mandates in a very unusual position. While local mandates were not explicitly preempted, the means of enforcing these mandates was preempted.[146] The largest city in the state, along with many other

Governor suggested he would withhold up to $200 million from the Hillsborough County School District unless it adopted in-person learning. Lori Rozsa et al., *A Florida School District Wanted to Wait to Reopen School Buildings*, WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/education/florida-coronavirus-schools/2020/08/14/a37b39a8-dd99-11eab205-ff838e15a9a6_story.html.

141 Brittany Muller, *Most Major Florida Cities Now Require Wearing Face Masks in Public*, NEWS4JAX (June 19, 2020), https://www.news4jax.com/news/local/2020/06/19/major-florida-cities-now-require-use-of-facemask-in-public-places/.

142 *Angry Residents Erupt at Meeting over New Mask Rule*, CNN, https://www.cnn.com/videos/politics/2020/06/24/mask-mandate-florida-anger-erupts-coronavirus-vpx.cnn (last visited Mar. 28, 2021).

143 Daniel Cassady, *Despite DeSantis, Nearly One-Third of Florida Counties Require Masks*, FORBES (July 23, 2020), https://www.forbes.com/sites/danielcassady/2020/07/23/despite-desantis-nearly-one-third-of-florida-counties-require-masks/. Sixty-seven counties and a large number of municipalities implemented mask mandates. In Broward County, masks are required in essential businesses and in the common areas of residential communities. In Miami, those who fail to comply with the requirement can face up to a $500 fine or risk being arrested. *Id.*

144 *See* Fla. Exec. Order No. 20-244 (Sept. 25, 2020) (suspending "the collection of fines and venalities associated with COVID-19).

145 Jeffrey Schweers, *Florida Surpasses 1 Million COVID-19 Cases*, TALLAHASSEE DEMOCRAT (Dec. 1, 2020), https://www.tallahassee.com/story/news/local/state/2020/12/01/florida-coronavirus-1-million-cases-covid-19-pandemic/6462304002/ ("He also said he is opposed to mask mandates, opting for people to make their own decisions about preventative actions. 'They don't work,' he said of mandates. 'People wear them when they go out, but they don't have to be strung up on a bayonet.'").

146 *See* Issac Morgan, *FL Counties Keeping Mask Mandates Even Though Gov. DeSantis Won't Allow Penalties for Violations*, FLA. PHOENIX (Sept. 28, 2020), https://www.talchamber.com/fl-counties-keeping-mask-mandates-even-though-gov-desantis-wont-allow-penalties-violators/ ("The county's facial covering mandate remains in place. Although the governor's order suspends the collection of fines and penalties enforced upon individuals, it does not preempt local governments from assessing fines or otherwise

localities, ended its enforcement of the mask mandate.[147] Many localities let requirements related to facial coverings expire given the lack of enforcement authority under state preemption.[148]

Local leaders, especially in the hardest-hit area of South Florida, sought to convince the governor to allow the enforcement of mask mandates and allow for citations for non-compliance.[149] With an upsurge in cases, the mayors sought to convince the governor to institute a statewide mask mandate or to allow for greater local control in shaping the pandemic response since most large and mid-size cities in the state already implemented local mask mandates.[150] Even in those cities in which few citations were issued, local officials believed that the possibility of fines was important to ensure compliance with the requirement.[151] Health professionals echoed the call for

penalizing businesses that violate emergency orders including mask mandates.").

147 Martin Vassolo, *Facing COVID Surge, Florida Mayors Ask DeSantis for Mask Mandate, More Local Control*, Mia. Herald (Nov. 18, 2020), https://www.miamiherald.com/news/local/community/miami-dade/article247260214.html ("On Sept. 25, DeSantis signed a 'right to work' executive order, ending state and some local COVID restrictions. That led Miami-Dade County to stop collecting face-mask fines and to reopen its bars and nightclubs.").

148 Sara-Megan Walsh, *Polk Leaders Split over Possibility of Reinstituting Mask Mandates*, Ledger (Nov. 22, 2020), https://www.theledger.com/story/news/local/2020/11/22/coronavirus-florida-polk-leaders-split-over-possibility-of-reinstituting-mask-mandates/6354752002/.

> Lakeland Mayor Bill Mutz said he supports the push for local governments to be given back the right to enforce mask mandates, if necessary, based on local infection rates. "It's clearly a local rule health care issue. Period," he said. "It needs to be prescriptive to that particular city and particular county." Lakeland commissioners allowed the city's mask mandate to expire Oct. 5 once the governor stripped enforceability. Winter Haven officials also let their mandate end Oct. 15.

