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LETTER FROM THE EDITOR-IN-CHIEF

For over sixty years, the *Howard Law Journal* has prided itself in its efforts to bring social justice issues to the forefront of legal discussions. Two years into the Trump era, we have seen political division, police brutality, and scandalous political moments such as the confirmation of Associate Supreme Court Justice, Brett Kavanaugh. Although we have seen these issues permeate our branches of government, news cycles, and social media we have also seen a rise of political and social movements such as the #BlackLivesMatter and #MeToo movements which are continuing to fight for marginalized groups.

With this political climate in mind, the *Howard Law Journal* presented the Fifteenth Annual Wiley A. Branton Symposium, "We the People? Internal and External Challenges to the American Electoral Process," on October 11, 2018. For the past fifteen years, the *Howard Law Journal* has dedicated the third and final Issue each year to the legacy of former Howard University School of Law Dean and notable civil rights leader, Wiley A. Branton. The Branton Symposium gives students, faculty, staff, and our surrounding community an opportunity to come together and engage in difficult legal discussion alongside notable legal scholars. The works of those legal scholars together with three student pieces make up our Fifteenth Annual Branton Symposium Issue. The topics encompassed in this Issue touch on matters including election law, partisan gerrymandering, redistricting, and campaign finance law.

Our first article, "Politics as Pretext," authored by Joshua S. Sellers focuses on one of the more convoluted dilemmas in election law—the distinction between government actions motivated by race from those motivated by partisanship. Sellers argues that the race or party dilemma is a variant of a dilemma that the law has confronted before. A dilemma about the extent of society's comprehension of "institutional" or "systemic" discrimination. In support of his claim, Sellers examines two doctrines in which the Supreme Court attended to institutional or systemic discrimination: the state action doctrine and the Civil Rights Act of 1964's Title VII doctrine. With the examination of these doctrines, Sellers concludes that if the elimination of institutional or systemic discrimination is the goal, then the stark dichotomy between race and partisanship found in election law doctrines should be dispensed with.

Next, Michael C. Li and Yurij Rudensky, highlight the round of redistricting that took place after the 2010 census in their article entitled, "Rethinking the Redistricting Toolbox." Li and Rudensky focus on the frustration that followed this redistricting in communities of color and the

role of Section 5 of the Voting Rights Act. Throughout their article, these authors provide egregious examples of the use of race as a tool of political gerrymandering that took advantage of increasing division of the two major political parties along racial lines. For example, the constraints placed by the Supreme Court on vote dilution claims under Section 2 of the Voting Rights Act, meant that Latino communities in North Texas were unable to win any additional representation, notwithstanding explosive and record-levels of Latino growth in the region. Li and Rudensky, close out their work with a warning that the next cycle of redistricting is likely to be even more challenging for communities of color because of the courts' restrictive interpretation of key parts of the existing doctrinal framework.

Is the right to vote at risk? Atiba R. Ellis addresses this question in his article, "The Dignity Problem of American Election Integrity." Ellis states that litigation concerning more stringent rules regarding voter participation, such as voter identification laws, has raised the question of whether some states are incidentally, or purposefully and with an intent to discriminate, disenfranchising voters. His article examines dignity as both a philosophical and jurisprudential concept and ultimately argues that the jurisprudential conception of dignity relevant to the law of democracy is one that enables and equalizes the status of each citizen.

Next, Derek T. Muller opens his article, "Nonjudicial Solutions to Partisan Gerrymandering," with this powerful quote from Justice Felix Frankfurter from his dissenting opinion in *Baker v. Carr* (1962): "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." Muller, in his article, addresses the decades of partisan gerrymandering and the sustained challenges in the courts. Muller argues that federal courts, while theoretically open to hearing partisan gerrymandering claims, have struggled to articulate a basis or a manageable test for courts to remedy partisan gerrymandering claims. Following this argument, Muller concludes that partisan gerrymandering reform is best suited for the political process and not the judiciary.

Our Branton Symposium Keynote speaker, Guy-Uriel E. Charles, alongside Luis E. Fuentes-Rohwer contributed to the conversation with their article, "Race, Voting, and Political Participation: Slouching Toward Universality." Their article provides a brief history of race and voting in the United States, with a focus on five distinctive yet interrelated moments: the founding period, the Civil War and Reconstruction, the 1890s and the Mississippi plan, the Second Reconstruction—culminated in the passage of the Voting Rights Act of 1965, and the concomitant retrenchment, exemplified by the recent *Shelby County* decision. From an analysis of each of these historical moments, Charles and Fuentes-Rohwer conclude that because of our thinking about race and voting, we as a society are slowly coming to the realization that restrictions on voting and political participa-

tion are hard to justify, whether they implicate race or not. And ironically, that because of race, we are slouching toward universality.

Our last symposium article, "The Foreign Threat to American Campaign Finance Law," is authored by Anthony J. Gaughan. In his article, Gaughan, points to the fact that Congress, in the 1970s, successfully prohibited Americans from accepting direct financial contributions from foreign sources because of the limited global communication at the time. But as the 2016 election demonstrated, the days of a closed system of campaign finance are long over. By using the Russian President Vladimir Putin's intelligence services, as an example, Gaughan argues that modern technology has created a global electronic village that empowers foreign actors to intervene in American elections like never before.

We are also proud to include three works authored by members of the *Howard Law Journal* in this Issue. Our first student comment is authored by, Aleena B. Aspervil, and is entitled, "If the Feds Watching: The FBI's Use of a 'Black Identity Extremist' Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection." Aspervil argues that the FBI has failed to adequately address the threat that white supremacy and right-wing extremism pose to law enforcement and American democracy. Aspervil explains that the FBI has chosen to target "Black Identity Extremists" without any relevant data showing that this ideology exists, or that this "shared" ideology has led to an increase in violence towards law enforcement officers. Aspervil concludes that this differential targeting leads to a violation of the 14th Amendment Equal Protection Clause.

Thereafter, Lauryn M. Harris, contributes to the conversation on the Federal Trade Commission's (FTC) Guidelines. Harris argues that these guidelines lack the necessary mechanisms for: (1) detection; (2) deterrence; (3) education; and (4) compliance when it comes to regulating social media influencers. Harris' comment urges the following resolutions: first, the FTC should be granted the authority to issue civil fines and the FTC should utilize its disgorgement authority so that social media influencers and companies are deterred from violating the Federal Trade Commission Act. Further, according to Harris, the need for detection and deterrence tactics could be lessened if the FTC implemented more social media advertising and discussions to bring awareness of the Guidelines to social media influencers, brands, and consumers. Lastly, Harris argues that for social media influencers to maintain compliance with the Guidelines, the FTC should incorporate in the Guidelines a recommended standard disclosure statement, so that there is a uniform way for social media influencers to comply with the Guidelines.

We close this Issue with my own piece, "Fostered or Forgotten: Leveling the Playing Field for Foster Youth Aging Out of the Foster Care System." In this comment, I make a call for foster care reform in an area where my research showed the greatest need—housing assistance. In this com-

ment, I provide a history of the foster care system in the United States as well as an overview of the shocking statistics of current and former foster youth who have experienced homelessness or precarious housing arrangements. While acknowledging that providing transitional housing assistance is just one of many vital services foster youth need, I argue that housing is among the most fundamental. I conclude that access to adequate housing will promote positive outcomes for current and former foster youth across many domains including education, employment, and physical and mental health.

In my final letter as Editor-In-Chief, and on behalf of the entire *Howard Law Journal*, I sincerely thank you all for your support and readership. Serving as the very first Latina Editor-In-Chief of the *Howard Law Journal* has been one of my greatest honors. The works encompassed in this Issue are both shocking and empowering. The submissions by these authors address mainstream issues from unique perspectives which highlight the mission and history of both Howard University School of Law and the *Howard Law Journal*. I am confident that the *Howard Law Journal* will continue to produce exemplary scholarly writing and carry on our longstanding legacy of excellence.

KARLA V. MARDUEÑO
EDITOR-IN-CHIEF
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Politics as Pretext

JOSHUA S. SELLERS*

One of the more convoluted dilemmas in election law involves distinguishing government actions motivated by race from those motivated by partisanship. In this Essay, prepared for the Howard Law Journal*'s 15th Annual Wiley Branton Symposium, I argue that the race or party dilemma is simply a variant of a dilemma that law has confronted before. It is a dilemma about the extent of law's—and by extension, society's—comprehension and definition of "institutional" or "systemic" discrimination.*

In support of this claim, the Essay examines two doctrines in which the Supreme Court attended to institutional or systemic discrimination: the state action doctrine and the Civil Rights Act of 1964's Title VII doctrine, as encapsulated in the Court's 1971 decision, Griggs v. Duke Power Company. *More precisely, it compares the assumptions and inferences about the nature of racial discrimination informing both the leading state action cases and* Griggs*, with those informing current election law doctrines in which the race or party distinction obtains.*

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Ultimately, the Essay argues that if the elimination of institutional or systemic discrimination is the goal, then the stark dichotomy between race and partisanship found in election law doctrines should be dispensed with.

INTRODUCTION

One of the more convoluted dilemmas in election law involves distinguishing government actions motivated by race from those motivated by partisanship. Drawing the distinction is difficult not only for the philosophical reasons pertaining to what constitutes intentionality, and in light of the evidentiary challenges presented to litigants, but more precisely, because of the racial composition of our two major political parties. The modern Democratic Party is comprised of a collection of white, black and brown elected officials and voters, whereas the modern Republican Party is comprised almost entirely of white elected officials and voters.[1] Consider the following rather astounding statistic from just a few years ago: "[A]mong state-level elected Republican officials nationwide, 98 percent are white."[2]

The extraordinary overlap between "race and party" often renders the "race or party" debate absurd. In much of the country, the Republican Party—which enjoys complete legislative and executive control in nearly half of the states, and complete legislative control in close to two-thirds of the states[3] —has a strong political incentive to stifle and discourage minority political participation.[4] Further, even innocuous election-related actions on the part of the Republican Party often work to the detriment of minorities. Given these conditions, it is often nonsensical to interpret many states' election law decisions as

1. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 171 (2018) ("[A]s the Democrats have increasingly become a party of ethnic minorities, the Republican Party has remained almost entirely a party of whites."); Lilliana Mason & Julie Wronski, *One Tribe to Bind Them All: How Our Social Group Attachments Strengthen Partisanship*, 39 ADVANCES POL. PSYCHOL. 257, 260-62 (2018) (providing empirical evidence "demonstrat[ing] the sorting of Blacks, Hispanics, Seculars, and Liberals into the Democratic Party, and Whites, Christians, and Conservatives into the Republican Party, across the electorate").

2. IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED AND WRECKED THE MIDDLE CLASS 1 (2014).

3. National Conference of State Legislature—State Partisan Competition, http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx; Ed Kilgore, *What's at Play in the 2018 State Legislature Races*, N.Y. MAG. (Mar. 27, 2018), http://nymag.com/daily/intelligencer/article/whats-at-play-in-the-2018-state-legislature-races.html.

4. *See, e.g.*, Astead W. Herndon, *Complaints of Voter Suppression Loom Over Georgia Governor's Race*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/us/politics/georgia-voter-registration-kemp-abrams.html.

motivated by *either* race or partisanship. Yet, aside from some limited exceptions, that is precisely what current election law doctrines demand.

Racial gerrymandering doctrine, for instance, recognizes partisanship as a satisfactory defense to a racial gerrymandering challenge.[5] Accordingly, Republican state officials routinely claim to have constructed a particular redistricting plan for legally innocuous partisan reasons, rather than impermissible racial ones.[6] Partisanship is also invoked as a defense in two types of cases brought under § 2 of the Voting Rights Act (VRA)—those involving vote dilution and vote denial.[7] In the former type (vote dilution), some courts have held that plaintiffs, in order to succeed, are required to establish that white voters—practically speaking, white Republican voters—support white candidates *because they are white*, rather than because they are Republicans.[8] In the latter type (vote denial), it remains an open question whether a defense based on partisanship is viable. At least one district court has credited such a defense, though its decision was reversed on appeal.[9] In short, in many instances, Republican-led legislatures' attempts to weaken Democrats, negatively impact minority voters.

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5. Easley v. Cromartie, (*Cromartie II*), 532 U.S. 234, 249 (2001) ("After all, the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.").

6. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1473 (2017) ("According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a 'strictly' political gerrymander, without regard to race."); Common Cause v. Rucho, 318 F. Supp. 3d 777, 801 (M.D.N.C., Aug. 27, 2018).

7. *See, e.g.*, Old Person v. Cooney, 230 F.3d 1113, 1128 (9th Cir. 2000) ("Finally, the State offers an alternative rationale, which we reject, for the district court's finding on white bloc voting. Losses by Indian candidates, contends the State, can fairly be ascribed to partisan politics and not race, at least where Democratic Indian candidates lose in majority Republican districts.") (vote dilution); Goosby v. Town of Hempstead, 180 F.3d 476, 482 (2d Cir. 1999) ("The Town Board argued that, because Republican Party affiliation was the determinant of electoral success in Town-wide elections, the 'bloc voting' that plaintiffs had demonstrated was along partisan, not racial, lines.") (vote dilution); N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320, 497–503 (M.D.N.C., Apr. 25, 2016) (vote denial).

8. League of United Latin American Citizens (LULAC) v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994) ("When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, defendants conclude, the district court's judgment must be reversed. We agree.").

9. *McCrory*, 182 F. Supp. 3d at 497-503, *rev'd*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) ("Thus, the district court apparently considered [the statute] simply an appropriate means for one party to counter recent success by another party.").

This is a widely known, empirically incontrovertible fact, though you would not necessarily get that impression if you only read judicial decisions. The formalism of law militates against conflating race and partisanship, even in today's immensely polarized environment in which the two are so thoroughly intertwined.[10] Furthermore, and importantly, it would be plainly inaccurate to assume that *everything* Republican-led legislatures do in the realm of election law in furtherance of their partisan aims also negatively impacts minority voters; that would be an overstatement. But the correspondence is greater than many are willing to admit.[11] Simply put, the Republican Party's use of politics as a pretext for discriminatory action is prevalent.

Scholars have devoted substantial attention to this dilemma, and, as far as doctrine is concerned, there is little new to say.[12] Therefore, in this Essay, I want to abstract a bit, and examine the dilemma from a conceptual perch. Broadly conceived, the race or party dilemma is simply a variant of a dilemma that law has confronted before. It is a dilemma about the extent of law's—and by extension, society's—comprehension and definition of "institutional" or "systemic" discrimination.[13] In other words, to what extent are courts willing to interrogate

10. JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 28–29 (2018); Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1521–22 (2019). *See also* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 278–79 (2011).

11. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015) ("[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life.").

12. *See*, *e.g.*, Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018); Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014).

13. "Institutional discrimination" refers to discrimination that arises and is reinforced within particular institutional settings, whether formal or informal. Kathleen Thelen & Sven Steinmo, *Historical institutionalism in comparative politics*, *In* STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 2 (Sven Steinmo et al., eds. 1992) ("[I]n general, institutionalists are interested in the whole range of state and societal institutions that shape how political actors define their interests and that structure their relations of power to other groups."). This definition includes "the rules of electoral competition" and "the structure of party systems." *Id*. Desmond King and Rogers Smith usefully supplement this definition with their explication of "racial institutional orders." Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 80, 81 (Joseph Lowndes et al., eds. 2008) ("*Racial* institutional orders are ones in which political actors have adopted (and often adapted) racial concepts, commitments, and aims in order to help bind together their coalitions and structure governing institutions that express and serve the interests of their architects."). "Systemic discrimination" refers to "a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession,

and assign liability to entire institutions for fomenting or validating racial discrimination?

In the election law context, as is the case under general equal protection doctrine, courts draw inferences and make presumptions, based on record evidence, in an effort to discern whether an impermissible motive is at work.[14] The most probative evidence is typically legislative history, witness testimony (often statistical in nature), and in the context of § 2 VRA litigation (where evidence of an impermissible motive is unnecessary), "social and historical conditions,"[15] often narrowly conceived. These are the scope conditions of the judicial inquiry. The essence of the inquiry is bounded, insofar as it interrogates *this* state legislature, during *this* time period, with regard to *this* election law. Institutional or cross-spatial analyses have no significant utility.[16]

But why not? In what follows, I question why not, by way of a detour into the knotty state action doctrine, and the Civil Rights Act of 1964's Title VII doctrine,[17] as encapsulated in the Supreme Court's 1971 decision, *Griggs v. Duke Power Company*.[18] I have no intention of delving deeply into the complicated morass of the state action doctrine, a chore ably performed by others.[19] Nor will I provide a comprehensive overview of Title VII case law. Rather, I want to compare the assumptions and inferences about the nature of racial discrimination informing both the leading state action cases and *Griggs*, with those informing current election law doctrines in which the race or party distinction obtains. The central concern is whether we are presently capable of rectifying institutional or systemic discrimination in the election law context.

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company or geographic area." U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/systemic/.

14. *See, e.g.*, Abbott v. Perez, 138 S.Ct. 2305, 2314 (2018); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977).

15. Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.").

16. One can certainly find exceptions to this claim, particularly in Voting Rights Act cases from the late 1980s and early 1990s. For a multitude of reasons, this was a unique era. *See* Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1362–65 (1995) (book review).

17. PUB. L. NO. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

18. 401 U.S. 424 (1971).

19. *See, e.g.*, Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1 (2018); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1986).

To reiterate, this is a conceptual undertaking. The state action doctrine, Title VII doctrine, and current election law doctrines are seemingly oriented around very different concerns: The state action doctrine considers *whether* constitutional protections exist, while Title VII and election law doctrines consider *how* various constitutional and statutory protections apply. But this distinction is misleading. As Mark Tushnet has noted, the state action issue is, at its heart, a question of constitutional duty.[20] Framed accordingly, the conceptual similarity across the doctrines is evident. In each area, courts have struggled with how to attend to institutional or systemic discrimination that, under traditional or formalist legal understandings, would be immunized. It is that similarity that warrants consideration and comparison.

Importantly, institutional and systemic discrimination does not depend upon the existence of animus, though of course animus is a persistent driver of such discrimination. However, in aspiring to remedy racial disadvantage in the realm of politics, we need more expansive thinking. A comprehensive response to institutional and systemic discrimination requires more than simply invalidating actions in which politics is insincerely used as a pretext for discriminatory intent. A full response requires legal cognizance of how racial disadvantage is buoyed by actions that may, when taken in isolation, appear benign. Appreciation of this latter point is the principal benefit of the cross-doctrinal analysis that follows.

In Part I, I review the state action doctrine and explain how, in several cases, the Court responded to the institutional discrimination that characterized Jim Crow. I then summarize *Griggs* and its conceptual treatment of institutional and systemic discrimination. Part II provides examples from election law doctrines in which the race or party distinction obtains, contrasting courts' approach to this dilemma with the approaches taken in some of the cases discussed in Part I. In Part III, I make the case that, if the elimination of institutional or systemic discrimination is the goal, then the stark dichotomy between race and partisanship found in election law doctrines should be dispensed with.

20. Mark Tushnet, *State Action in 2020*, *in* THE CONSTITUTION IN 2020 69, 72 (Jack M. Balkin & Reva B. Siegel eds. 2009) ("The usual form taken by litigation in which the state-action issue arises obscures the connection between the state-action doctrine and constitutional duty.").

I. STATE ACTION, *GRIGGS,* AND INSTITUTIONAL OR SYSTEMIC DISCRIMINATION

Constitutional protections apply only to government action; private parties are not subject to constitutional restraint. This limitation, commonly referred to as the state action doctrine, dates to the infamous *Civil Rights Cases* of 1883,[21] and is a foundational principle of constitutional law. In the mid-twentieth century, as the civil rights movement grew in strength, the state action doctrine served as a substantial obstacle to overcoming a wide range of discriminatory activity. Because of the doctrine, African American plaintiffs had no constitutional standing to challenge discrimination by individuals, or by private businesses, despite the fact that such discrimination severely disrupted African Americans' lives in myriad ways.