Id.

149 *'We Should Have That Local Control': Local Leaders Urging Gov. Ron DeSantis to Give Them Resources to Fight COVID*, CBS Mia. (Nov. 22, 2020), https://miami.cbslocal.com/2020/11/22/south-florida-leaders-urge-ron-desantis-action-covid/ ("'I do agree that we should have that local control,' said Miami Mayor Francis Suarez. 'That is something we had at the beginning and we were effective at using the local control.'").

150 Vassolo, *supra* note 147.

151 Greg Allen, *Florida's Governor: Officials Can Require Face Masks, but Can't Enforce It*, NPR (Oct. 7, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/10/07/921216724/floridas-governor-officials-can-require-face-masks-but-can-t-enforce-it; Nicholas Reimann, *Florida Mayors Plead for Mask Mandate, but DeSantis Says No New Restrictions Coming*, Forbes (Nov. 18, 2020), https://www.forbes.com/sites/nicholasreimann/2020/11/18/florida-mayors-plead-for-mask-mandate-but-desantis-says-no-new-restrictions-coming/.

> Despite repeated requests from local officials and infectious disease

greater local control in Florida with respect to facial coverings.[152] However, the governor instead extended his prohibition on local enforcement of mask mandates in late November 2020.[153]

In Central Florida, local officials confronted widespread flouting of social distancing guidelines, particularly in bars and nightclubs, amidst severe constraints on the ability of local officials to respond.[154] Even as hospitalization rates increased, many local leaders were left without any effective tools to combat the spread of the virus.[155] Seeking to circumvent

> experts, DeSantis refused to issue a statewide face covering mandate But in Miami, Orlando, Tampa, and most other large and mid-size cities, local governments did. Those ordinances can remain in place, DeSantis said but local officials can't collect fines from scofflaws. . . . Kriseman says St. Petersburg has a face mask mandate in place, but up to now hadn't issued any fines. But, he says, "I still like having that tool in my tool belt." Prohibiting local officials from enforcing the mandate, Kriseman says is "like telling somebody we have a speed limit, we expect you to follow the speed limit, but we're not going to give you a ticket if you do violate it."

Id.

152 Troy Kinsey, *Doctors Call on DeSantis to Allow Tougher Local Restrictions as COVID-19 Cases Rise*, SPECTRUM NEWS 13 (Nov. 28, 2020), https://www.mynews13.com/fl/orlando/news/2020/11/28/doctors-desantis-tougher-local-restrictions-covid-19-cases ("This week, doctors representing Physicians for Social Responsibility endorsed the call for more local control, faulting DeSantis for not having ordered a statewide mask mandate.").

153 Evan Axelbank, *DeSantis Extends Ban on Mask Bans, Business Restrictions*, FOX 13 NEWS (Nov. 25, 2020), https://www.fox13news.com/news/desantis-extends-ban-on-mask-bans-business-restrictions.

154 Ryan Gillespie & Stephen Hudak, *Gov. Ron DeSantis Doesn't Want to Shut Down Florida. What Power Do Mayors Have to Control the Virus?*, ORLANDO SENTINEL (Nov. 20, 2020), https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-county-restrictions-20201120-6rfuaheapjg3nfhdysvmiupaxm-story.html.

> [Orange County Mayor] Demings said his strike teams visited 11 bars last weekend and none were in compliance. In one example, after midnight at Knights Pub in east Orange, the teams found a line of patrons wrapped around the building and a manager on duty said there were about 500 people inside. The teams noted hand sanitizer stations inside but no way to socially distance. At other bars teams found crowds around the bar or bartenders not wearing face coverings.

Id.

155 Ryan Gillespie & Stephen Hudak, *Orange County Mayor to Begin Fining Businesses This Weekend if They Don't Enforce Masks*, ORLANDO SENTINEL (Dec. 4, 2020), https://www.orlandosentinel.com/news/orange-county/os-ne-coronavirus-orange-update-124-20201204-k3jvnwtlszf4xel6dg6krea62a-story.html; Gillespie & Hudak, *supra* note 154.

> "Counties and cities need to have the flexibility to make choices to respond to what's happening in their [jurisdictions] and, when you take away the enforcement measures, they're no longer able to respond based

state preemption, local officials in Orange County issued new executive orders implementing fines on businesses that failed to enforce requirements related to facial coverings and social distancing.[156] This approach is similar to one taken by localities in Texas in response to state preemption.[157] In South Florida, Miami took a similar approach by increasing enforcement against businesses not following its "New Normal Guidelines."[158] Despite the Governor's order, Miami Beach plans to continue issuing citations to those who violate the mask mandate, although police were instructed to offer

> on infection rates or hospital capacity or other health data," said Cragin Mosteller, a spokeswoman for the Florida Association of Counties. "Those are local numbers and therefore should be addressed by local decisions."

Id.

156 Gillespie & Hudak, *supra* note 154.

> The order takes effect Sunday morning and requires social distancing of six feet or more where possible. It also requires business owners enforce a mask mandate for employees and patrons and encouraged businesses to reduce on-site employees by allowing work-from-home options. Businesses must also have signage and markings to help maintain social distancing. Penalties include fines of $500 as an immediate citation. A special magistrate could impose steeper fines of $1,000 per day or, for repeat offenders, up to $5,000 per day. If the damage is deemed irreparable, a magistrate can impose fines of up to $15,000. [Mayor] Demings said the order was necessary because, despite weeks of his pleas for voluntary compliance with guidelines created by the CDC, some businesses still flouted them.

Id.

157 David A. Graham, *Governors Are Passing the Coronavirus Buck to Mayors*, Atlantic (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/covid-preemption-reversals/613210/ (explaining that in June 2020, Texas Governor Greg Abbott reversed his prior sentiments when he "said he would not block Bexar County, home to San Antonio, from forcing employees and customers at businesses to wear masks"). However, in April 2020, Governor Abbott made clear that: "My executive order, it supersedes local orders, with regard to any type of fine or penalty for anyone not wearing a mask." Sami Sparber, *Gov. Greg Abbott Says Harris County Can't Impose Fine over Face Mask Order*, Tex. Tribune (Apr. 27, 2020), https://www.texastribune.org/2020/04/27/harris-face-masks-fine-texas-coronavirus/. He reaffirmed those sentiments in May 2020 as well. Nic Garcia, *Texas AG Ken Paxton: Dallas County, Other Local Governments, Must Scale Back Orders to Align with State*, Dall. Morning News (May 12, 2020), https://www.dallasnews.com/news/public-health/2020/05/12/texas-ag-ken-paxton-dallas-county-other-local-governments-must-scale-back-orders-to-align-with-state/.

158 Christina Vazquez, *Miami Cities Grapple with Enforcing Mask Mandate as Florida Gov. Continues to Not Allow Fines*, Local 10 News (Nov. 25, 2020), https://www.local10.com/news/local/2020/11/26/miami-cities-grapple-with-enforcing-mask-mandate-as-florida-gov-continues-to-block-citations/.

masks to anyone without one first.[159] Key West issued a new facial covering requirement for all residents when they leave their homes.[160]

159 *Id.* ("'We need to let people know they have to wear masks and (we will) give citations even if we can't collect the fine right now,' said Miami Beach Mayor Dan Gelber . . . . When it comes to enforcement for the individual mask mandate in the city of Miami, Suárez said that he is going to keep a close watch on what happens in Miami Beach. If the data shows that the strategy of issuing citations to increase self compliance works even though they cannot issue fines because of the governor's orders at this point, he might consider that idea in his city.").

160 Melissa Alonso & Scottie Andrew, *Key West Will Require Everyone to Wear a Mask and Will Fine Anyone Who Doesn't Up to $500*, CNN (Nov. 19, 2020), https://www.cnn.com/2020/11/19/us/key-west-covid-mask-requirement-500-find-trnd/index.html ("If Key West residents repeatedly fail to wear a face mask when they're in public, even when social distancing is possible, they can be fined up to $500 after a verbal warning and civil citation, the ordinance rules. The ordinance exempts children under age 6, private workers and gymgoers, among some other groups.").

Conclusion: The Dynamics of Pandemic Preemption

Pandemic preemption can slow or prevent local action through a variety of mechanisms. Explicit state preemption removes the authority of local governments to act. However, the situation is not always as clear in pandemic preemption because often orders by state Governors, in the absence of explicit state statutes, also claim to bar local action. Nonetheless, the lack of clarity regarding state preemption is often enough to deter local officials from aggressively responding to the pandemic. The likelihood of this outcome increases dramatically as state law or state officials threaten to withhold funding from localities that take action.

The COVID-19 pandemic emerged in the context of a growing trend toward statewide preemption in a range of areas including public health. A number of scholars have highlighted the dramatic expansion of state preemption of local authority in recent years.[161] Although this new preemption has covered a wide range of substantive areas of law, public health has been directly affected through limits on local rulemaking related to areas such as smoking and nutrition.[162] Nonetheless, these discrete constraints on local initiative are generally not related to the need for timely emergency action.