Though discrimination on the part of private actors was ubiquitous, the formal law immunized these actors from constitutional sanction. In response, the Supreme Court created exceptions to the state action doctrine, in large part premised on the government's complicity in perpetuating or validating discriminatory regimes. Similar logic informed the Court's decision in *Griggs*, albeit in the context of employment discrimination litigation under Title VII.

In this Part, I first review the leading state action cases, and then summarize *Griggs* and its conceptual treatment of institutional and systemic racial discrimination. The principal purpose is to illustrate how courts have addressed both types of discrimination in the past, so as to draw a comparison with current election law doctrines.

A. Private Action as Pretext

The state action issue arose perhaps most prominently in the so-called *White Primary Cases*. The state of Texas, like much of the South in the early and mid-twentieth century, went to great lengths to exclude African Americans from voting in Democratic Party primaries.[22] After the Supreme Court struck down a Texas statute that con-

21. 109 U.S. 3 (1883).

22. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 197 (rev. ed. 2009) ("By 1920, racially exclusive primary elections in the Democratic Party had become the norm not only in all southern state elections but in nearly every county in the South: since electoral outcomes invariably were determined in primaries, this was an extremely tidy and efficient vehicle for black disfranchisement."); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 156 (2004) ("The white primary's significance as a barrier to southern *blacks*' participation thus emerged after the South's transformation into a one-party system.").

tained an express prohibition to that effect,[23] the Texas Democratic Party, a private entity under law, moved to exclude African Americans from party membership entirely, rendering them ineligible for participation in the party's primaries.[24] The Court found the exclusion unconstitutional under the Fifteenth Amendment.[25]

Where was the state action? The Court located it in the State's requirement, operation, and validation of the results of the election system:

> If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.[26]

In these circumstances, the Court determined, the State's complicity in the discrimination could not be ignored.

A similar conclusion was reached in *Terry v. Adams* with regard to the private, whites-only primary put on by the "Jaybird Democratic Association," a "self-governing voluntary club"[27] in Texas, the winners of whom almost invariably earned the Democratic Party's endorsement in formal primary elections.[28] In reference to the integral nature of the Jaybird primary to electoral outcomes, the Court held that "[i]t violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that

23. Nixon v. Herndon, 273 U.S. 536, 541 (1927) ("States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.").

24. Smith v. Allwright, 321 U.S. 649, 656–57 (1944). For a thorough overview of the *White Primary Cases* see Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 332–49 (2004).

25. *Smith*, 321 U.S. at 661-62 ("It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."); U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

26. *Smith*, 321 U.S. at 664.

27. Terry v. Adams, 345 U.S. 461, 462 (1953).

28. *Id*. at 463 ("While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries they have nearly always done so and with few exceptions since 1889 have run and won without opposition.").

produces an equivalent of the prohibited election."[29] Even Justice Frankfurter, who was notoriously opposed to the Court intervening in political disputes,[30] concurred in *Terry*, finding "[t]he vital requirement [to be] State *responsibility*—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored."[31]

Similar thinking is evident in *Shelley v. Kraemer*.[32] At issue was the legality of a racially restrictive covenant under which white homeowners contractually refused to sell their property to African Americans. A number of African Americans sought to purchase property in a neighborhood to which the covenant applied. Their attempt was unsuccessful, as the legality of the covenant was upheld in state court. Under the state action doctrine, there would not appear to be any avenue for constitutional redress; after all, the signatories to the covenant were private persons operating in protection of their private property. Nevertheless, the Court once again found state action.[33]

Though the creation and signing of the covenant was undoubtedly private activity, the Court noted that the "action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment."[34] In other words, the involvement of the state courts in enforcing the covenant constituted state action that permitted the African American plaintiffs to pursue their constitutional claims. Certainly, not all persons employed by the state courts or serving as

29. *Id*. at 469. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 658 (1998) ("[S]ome justices believed that, regardless whether conventionally sound legal grounds could be found for invalidating the Jaybird Association, the Court ought to do so lest it inadvertently lend any imprimatur to white supremacy.").

30. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."); Colgrove v. Green, 328 U.S. 549, 553 (1946) ("Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests.").

31. *Terry*, 345 U.S. at 473 (Frankfurter, J., concurring) (emphasis added). *See* Chemerinsky, *supra* note 19, at 508 n.19 ("The common theme in all these [state action] cases is that private conduct needs to comply with the Constitution only if the state can be held responsible, in some way, for the activities.").

32. 334 U.S. 1 (1948).

33. *Id*. *at* 19; RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 85–91 (2017) (providing context for *Shelley*).

34. *Shelley*, 334 U.S. at 14.

judicial officers were racist. Their intent, though, was unimportant. The Court saw the private and public discrimination as so interrelated that it abandoned formalism in light of what it perceived to be institutional discrimination.

The case of *Burton v. Wilmington Parking Authority*[35] provides another example. The Eagle Coffee Shoppe, a privately-operated establishment in Wilmington, Delaware, refused to serve an African American customer. Upon review, the Supreme Court of Delaware held that the shop, in withholding service, was acting in "a purely private capacity," despite the fact that it was located inside of a public parking structure.[36] The Court disagreed, finding significant the fact that the public parking authority owned the space, which it leased to the shop. As such, the fact that the shop "operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the 14th Amendment to condemn."[37] So again, the Court abandoned formalism, and thereby prevented the immunization of institutional discrimination.

Evans v. Newton[38] involved the status of a whites-only park in Macon, Georgia. The city, once the sole trustee of the park, resigned that authority and appointed three private persons as trustees.[39] That appointment, the Court concluded, did not free the trustees from constitutional restraint. The decision reinforced the view that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action."[40] Central to the Court's reasoning were the lingering elements of municipal control over the park's management.[41]

To be clear, these exceptions to the state action doctrine were controversial in their time (and remain so), and it was at times difficult to apply their respective holdings to subsequent state action disputes. Today, of course, cases like *Shelley*, *Burton*, and *Newton* do not arise, because the activity they addressed is in clear violation of federal civil rights laws. Perhaps the best that can be said of the exceptions is that

35. 365 U.S. 715 (1961).
36. Wilmington Parking Auth. v. Burton, 157 A.2d 894, 902 (Del. 1960).
37. *Burton*, 365 U.S. at 724.
38. 382 U.S. 296 (1966).
39. *Id*. at 298.
40. *Id*. at 299.
41. *Id*. at 302.

they were "a plausible adaptation of the [state action] doctrine to particular historical conditions."[42]

Yet what is noteworthy is how capacious a view of institutional discrimination the Court took in these cases. Rather than dwell on the public/private distinction that sits at the heart of the state action doctrine, the Court acted to rectify entrenched racial discrimination that would otherwise have gone unaddressed.[43] The immensity of the problem justified collapsing the public/private distinction and compressing the doctrinal space in which such discrimination was immunized. That general approach is decidedly different than what is found in election law doctrines today.

B. Business Necessity as Pretext

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, sex, religion, or national origin.[44] It expressly exempts from coverage, however, employment practices that are based upon "the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[45] This exemption was at the center of *Griggs v. Duke Power Company*.[46]

The Duke Power Company in North Carolina implemented minimum education requirements and an aptitude test for both the assignment and transfer of its employees.[47] Both policies were facially neutral with regard to race, yet functionally "disqualif[ied] Negroes at

42. David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMM. 409, 414 (1993). *See* Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protections, and California's Proposition 14*, 81 HARV. L. REV. 69, 97–98 (1967) ("As we reflect more exactly and deeply in every decade on the involvements of governmental power with racial discrimination, we find, and we are going to find even more, that no line can warrantably be drawn at any point short of the discernment that racist regimes, and widespread racial discrimination, live within law, that they do not exist unless tolerated and sanctioned by law, and that equal protection of the laws against racism is always 'denied' if law – including even the law of revenue and appropriation – is not being used to eradicate racial inequality.").

43. Strauss, *supra* note 42, at 413 ("The state action requirement, applied to [Jim Crow], was a formalism that served only to generate arbitrary results and to allow some socially organized racial discrimination, of a kind that was clearly condemned by the Constitution, to survive.").

44. 42 U.S.C. § 2000e-2(a) (2012). For a summary of the Act's passage, see WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1–21 (5th ed. 2014).

45. 42 U.S.C. § 2000e-2(h) (2012).

46. 401 U.S. 424 (1971).

47. *Id*. at 425–29.

a substantially higher rate than white applicants,"[48] an outcome that the Supreme Court found to violate Title VII. Notably, the Company's intention in implementing the policies was benign. The Court noted that "a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force."[49] This fact did not preclude the Court from finding for the plaintiffs.

For one, performance on the aptitude test was seemingly unrelated to the ability to perform the associated jobs.[50] Had that been the case, that is, had the Company demonstrated a compelling "business necessity"[51] for the test, the claim may have failed. But since that was not the case, the Company was obligated to either abandon the test or develop a better version that accurately measured job capabilities.[52] The skeptical approach to what constitutes a business necessity—a concern about business necessity as pretext—is instructive.

Griggs instantiated what Owen Fiss has recently labeled "the theory of cumulative responsibility."[53] The theory, as Fiss describes it, "condemns any institution, regardless of its own past actions, from engaging in a practice that aggravates, perpetuates, or merely carries over a disadvantage Blacks had received at the hands of some other institution acting at some other time and in some other domain."[54] As noted above, the Company's intentions were benign; there was no evidence of racism on the part of Company agents. That fact, however was not dispositive.

The theory of cumulative responsibility supported the Title VII violation based in part on "the inferior education received by Negroes in North Carolina."[55] In implementing its employment policies, the Court reasoned, the company was in a sense validating educational injustice and perpetuating systemic discrimination. The notion of shared responsibility for discrimination undergirding this approach is positively anti-formalist. Why should the Duke Power Company be

48. *Id*. at 426.
49. *Id*. at 431.
50. *Id*. at 431 ("On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.").
51. *Id*.
52. *Id*. at 436 ("What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.").
53. Owen Fiss, *The Accumulation of Disadvantages*, 106 CAL. L. REV. 1945, 1946 (2018).
54. *Id*.
55. *Griggs*, 401 U.S. at 430.

condemned for something it had no power over, namely, the education afforded African Americans in North Carolina? Fiss provides the following answer in the context of a hypothetical scenario in which the head of a company asks that question:

> The aggrieved CEO in our imagined lawsuit must come to understand that the firm is not being held accountable for shortcomings in the education that Blacks had received. Rather, the firm is being held accountable for its own actions, the method it chose for selecting its employees. On the surface this method may seem innocent enough, but in truth it will, due to a myriad of factors including the inferior character of the education that Blacks had received, have unfortunate social structural consequences.[56]

In refusing to immunize the Duke Power Company from liability, the Court in *Griggs* effectuated an expansive conception of racial discrimination, one that attends to both institutional and systemic harms.[57] In the employment discrimination context, the Court conveyed, general appeals to business necessity must give way to larger concerns about rectifying racial subordination. That principle, which still informs Title VII litigation,[58] holds insights that are germane to the race or party dilemma.

II. THE RACE OR PARTY DILEMMA

As noted above, current election law doctrines demand the drawing of a distinction between government actions motivated by race and those motivated by partisanship. This dichotomy persists, despite, in many instances, no meaningful difference between the two.[59] The underlying rationale—that actions motivated by race are inherently suspect and likely impermissible, whereas actions motivated by partisan concerns are *prima facie* legitimate and thereby legally benign—has immunized a range of partisan action with racially disparate effects. In this Part, I provide examples from election law doctrines in

56. Fiss, *supra* note 53, at 1950.

57. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1493 (1987) ("The concept of the continuing effects of historical patterns of discrimination suggested that current institutions might perpetuate discrimination even though no one in those institutions remained personally prejudiced. This insight was not a historical concern of the 1964 Act, but it evolved into a current concern and was recognized in subsequent statutes, judicial decisions, and commentary.").

58. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 587–88 (2009).

59. *Sellers*, *supra* note 10, at 1561 ("[I]n multiple doctrines, race and party are treated as distinguishable. Adherence to that fiction frustrates the development of a realist jurisprudence.").

which the race or party distinction obtains, contrasting courts' approach to this dilemma with the approaches taken in the cases discussed in Part I.

The dichotomy can be traced back to *Easley v. Cromartie*,[60] a racial gerrymandering case from 2001. The Supreme Court took up the question of whether the North Carolina legislature, in constructing a congressional district (District 12), impermissibly used race as the "predominant factor" in its design. Justice Breyer's majority decision plainly stated: "The issue in this case is evidentiary. We must determine whether there is adequate support for the District Court's key findings, particularly the ultimate finding that the legislature's motive was predominantly racial, not political."[61] Following a painstaking analysis of everything from e-mails written by legislative staff members to competing expert witness testimonies, the Court rejected the challenge to the District, concluding that political concerns likely explained its design. Following the decision, states and localities could reliably raise partisan defenses for their actions.

Just two years ago, the Court decided another racial gerrymandering case from North Carolina, *Cooper v. Harris*.[62] Part of the case involved a challenge brought against the same congressional district that had been challenged in *Cromartie*. Despite increasing the black-voting-age-population in the District from 43.8 percent to 50.7 percent, the Republican-led state legislature "altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign."[63] Politics, the legislature asserted, governed its districting choice. Justice Kagan, writing for the majority, acknowledged the race or party dilemma in noting that "a trial court has a formidable task: It must make 'a sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines."[64] After detailing the relevant evidence, the Court found the district court's determination that racial considerations predominated over political ones to be plausible, thereby invalidating the District.[65]

60. 532 U.S. 234 (2001) (*Cromartie II*).
61. *Id*. at 241.
62. 137 S. Ct. 1455 (2017).
63. *Id*. at 1473.
64. *Id*.
65. *Id*. at 1481–82.

But Justice Alito, writing in dissent, read the evidence much differently, arguing that "The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high evidentiary standard that our cases require challengers to meet in order to prove racial predominance."[66] The legislature's decision, he stated, "is easily explained by a coherent (and generally successful) political strategy,"[67] and he accused the majority of "adopt[ing] the most damning interpretation of all available evidence."[68]

The contrasting opinions of Justices Kagan and Alito in *Cooper* exemplify the convoluted nature of ascertaining whether a particular government action is motivated by race or partisanship. Lower courts, though, must adhere to this binary approach. Consider *Lopez v. Abbott*, a recent case from Texas involving judicial elections.[69] Texas, curiously, has two "high courts," one for civil matters, and the other for criminal. The justices of these courts are selected in at-large, statewide elections. Historically, at-large elections have served as a means of minimizing the electoral strength of minority voters.[70] Because voting patterns are so often racially polarized, the use of at-large elections effectively prevents minority voters from electing candidates of choice.[71] As such, Hispanic voters and a non-profit organization in Texas brought a § 2 Voting Rights Act (VRA) claim against the Governor, seeking the replacement of the at-large election system with one in which justices are selected from single-member districts.[72]

As background, vote dilution claims brought under § 2 of the VRA are evaluated within a three-part framework announced in the 1986 case, *Thornburg v. Gingles*.[73] The *Gingles* framework assesses whether plaintiffs enjoy geographic compactness and a population suf-

66. *Id*. at 1491–92.
67. *Id*. at 1496.
68. *Id*. at 1504.
69. 339 F. Supp. 3d 589 (S.D. Tex., Sept. 12, 2018).
70. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1839–42 (1992).
71. Sellers, *supra* note 10, at 1536 ("Dilution claims, it should be noted, are premised on the enduring fact that African American, Hispanic, and white voters generally favor different candidates. Consequently, the use of at-large or multimember electoral districts is a reliable means of preventing minority voters from electing candidates of choice. Put differently, absent some degree of racial crossover voting, minority voters are unlikely to see their preferred candidates in office.").
72. *Lopez*, 339 F. Supp. 3d at 599.
73. 478 U.S. 30.

ficient to comprise a majority in a single-member district,[74] whether plaintiffs are politically cohesive,[75] and whether voting patterns in the relevant jurisdiction are racially polarized.[76] If these three preconditions are met, courts then undertake a "totality of the circumstances" inquiry, premised on several factors listed in a Senate Report that was produced during the 1982 amendments to the VRA.[77]

This was the applicable framework in *Lopez*. The race or party dilemma was manifest in the totality of the circumstances inquiry.[78] The Senate Report informing the inquiry lists nine factors for judicial consideration:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction;
> 8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

74. *Id*. at 50.
75. *Id*. at 51.
76. *Id*.
77. S. REP. NO. 97-417 (1982).
78. Judge Nelva Gonzales Ramos found the plaintiffs to have satisfied all three of the *Gingles* prerequisites. *Lopez*, 339 F. Supp. 3d at 610–11.

> 9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[79]

The district court judge methodically moved through each factor, assessing with regard to several, whether race or partisanship better explained the record evidence.

For instance, in considering the second Senate factor—whether elections for judicial office are racially polarized—the court noted that "the decision requires parsing of closely aligned evidence of race and party."[80] The difficulty was that, traditionally, white-preferred candidates ran as Republicans, and Hispanic-preferred candidates ran as Democrats, permitting "equal inferences in favor of racial polarization and partisan polarization."[81] With no obvious means drawing a distinction, the court looked at the results of recent judicial elections, finding that, at times, white voters supported Hispanic Democratic candidates,[82] and that, on one occasion, Hispanic voters supported a Hispanic Republican candidate over a Libertarian rival.[83] These findings led the judge to slightly favor the state's partisanship defense.

In a brief two-paragraph section considering the fifth Senate factor—the legacy of discrimination in Texas—the judge did acknowledge that "Latinos, generally speaking, suffer a socioeconomic status and voter registration rate significantly lower than those of whites,"[84] and affirmed that the plaintiffs were not required to establish a "causal nexus between the history of discrimination and Latino's current weaker political power."[85] The judge purported to assign this factor "heavy weight in favor of Plaintiffs."[86] After reviewing all of the Senate factors, however, and having balanced the evidence of racial vote dilution against the state's defenses, the judge found that partisanship better explained why Texas has had so few Hispanic high court justices.[87]

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79. S. REP. NO. 97-417, at 28–29 (1982).

80. *Lopez*, 339 F. Supp. 3d at 612.

81. *Id*.

82. *Id*. at 613 ("In fact, whether running as Democrats or Republicans, Hispanic candidates for high judicial office have tended to slightly outperform non-Hispanic candidates with non-Hispanic voters.").

83. *Id*. at 614.

84. *Id*. at 616.

85. *Id*.

86. *Id*.

87. *Id*. at 619.

Under conventional § 2 analysis, *Lopez* may have been correctly decided. Plaintiffs' evidence of discrimination was not damning, and the state made important countervailing arguments about its interest in having justices selected statewide.[88] But the conventional approach itself, I am arguing, is insignificantly tailored to the task of remedying racial discrimination. The fundamental question is whether our efforts to eliminate racial discrimination in politics should principally rest on judges' interpretations of legislative documents and competing expert witness reports. Conceptually, this is a much different approach than what was seen in the cases discussed in Part I.

From the perspective of the *White Primary Cases* or *Griggs*, *Cooper* and *Lopez* appear mechanical. Justice Kagan's majority opinion in *Cooper* emphasized that the Court gives "singular deference to a trial court's judgments about the credibility of witnesses."[89] In that case, public statements by the two Republican state legislators overseeing the redistricting process at issue evinced racial motivations.[90] Similar intent was apparent in the deposition testimony and mandatory report of the State's expert witness.[91] Taken together, the *Cooper* majority had little difficulty upholding the trial court's determination that racial motivations predominated over partisan ones. *Lopez*, as detailed above, undertook a similar inquiry, which, while probing, devoted limited attention to broader social factors.