The strategies employed by states to limit local authority and the scope of local action in pandemic preemption reflect the broader preemption strategies of states: (1) condition local funding on compliance, (2) block all local action in the field, (3) engage in litigation to ensure local compliance, and (4) prevent local enforcement of existing laws. The significance of pandemic preemption relates to the way in which a rapid local response is, in many ways, the only tool that can change the trajectory of infection and death in local communities. Early and sustained local action is a key

161 *See generally* Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 Yale L.J. 954, 957, 962 n.2 (2019); Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis*, Nat'l League Cities (2018); Kim Haddow et al., Local Sol. Support Ctr. & State Innovation Exch., The Growing Shadow of State Interference: Preemption in the 2019 State Legislative Sessions (2019), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/5d66a3c36044f700019a7efd/1567007722604/LSSCSiXReportAugust2019.pdf; Jesse J. Richardson et al., Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management (2003), https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf.

162 *See Preemption Can Impede Local Tobacco Protection Efforts*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/statesystem/factsheets/preemption/Preemption.html (last visited Jan. 6, 2021); *State Policies to Prevent Obesity: Preemption*, State Childhood Obesity, https://stateofchildhoodobesity.org/state-policy/policies/preempt/ (last visited Jan. 6, 2021).

contributing factor to reducing mortality. Pandemic preemption often leaves localities defenseless in real time as their communities are overwhelmed with surging caseloads, overloaded hospitals, and rising mortality.

While most local preemption is clearly grounded in state statute, pandemic preemption has another complicating feature in that it often features executive, rather than legislative, preemption. As governors utilize their emergency powers and issue executive orders under these powers, pandemic preemption often takes the form of executive, rather than legislative, action. The role of executive action raises important and, in many states, still unresolved questions about not only the scope of executive authority but also its role in constraining the emergency authority of local officials.[163]

These issues are only rarely resolved through litigation, so the assessments of city attorneys or state attorneys general are often the final, if not necessarily authoritative, word on such controversies. Even in the rare instances in which pandemic preemption has been litigated, as in Georgia, settlements between the parties are often more likely than binding court opinions, given the fast-moving nature of the situation. While many important legal questions surrounding pandemic preemption remain unresolved, the impact of pandemic preemption nonetheless remains profound in the context of COVID-19.[164]

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163 Schragger, *supra* note 64, at 6.

> Though state emergency authority and public health and safety laws are often broad, governors' emergency powers are not unlimited. It is also an open question whether executive orders have preemptive effect in the 40 or so "*home rule*" states where localities have broad constitutional or statutory authority to govern themselves. Cities in these states can argue that their home rule authority to regulate local public health trumps the governor's executive powers, or that executive orders provide only a floor, not a ceiling, on local protective efforts. The financial and political costs associated with litigating these issues is obviously a barrier for many local governments, but the potential effects of lifting preemption laws is also significant.

Id.

164 Schragger & Lankachandra, *supra* note 64, at 5.

> Local health and safety regulations are another potential avenue of regulation. Though several states have made it difficult to impose mask mandates, cities may still be able to require businesses to implement precautionary safety measures, like sanitation and distancing requirements, especially since federal guidance from the Occupational Safety and Health Administration has been so scant. . . . A number of states' statutes grant local governments broad authority to protect the health and safety of residents during declared states of emergency.

While there are examples of public health exceptions in other areas of law, pandemic preemption reveals the need for a wider debate about the role of such exceptions in the context of local preemption. A core function of local government is to protect the health of its residents and the history of public health in the United States reflects local efforts to create boards of health and other institutions to accomplish this central goal.[165] While the financing of health and the regulation of health entities is often primarily a state function, there remains a vital role for local governments in public health, which is accentuated in the context of a pandemic. Pandemic preemption points to the consequences of limited exceptions for public health in the context of the widening scope of state preemption.

In the major pandemic of the last century, the 1918 flu pandemic, the different responses by local governments dramatically shaped the overall number of deaths in those communities. Localities that responded more quickly, more comprehensively, and for a longer period experienced sharply lower rates of above-average mortality as compared to those localities which responded more slowly, less comprehensively, and for a shorter period of time. Over one hundred years later, local action once again has proven significant. However, this time, life and death often turned less on the independent decisions of local officials and more on whether state officials preempted effective local action.

> While courts, in general, have not clarified the scope and practical consequences of broad local emergency powers, it might be argued that such authority allows local governments to adopt temporary emergency policies even when state law expressly preempts such policies under normal circumstances, or at least when it is unclear whether a local policy might be preempted by state law.
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> *Id.*

165 Drew Altman & Douglas Morgan, *The Role of State and Local Government in Health*, 2 Health Affs. 7, 10, 15–16 (1983).