By contrast, the condemnation of institutional discrimination in the *White Primary Cases* relied on a more thoroughgoing assessment. Thus, in *Terry*, it was deemed germane that Jaybird Democratic Association membership had historically always been limited to whites.[92] Moreover, the function of the Association was not viewed in isolation, but was considered as part of a larger electoral apparatus, a "comprehensive scheme of regulation of political primaries," as put by Justice Frankfurter.[93] As described above, in sanctioning the results of the Jaybird primary, the State formed a connection between private and public activity that overcame the state action defense: "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth

88. *Id*. at 604–05.
89. Cooper v. Harris, 137 S. Ct. 1455, 1474 (2017).
90. *Id*. at 1475.
91. *Id*.
92. Terry v. Adams, 345 U.S. 461, 463 (1953).
93. *Id*. at 475 (Frankfurter, J., concurring).

Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense."[94]

Notably, *Terry* at various points references the following entities and individuals as complicit in the exclusionary scheme: the State of Texas, the Democratic Party, county officials in the party, the executive committee of the Jaybird Democratic Association, newspapers, and white citizens. It was the collective abetment of these entities and individuals that justified adaptation of the state action doctrine.

Griggs, recall, expressed a theory of racial discrimination premised on the understanding that the effects of discrimination are not circumscribed.[95] Under such a theory, all institutions share in the responsibility of combatting racial discrimination, even those not engaged in such discrimination themselves. Accordingly, if a given practice has a disparate impact on racial minorities, that practice should presumptively be disallowed as a matter of law.

The conceptual approaches taken in the *White Primary Cases* and *Griggs* are complementary. The former line of cases, particularly *Terry*, perceived the relevant institutional entities as so entangled that the Court could not sensibly disaggregate the Jaybird Democratic Association from the larger scheme. The approach taken in *Griggs* apprehended the multifarious sources of disadvantage, assigning liability to an entity for simply perpetuating racial disadvantage. There, external discrimination in the educational system (i.e. external to the Duke Power Company) manifested in the form of systemic discrimination within the industry.

It is an open question as to whether either or both of these conceptual approaches might inform contemporary election law disputes, and in particular, the race or party dilemma, in a meaningful way. I consider that possibility in Part III.

III. INSTITUTIONAL OR SYSTEMIC DISCRIMINATION IN ELECTION LAW

In this Part, I make the case that, if the elimination of institutional or systemic discrimination is the goal, then the stark dichotomy between race and party found in election law doctrines should be dis-

94. *Id*. at 469.

95. Fiss, *supra* note 53, at 1949 ("The theory of cumulative responsibility appreciates the interconnected character of social life and the fact that people carry the disadvantages they receive in one domain, say education, to others, such as employment. It is predicated on the sad truth that inequality begets inequality.").

pensed with. What would an institutional or systemic approach, as outlined above, entail in the election law context? At the least, it would require the development of a workable theory of political parties.

Political parties are of course complex institutions, uniting elements in the federal government, state governments, and the electorate.[96] Generally, then, it is difficult to discuss political parties in categorical terms. That said, the parties of today are thoroughly integrated across levels. As the political scientist Daniel Hopkins states in his recent book on the nationalization of American politics, it "is . . . a mistake to treat state and local politics as independent and autonomous when many of the same voters, candidates, parties, and interest groups are politically acting across multiple levels of the federal system simultaneously."[97] Jessica Bulman-Pozen further observes that "[t]oday's parties are best understood as networks of individuals and organizations, including elected representatives and party officials, but also allied interest groups, issue activists, political action committees (PACs) and Super PACs, candidates' personal campaign organizations, political consultants, and the like."[98]

Thus, when Republican-led legislatures implement or defend, say, voter ID laws in Texas, Arkansas, or Wisconsin, what makes more sense: viewing that decision as a reasoned choice made by those respective state legislatures in response to sincere concerns about local voting fraud? Or alternatively, as an institutional choice, supported by President Trump, the Department of Justice, Republican governors, and much of the Republican electorate? I suspect the latter.

As has been widely reported, Trump has made routine unsubstantiated claims about the threat of voter fraud.[99] Just this year he inaccurately tweeted that 58,000 non-citizens voted in Texas.[100] Earlier in

96. Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1759–60 (1993).

97. DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 2 (2018). *See also* Yascha Mounk, *McPolitics*, NEW YORKER (July 2, 2018), https://www.newyorker.com/magazine/2018/07/02/the-rise-of-mcpolitics ("The Democratic and Republican Parties have become much more homogenous, offering largely the same ideological profile in Alabama as they do in Vermont.").

98. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1085 (2014).

99. *See, e.g.*, Amy Gardner, *Without Evidence, Trump and Sessions Warn of Voter Fraud in Tuesday's Elections*, WASH. POST (Nov 6, 2018), https://www.washingtonpost.com/politics/without-evidence-trump-and-sessions-warn-of-voter-fraud-in-tuesdays-elections/2018/11/05/e9564788-e115-11e8-8f5f-a55347f48762_story.html.

100. Donald Trump (@realDonaldTrump), Twitter (Jan. 27, 2019, 5:22 AM), https://twitter.com/realDonaldTrump/status/1089513936435716096.

his Administration, he formed a controversial and short-lived Presidential Advisory Commission on Election Integrity, the focus of which was voter fraud.[101] While serving as Attorney General, Jeff Sessions deployed election-day monitors throughout the country to police "fraud in the voting process."[102] Sessions also dropped a Justice Department objection to Texas' voter ID law that preceded his tenure.[103] Republican governors consistently voice support for voter ID laws.[104] And a leading study on public perceptions of voter ID laws demonstrates significantly higher support for their use by those who self-identity as Republicans.[105] Taken together, it seems appropriate to broaden our scope in assessing the intent behind voter ID laws and other election administration measures.

Similarly, when the Republican Party in Virginia or North Carolina, for instance, redistricts in ways that decrease minority voting power, should those states' redistricting plans be evaluated as localized partisan determinations, or emanations of a larger party-supported plan to pack African American and Hispanic voters in as few districts as possible, as a means of entrenching party control of state legislatures and the House of Representatives? Again, the latter interpretation seems more credible.[106]

So when courts evaluate election administration laws that have a disparate impact on minority voters, or a redistricting plan that dilutes minority voting strength, or the legality of model legislation imple-

101. Michael Wines & Maggie Haberman, *Trump Closes Voter Fraud Panel That Bickered More Than It Revealed*, N.Y. TIMES (Jan. 4, 2018), https://www.nytimes.com/2018/01/04/us/voting-fraud-commission.html.

102. Dominic Holden, *Trump and Sessions Vowed to Punish Election "Fraud," Raising Fears of Voter Intimidation*, BUZZFEED NEWS (Nov. 5, 2018), https://www.buzzfeednews.com/article/dominicholden/jeff-sessions-voter-fraud-election-monitors-intimidation.

103. Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID Law*, N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/us/justice-dept-will-drop-a-key-objection-to-a-texas-voter-id-law.html.

104. *See, e.g.*, John Hageman, *Burgum Signs Voter ID Bill Amid Lawsuit*, BISMARK TRIBUNE (Apr. 24, 2017), https://bismarcktribune.com/news/state-and-regional/burgum-signs-voter-id-bill-amid-lawsuit/article_bec91fc2-dd86-531f-9812-cd9b4cd57bc4.html; Jake Silverstein, *Greg Abbott on Voter ID*, TEXAS MONTHLY (Jan. 21, 2013), https://www.texasmonthly.com/politics/greg-abbott-on-voter-id/.

105. Charles Stewart III et al., *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1463 (2016) ("Republican support measured 88.4% in 2012 and 91.2% in 2014.").

106. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 243, 333 (2016) (introducing "REDMAP" and describing its success); Elizabeth Kolbert, *Drawing the Line*, NEW YORKER (June 27, 2016), https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting (same).

mented nationwide,[107] divorcing that evaluation from the larger institutional context seems imperceptive. Why, given the documented interrelationship between various institutional segments of the Republican Party, should defenses resting on partisanship continue to receive legal immunity?

There are at least three compelling objections to the adoption of an institutional or systemic theory in the election law context. The first concerns judicial capacity. What tools do courts have to undertake an institutional inquiry? What would the parameters of such an inquiry be? Certainly, it would be improper to assign liability to a state legislature based on something that President Trump expressed on Twitter. However, the nationalization of Republican Party voter restriction efforts seems to betray a coordinated institutional intent. Judge Posner aptly summarized the partisan split with regard to voter ID laws:

> The data imply that a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver's license or feel comfortable dealing with officialdom, to vote, and that liberal states try to make it easy for such people to vote because if they do they are likely to vote for Democratic candidates.[108]

Applying an institutional or systemic theory of discrimination resembling those that informed *Terry* or *Griggs* would permit consideration of this trend. It would allow for the direct consideration of the sustained Republican Party effort, at all of its institutional levels, to impose voting-related barriers on people of color. It would similarly permit acknowledgement of the fact that the difficulties many minorities have in obtaining identifying documentation, meeting onerous bureaucratic demands, or voting on a single day, are rooted in societal inequalities from both past and present, and reflect more than just intentional discrimination. All of this is to say that there isn't an obvious reason why indicia of institutional intent couldn't more systematically be included in record evidence.

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107. *See, e.g.*, Nancy Scola, *Exposing ALEC: How Conservative-Based Laws Are All Connected*, THE ATLANTIC (Apr. 14, 2012), https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/ (describing how many voter ID laws are drafted by the American Legislative Exchange Council, a conservative non-profit counting conservative legislators in its membership).

108. Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

A second objection is that it is inherently biased. For example, some states have approved generous voting periods during which voters may cast their ballots, whereas others have acted more stingily. Litigation has arisen over the question of whether the more generous states are legally permitted to *reduce* the number of early-voting days, if the reduction is shown to have a disparate impact on minority voters.[109] An institutional approach as described above presents the possibility that the reduction of voting days in a Republican-led state could be invalidated (if perceived as part of a nationwide voter suppression effort), while the same reduction in a Democratic-led state would be deemed legitimate.[110]

While a reasonable concern, it is substantially outweighed by the prospective virtues of an institutional approach. This is not to say that the Democratic Party is an inherently well-intentioned entity to which the benefit of the doubt should always be given. However, a gross asymmetry exists between the parties when it comes to voter suppression efforts. An institutional approach assigns significance to this simple reality, and furthers the Constitutionally-inspired goal of equalizing electoral participation.

A third and more fundamental objection is that institutional analysis is incompatible with traditional methods of legal reasoning. Legal reasoning, in general, requires cabining the requisite inquiry, adhering to the requisite framework, and thereby discounting inessential information. There is no cause, for example, for evaluating the intent behind presidential or gubernatorial statements, or the ubiquity of a particular kind of model legislation, in the context of litigation over abortion restrictions or the right to transport guns.[111] Such an all-encompassing form of judicial inquiry is unwieldy and invites shoddy analysis untethered to the facts of a particular case.

The principal response to this objection is that election law doctrines already contain pathways by which such institutional analysis could proceed. The use of these pathways would merely restore the

109. *See* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. (forthcoming 2019).

110. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2172–73 (2015) ("Given present political alignments, the political-incentives presumption would tend to hobble Republican but not Democratic efforts to adjust electoral ground rules for partisan advantage. This may make the presumption too politically fraught for the courts to adopt.").

111. For discussion of when presidential speech may in fact prove actionable, see Katherine Shaw, *Speech, Intent, and the President* 104 CORNELL L. REV. (forthcoming 2019); Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

animating objectives of the Reconstruction Amendments and Voting Rights Act. While the prospect of a reconceptualization of equal protection jurisprudence is slim,[112] the VRA offers means by which an institutional or systemic analysis could proceed.

One proposal, advanced by Christopher Elmendorf and Douglas Spencer, involves interpreting § 2 of the VRA "to create rebuttable presumptions to guide and regularize the adjudication of section 2 claims."[113] The central idea is that courts should deem plaintiffs' burden presumptively satisfied under certain conditions, namely, when disparate impact has been shown and the incentive for partisan-based voter suppression is high. If followed, courts would "acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional."[114] While the proposal is more doctrinal than conceptual, it is quite obviously compatible with an institutional or systemic theory of discrimination, as detailed here.

A second pathway by which an institutional analysis could proceed is in the context of § 2 vote denial litigation. This category of litigation, which is of recent vintage,[115] includes a two-element test. First, plaintiffs must demonstrate that the challenged practice "imposes a discriminatory burden on members of a protected class, meaning that members of the protected class, 'have less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.'"[116] Second, the challenged practice "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."[117] The "totality of the circumstances" inquiry—introduced in Part II when discussing § 2 vote dilution—plays an additional and important role.

Recall that the totality of the circumstances inquiry is informed by nine Senate Report factors. In writing about vote denial litigation, Pamela Karlan has argued that the ninth factor—whether the policy

112. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 15–20 (2013).

113. Elmendorf & Spencer, *supra* note 110, at 2147.

114. *Id*. at 2148–49.

115. *See generally* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 129 YALE L.J. 1566 (2019).

116. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 245 (4th Cir. 2014) (quoting 52 U.S.C. § 10301).

117. *Id*. at 240 (quoting Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 ((6th Cir. 2014), *vacated as moot*, No. 14—3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)).

underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous—should function as a prohibition on partisan manipulation of electoral rules:

> When race and political affiliation are as closely entwined as they are in many of the jurisdictions whose restrictive election laws have recently been challenged, partisan motivation may often rise to the level of purposeful racial discrimination, violating both section 2 and the Fourteenth Amendment's prohibition on purposeful racial discrimination. But even if a court were to find that partisan considerations did not rise to that level, it must treat those motivations under the section 2 results test as evidence that the jurisdiction's policy is tenuous and therefore, under the totality of the circumstances, partisan motivation cuts in favor of finding section 2 liability.[118]

As with the Elmendorf and Spencer proposal, Karlan's proposal highlights a means by which an institutional or systemic theory of discrimination could be incorporated into election law doctrine.

Over time, political circumstances may of course change; certainly that is the desire of many. The ideological consistency of the political parties may decline, or the party structure may disaggregate such that there is greater diversity among various party components. In such a circumstance, the institutional conceptualization offered here would be less useful (the concern with systemic discrimination, however, would remain salient). But at present, if in fact we mean to combat institutional or systemic discrimination, then the stark dichotomy between race and party found in election law doctrines should be dispensed with.

CONCLUSION

The race or party dilemma has confounded courts for decades. At present, one can safely conclude that it obscures more than it reveals, and immunizes a coordinated Republican Party campaign that all too often either encourages or results in minority disenfranchisement. We are thankfully a long way from the era of Jim Crow, but despite the progress we have made, we seem to have lost our ability in the law to confront discrimination in all of its guises. There are lessons to be learned from reflecting on what inspired the *White Primary*

118. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims* 77 OHIO ST. L.J. 763, 788–89 (2016).

Cases, other leading state action cases, and *Griggs*, the combination of which illustrate the judicial capacity for imaginativeness and conscientiousness. It is those qualities that we need to rejuvenate in response to the use of politics as a pretext for the perpetuation of racial discrimination.

Rethinking the Redistricting Toolbox

MICHAEL LI AND YURIJ RUDENSKY*

INTRODUCTION

The round of redistricting that took place after the 2010 census was in many ways a frustrating one for communities of color.

To be sure, communities of color were largely able to hang onto the gains of earlier decades, thanks to the swan-song presence of Section 5 of the Voting Rights Act.[1] But there were very few new gains—despite the rapid growth of Latino and Asian communities in many parts of the country. The cycle also saw the shockingly cynical use of

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1. *See generally* Enbar Toledano, *Section 5 of the Voting Rights Act and It's Place in "Post-Racial" America*, 61 EMORY L.J. 389 (2011).

race as a tool of political gerrymandering that took advantage of increasing division of the two major political parties along racial lines.[2] Egregious examples of this tactic took place not just in southern states like North Carolina, but also in northern states like New York, where the careful fracturing of African American and Latino communities on Long Island was key to engineering a pro-Republican state senate map.[3]

Efforts to block aggressive redistricting in the courts, likewise, proved to be a decidedly mixed bag. Racial gerrymandering claims, to the surprise of some, were an unexpectedly robust tool to challenge the packing of African American voters in the South. But the other traditional tools used to protect the electoral power of communities of color were far less effective. Constraints placed by the Supreme Court, for example, on vote dilution claims under Section 2 of the Voting Rights Act, meant that Latino communities in North Texas were unable to win any additional representation, notwithstanding explosive and record-levels of Latino growth in the region.[4] Similarly, courts took a highly superficial approach to questions of intentional discrimination that allowed highly discriminatory maps to remain in place.

The next cycle of redistricting is likely to be even more challenging for communities of color because of the courts' restrictive interpretation of key parts of the existing doctrinal framework. Further, because communities themselves are changing in ways that make it harder to apply existing tools—and also because the courts themselves, including the Supreme Court, are changing in ways that could make them even less favorably disposed to traditional race-based remedies.[5] If the 2010 map cycle was frustrating, the 2020 cycle has the

2. Abigail Thernstrom, *Redistricting, Race and the Voting Rights Act,* 38 NAT'L AFF. (2019).

3. *See id.*

4. Cameron Langford, *Texas Defends Against Latino Voting-Rights Claims*, COURTHOUSE NEWS SERVICE (Feb. 12, 2018), https://www.courthousenews.com/texas-defends-against-hispanic-voting-rights-claims/.

5. Todd Ruger, *Brett Kavanaugh Could Decide How Redistricting is Done*, ROLL CALL (Feb. 21, 2019), https://www.rollcall.com/news/congress/brett-kavanaugh-could-decide-how-redistricting-is-done ("Kavanaugh will be the center of attention when the Supreme Court hears oral arguments in March about congressional maps in North Carolina and Maryland. He is expected to have the pivotal vote in the cases that could curtail how states use politics to draw legislative and congressional districts — or leave them free to be even more partisan in the future. And a future legal challenge to one of those newly created independent commissions could give conservatives on the Supreme Court a chance to reverse an earlier ruling and strike them down as unconstitutional, legal experts say.").

potential for being seriously frightening. It is time for a somber reassessment of the toolkit.

This article will look at the current state of law as it relates to protection of communities of color in the redistricting process, the stress points that will make the next round of redistricting in 2021 even more challenging, and then finally some of the ways those stress points can be relieved.

I. STRESS POINTS: WHY THE NEXT REDISTRICTING CYCLE WILL BE DIFFERENT (AND POTENTIALLY WORSE)

A. The Shifting Demographic Landscape

Ensuring fair representation for communities of color has never been easy, but in 2021 rapidly changing demographics will test existing tools as never before. For decades now, the United States has been increasingly trending away from being a white-majority country toward a multi-racial and ethnic plurality society.[6] The most recent population release by the United States Census Bureau helps underscore the imminence of the turning point. For the first time in American history, there has been a decline in the absolute number of non-Hispanic whites.[7] The trend line for other racial groups are exactly the opposite. In 2018, the majority of children under nine were non-white.[8] The first generation to be majority people of color is in the fourth grade, and its first members will be eligible to vote by 2026—the halfway mark of next decade's redistricting cycle.[9]

But, counterintuitively, as these changes accelerate, so do the challenges facing the civil rights community in race-based redistricting advocacy. One of the biggest reasons for the increased difficulty of ensuring fair representation for communities of color is the fact that, while the country is becoming more demographically diverse, it also is

6. RUY TEIXEIRA ET AL., STATES OF CHANGE: THE DEMOGRAPHIC EVOLUTION OF THE AMERICAN ELECTORATE, 1974-2060 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/02/SOC-report1.pdf.

7. William H. Frey, *US White Population Declines and Generation 'Z-Plus' is Minority White, Census Shows*, BROOKINGS INSTITUTION BLOG (June 22, 2018), https://www.brookings.edu/blog/the-avenue/2018/06/21/us-white-population-declines-and-generation-z-plus-is-minority-white-census-shows/; JONATHAN VESPA ET AL., DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf.

8. Frey, *supra* note 7.

9. *Id*.

simultaneously becoming increasingly interwoven. Latinos have moved into historically African American neighborhoods in Los Angeles, for example, while African Americans and Latinos have moved into previously all-white suburbs in places like Atlanta, Austin, and Raleigh-Durham.[10] At the same time, gentrification is upending the traditional ethnic mix of cities across the country like Brooklyn and St. Louis.[11]

This increasing demographic complexity runs headlong into long-standing interpretations of the Voting Rights Act assuming that communities are composed of one majority group and one minority group, with a high degree of segregation. But those predicates increasingly are not the case, making use of traditional remedies harder and harder. To be sure, nothing in Section 2 of the Voting Rights Act itself requires such interpretations.[12] The statue itself merely prohibits the use of electoral districts and qualifications, standards, practices, or procedures that deny or abridge the right of people "to vote on account of race or color."[13] But, despite no references to racial majority or minority status in the plain text of Section 2,[14] the Supreme Court has generally understood the resolution of a Section 2 case to center on "the impact of the contested structure or practice on *minority* electoral opportunities."[15] Indeed, the seminal three-part test couched the relevant inquiry entirely in terms of "minority voters" and "majority voters" and numerical superiority.[16] So beyond the complications to the application of the Section 2 analytical framework, which is discussed in Part II of this article, there are fundamental philosophical,

10. Dakota Smith & Angel Jennings, *In L.A.'s Historic African American Core, A Growing Latino Wave Represents A Possible 'Turning Point'*, LA TIMES (Feb. 28, 2017), https://www.latimes.com/local/lanow/la-me-ln-blacks-latinos-south-la-20170228-story.html; Noah Smith, *Why Charlotte and Raleigh Work for Black Residents*, BLOOMBERG (Mar. 28, 2018), https://www.bloomberg.com/opinion/articles/2018-03-28/why-charlotte-and-raleigh-work-for-black-residents.

11. Balazs Szekely, *Downtown LA's 90014 Heads the List of Fastest-Gentrifying ZIPs Since the Turn of the Millennium*, RENTCAFE (Feb. 26, 2018), https://www.rentcafe.com/blog/rental-market/real-estate-news/top-20-gentrified-zip-codes/.

12. *See generally* 52 U.S.C. § 10301.

13. *Id.*

14. The only mention of the minority concept is in the context of the "language minority group" classification. *See* 52 U.S.C. § 10303(f).

15. Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (emphasis added).

16. To lay the foundational justification for the *Gingles* test, the Court wrote that the "theoretical basis for [a vote dilution claim] is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.". *Id.* at 47.

or at the very least conceptual semantic, adjustments that must be made, if that is even possible at this juncture.

But the issues posed by changing demographics are not limited to untethering the judiciary from its traditional majority versus minority dichotomy in interpreting the Voting Rights Act. The population shifts happening within each racial classification also make the landscape more challenging. For example, in 2012, naturalized citizens and noncitizens made up approximately 9.7 percent of the overall black population, just six years later, that percentage was up to 11 percent.[17] Close to 20 percent of the black population is composed of foreign born individuals or their children, predominantly from Nigeria, Kenya, Ghana, Ethiopia, Guyana, Jamaica, Trinidad and Tobago, Haiti, Dominican Republic, and Somalia.[18] For those identifying as Hispanic or Asian, the multiculturalism is even more pronounced.[19] And of course, the fastest growing racial category—those that identify with two or more races—further challenges the idea of racial monoliths.[20] People with multiple, and potentially competing, racial identities may not factor neatly into any paradigm that takes a formalistic approach to grouping people together based on shared racial characteristics.

In these ways, the trend toward a society composed of a racial plurality, and the simultaneously increasing diversity of the racial groups themselves, will continue to strain existing frameworks that have, up-to-now, depended on a simple, more or less static two-race dynamic and that have not been deployed in the multi-racial and ethnic coalition context.

17. Current Population Survey Table Creator: Race Black: alone or in combo and Nativity 2012-2018, U.S. CENSUS BUREAU, https://www.census.gov/cps/data/cpstablecreator.html.

18. Monica Anderson & Gustavo Lopez, *Key Facts About Black Immigrants in the U.S.,* PEW RES. CENTER (Jan. 24, 2018), http://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/.

19. Gustavo Lopez et al., *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RES. CENTER (Sep. 8, 2017), http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/; Antonio Flores, *How the U.S. Hispanic Population is Changing*, PEW RES. CENTER (Sep. 18, 2017), http://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/.

20. Bill Chappell, *Census Finds A More Diverse America, As Whites Lag Growth*, NPR (June 22, 2017), https://www.npr.org/sections/thetwo-way/2017/06/22/533926978/census-finds-a-more-diverse-america-as-whites-lag-growth.

B. The Growing Overlap of Race and Party

At the same time the country has gotten more diverse, it also has become increasingly racially polarized in political terms, especially in the South.[21] At the time Section 2 was designed, whites and African Americans in the South both still voted overwhelmingly in the Democratic primary.[22] By the 1980s this began to change, as southern white voters began a drift to the Republican Party.[23] This drift became a flood by 1994 and has continued even into this decade.[24]

As this shift was happening, the Supreme Court created a legal loophole with its ruling in *Easley v. Cromartie* (*Cromartie II*) that politics could be used to explain—and justify—a map that had been seemingly drawn along racial lines.[25] While a map drawn with close attention to race would fail under the court's racial gerrymandering line of cases, it could survive if mapdrawers could show that race had been a proxy for politics.[26]

The opening created by the combination of *Cromartie II* and the increased polarization of the Democratic and Republican parties along political lines has proven hard for mapdrawers to resist.[27] Communities of color have long been used by both major parties to create or shore up a political advantage.[28] But the 2011 redistricting cycle saw a growing number of efforts both to target communities of color and then to defend those maps on the basis of politics. The resulting disputes, which were primarily brought as racial gerrymandering claims, proved challenging for courts to resolve – and especially frus-

21. Alana Semuels, *Segregation Had to Be Invented*, ATLANTIC (Feb. 27, 2017), https://www.theatlantic.com/business/archive/2017/02/segregation-invented/517158/ ("Today, schools in the South are almost as segregated as they were when Sevone Rhymes was a child. Southern cities including Charlotte are facing racial tensions over the shootings of black men by white policemen, which, in Charlotte's case, led to massive protests and riots.").

22. Joshua Zingher, *Whites Have Fled the Democratic Party. Here's How the Nation Got Here*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/22/whites-have-fled-the-democratic-party-heres-how-the-nation-got-there/?utm_term=.e5bd1ec0debe.

23. Merle Black, *The Transformation of the Southern Democratic Party*, 66 J. POL. 1001 (2004).

24. Charles S. Bullock, III et al., *The Consolidation of the White Southern Congressional Vote*, 58 POL. RES. Q. 231 (2005).

25. *See generally* Easley v. Cromartie, 532 U.S. 234 (2001).

26. *Id.* at 252.

27. Jason Altmire, *Gerrymandering Must Die, But It Won't Stop Polarization*, DAILY BEAST (Jan. 13, 2018), https://www.thedailybeast.com/gerrymandering-must-die-but-it-wont-stop-polarization.

28. Michael Kelly, *Segregation Anxiety*, NEW YORKER (Nov. 20, 1995), https://www.newyorker.com/magazine/1995/11/20/segregation-anxiety.

trating to the Supreme Court.[29] While the Supreme Court took tentative steps to defuse the tension (see *supra*), the growing overlap between race and party remains a source of potential mischief as the country heads into the next cycle of redistricting.[30]

C. The Loss of Section 5

On the legal side, one of the most profound changes in the next round of redistricting after the 2020 census will be the absence of Section 5 of the Voting Rights Act.

When redistricting took place in 2011, seven southern states – plus Alaska and Arizona –were required to have all redistricting plans precleared (pre-approved) by the Department of Justice or a federal court before they could go into effect.[31] Another six states were required to obtain federal government approval for the portions of redistricting plans covering parts of the state where there had been a history of discrimination.[32] The preclearance requirement covered local government redistricting plans as well as legislative and congressional plans.[33] To win preclearance, the burden was on the jurisdiction to show that the plan was non-discriminatory and would not leave minority voters worse off with respect to "their effective exercise of the electoral franchise" (a principle known as non-retrogression).[34]

The impact of Section 5 was profound. Although the Justice Department and courts precleared the vast majority of redistricting plans submitted to it in 2011, there were notable exceptions.[35] In 2011, a federal court denied Texas' request to preclear its legislative and congressional plans, resulting in a redraw of the maps.[36] A number of local government redistricting plans also were blocked from going into

29. *See e.g.*, Cooper v. Harris, 137 S.Ct. 1455 (2017).

30. *Id.*

31. Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were covered as a whole by Section 5. In addition, portions of California, Florida, New York, North Carolina, South Dakota, and Michigan also were covered. *Jurisdictions Previously Covered By Section 5*, U.S. DEP'T OF JUSTICE (Aug. 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

32. *Id*.

33. L. Paige Whitaker, CONG. RESEARCH SERV.,7-5700, *Congressional Redistricting: Legal and Constitutional Issues* 1 (2015).

34. *See* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FL. ST. U. L. REV. 573 (2016)*; see also,* Beer v. U.S. 425 U.S. 130, 141 (1976).

35. *Id.* at 579-80.

36. *Id.* at 602.

effect.[37] And Section 5 acted as a significant constraint on the temptation to dismantle the growing non majority-minority districts that nonetheless were electing minority-preferred candidates on a consistent basis.[38]

But Section 5 looks unlikely at this time to be a factor in the next round of redistricting, thanks to the Supreme Court's decision in *Shelby County v. Holder*, which invalidated not Section 5 itself, but the formula used to determine what states and jurisdictions are subject to preclearance, finding that the formula had "no logical relationship to the present day."[39] Congress could adopt a new coverage formula to replace the one invalidated by the Supreme Court, but it seems unlikely that could happen in the current political environment.

The loss of Section 5 is likely to be felt keenly at the local government level where there simply are not enough resources to monitor every type of potential shenanigan.[40] But it also could open the door to efforts, in places where it is politically beneficial, to dismantle districts where communities of color had successfully been able to elect candidates for many years. For a hint at what might be possible, consider the two-decade travail of Texas' 23rd Congressional District, where in two redistricting cycles in a row, white lawmakers attempted to dilute the ability of Latinos to elect preferred candidates.[41]

D. The Limits of Section 2

Though the Supreme Court has not yet signaled an intent to call the constitutionality of Section 2 of the Voting Rights Act into question, the Court has, in the last twelve years, nonetheless become more restrictive in how it interprets voting rights laws, expressing increasing discomfort when it comes to making nuanced judgment calls on questions of race.[42]

At the time of its passage, Section 2 of the Voting Rights Act provoked little controversy.[43] As the Supreme Court surmised, this was likely because when "first enacted, [Section] 2 tracked, in part, the text of the Fifteenth Amendment."[44] As a result, the Supreme

37. *Id.* at 576.
38. *Id.* at 582-83.
39. Shelby County v. Holder, 570 U.S. 529, 554 (2013).
40. *Id.* at 561(Ginsburg, J., dissenting).
41. *Id.* at 572.
42. *Id.* at 557.
43. Bartlett v. Strickland, 556 U.S. 1, 10 (2009).
44. *Id.*

Court interpreted the section as doing little "more than elaborate[ing] upon . . . the Fifteenth Amendment" and that it was "intended to have an effect no different from that of the Fifteenth Amendment itself."[45] This reasoning informed the Court in *Mobile v. Bolden*, which, consistent with Fifteenth Amendment jurisprudence, required litigants to establish discriminatory intent as part of a Section 2 claim.[46]

The *Bolden* ruling prompted Congress to clarify that a Section 2 claim could be based purely on discriminatory impacts.[47] In 1982, Congress amended the Voting Rights Act to its current form to prohibit practices "imposed or applied . . . in a manner which results in a denial or abridgment" of the right to vote.[48] The 1982 amendments also added a subsection, Section 2(b), providing a test for determining whether a Section 2 violation has occurred.[49]

Since this amendment, section 2 of the Voting Rights Act has been the key tool for communities of color seeking to vindicate their voting rights by challenging discriminatory redistricting plans, at-large election systems,[50] and other electoral devices and voting regulations.[51] The Act, even in its 1982 update, largely contemplated a black and white paradigm where the voting power of black communities was systemically undermined in relation to their white counterparts.[52] Judicial interpretation of Section 2 has, for the most part, stayed true to this original conception.

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45. *Id.*

46. The Supreme Court reasoned that

> [a]ssuming . . . that there exists a private right of action to enforce this statutory provision, it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself. . . Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.

Mobile v. Bolden, 446 U.S. 55, 60-62 (1980) (internal citations omitted).

47. 96 Stat. 134, 52 U.S.C. § 10301.

48. *Id.*

49. *Id.*

50. An at-large election system is one where all persons registered to vote in a particular political jurisdiction can cast ballots for all members of a multi-member democratic body. This is in contrast with a single-member district system where voters are split into districts that each elect one representative. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1839 (1992).

51. *See generally* United States Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States 2018 Statutory Enforcement Report* (2018); *see also* Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643 (2006).

52. *See generally Id.* at 678-85 (providing examples of systematically undermined voting power in black communities South Carolina, South Dakota, Georgia, Texas, etc.)

To successfully prosecute a Section 2 claim, plaintiffs must demonstrate, by a totality of the circumstances that a protected class does not have "an equal opportunity to participate in the political process."[53] This statutory command has been operationalized in two steps by the Supreme Court in *Thornburg v. Gingles*.[54] First, litigants must satisfy the threshold *Gingles* precondition quantitative inquiry.[55] Second, they must meet the "Senate factors" qualitative considerations.[56] At both phases, litigants will likely have an increasingly difficult task meeting their burden, given practical challenges posed by increasingly racial heterogeneity in communities of color and the Supreme Court's trend toward bright-line inquiry.

The first *Gingles* factor requires a community of color to "demonstrate that it is sufficiently large and geographically compact to constitute a majority" in a district.[57] In other words, the inquiry determines whether an appropriate remedy—the drawing of districts that are majority-minority—would be available to plaintiffs.[58] The second and third *Gingles* factors require a community of color to "show that it is politically cohesive" and "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[59] These two conditions determine whether a cognizable injury—unsuccessful cohesive minority attempts to elect candidates of choice as a result of racially polarized voting tendencies of the white majority—has occurred.[60]

The Supreme Court has not signaled an intention to update its understanding of these concepts to maintain the continued viability of the *Gingles* inquiry. If anything, the Court has demonstrated a preference for more mechanical applications, which will make it fundamentally more difficult to make the case and community specific inquiries to account for the growing complexity of communities of color.[61]

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53. 52 U.S.C. § 10301.

54. Thornburg v. Gingles, 478 U.S. 30, 44–45, 50 (1986).

55. *See e.g.*, Lopez v. Abbott, 339 F. Supp. 3d 589, 600-01 (S.D. Tex. 2018); *see also Thornburg,* 478 U.S. at 50.

56. *Id at 602, Throngurg,* 478 U.S. at 44–45.

57. *Gingles*, 478 U.S. at 50.

58. *Id.* at 47.

59. *Id.* at 90.

60. *Id.*

61. *See Bartlett*, 556 U.S. at 17 (reasoning that "[t]he rule [adopted by the Court] draws clear lines for courts and legislatures alike. The same cannot be said for a less exacting standard . . . [that] would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions.").

The Supreme Court, in particular, has made the first *Gingles* factor much harder for communities of color to satisfy.[62] In *Bartlett v. Strickland*, the Supreme Court imposed a bright-line rule for defining what it means for a minority group to be sufficiently large.[63] To meet the precondition, the Court held that litigants must demonstrate that members of the relevant racial group could form more than 50 percent of the citizen voting age population of a particular district.[64] The opinion rejected the lower court's finding that "crossover" voters from the white community who supported black candidates could be combined with the population of the black community to create a "de facto" majority black district that could elect candidates of choice.[65]

In arriving at this outcome, the Court's reasoning largely rested on the supposed tension that permitting such "crossover districts" would create between the numerosity requirement of the first *Gingles* precondition and the sufficiency of the racially polarized white bloc voting to defeat minority-preferred candidates of the third *Gingles* precondition.[66] That is, the Court balked at the thought that the white community could be bisected with one portion used to establish injury and a different portion used to establish the viability of a remedy.[67]

But the Court was also concerned with judicial manageability of a standard that permitted crossover districts. Justice Kennedy reasoned that

> Crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates. Under petitioners' view courts would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions. And predictions would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.[68]

62. *Id.* at 15.
63. *Id.* at 25–26.
64. *Id.*
65. *See id.* at 2.
66. *Id.* at 16.
67. *Id.* at 21.
68. *Id.* at 18.

In other words, a majority of the Supreme Court believed that it is important for an adopted rule to be applicable to all possible iterations of Section 2 challenges. It was also uncomfortable with how jurisdiction and fact specific the inquiry for protecting crossover districts would be.[69]

Both threads of the Court's reasoning from *Bartlett* pose significant challenges to using Section 2 to protect communities that want to combine voting strength in a coalition district. For now, the Supreme Court has sidestepped the question.[70] However, circuit courts' attempts to bring coalition district claims have had mixed results.[71] But, if the Supreme Court were to take up the question, it is easy to see how, without additional developments in the field, the Court's logic from *Bartlett* could be imported to thwart coalition voting rights efforts on communities of color that increasingly occupy common neighborhoods.[72]

The Supreme Court's existing discomfort with making "predictive political judgments" in the crossover district context[73] will likely be magnified when courts are asked to parse through claims implicating the voting rights of three or more racial groups.[74] Indeed, for the *Bartlett* majority, the presence of "more than two parties or candidates" in certain elections was enough to make the concurrent consideration of white crossover voting unmanageable.[75] It is hard to imagine that factoring in additional racial groups under existing inquiries would somehow be more acceptable to the Court. New datasets, quantitative methods, and legal and evidentiary frameworks

69. *Id.* at 36.

70. *Id.* at 13–14 (explaining that crossover districts are distinct from districts where two minority groups form a coalition and that the Court "do[es] not address that type of coalition district here.").

71. *Compare* Nixon v. Kent County, 76 F.3d 1381, 1386–87 (6th Cir. 1996) (finding that coalition claims are not cognizable under Section 2 because the plain language of the statute "does not mention minority coalitions, either expressly or conceptually" and that it "consistently speaks of a 'class' in the singular) *with* Concerned Citizens of Hardee County v. Hardee County Board of Commissioners, 906 F.2d 524, 526 (11th Cir. 1990) (establishing that "[t]wo minority groups (in this case blacks and Hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner.); Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both blacks and Hispanics."); *and* Huot v. City of Lowell, 280 F. Supp. 3d 228, 235 (D. Mass. 2017) (reasoning that "Section 2's remedial purpose is best served by allowing minority coalition claims.").

72. *Bartlett*, 556 U.S. at 13–14.

73. *Id.* at 18.

74. *Id.*

75. *Id.*

must be introduced and accepted for courts to keep up with new demographic realities.

But this need is not just to make necessary advances in the multiracial context. As discussed above in Part I(A), the growing complexity of each racial group, may raise the same manageability concerns in more "conventional" Section 2 claims brought by single racial groups. There is a fear, particularly among members of Asian and Latino communities, that subgroups of differing ethnic origins will be disaggregated much like multiple racial groups are in the crossover, and potentially the coalition, district context. Advocates and experts may well need to make additional showings in the future so that groups such as Puerto Ricans and Dominicans can be considered one cohesive Latino community or that Chinese and Indian individuals are an Asian community for purposes of Section 2 cases.

A similar set of questions applies in the other *Gingles* inquiries as well. At their core, the second and third preconditions have been designed to determine "the cause of minority voters' lack of success."[76] Though no discriminatory intent need exist or be proven,[77] litigants must demonstrate a causal link between a minority group's inability to elect preferred candidates and the majority group's tendency to vote as a bloc in opposition.[78]

To establish this connection, plaintiffs must analyze past elections and offer evidence detailing the voting patterns of the relevant racial groups.[79] First, courts generally identify the candidates that are actually preferred by the minority group.[80] Then, they observe whether the white majority votes as a bloc for other candidates in those elections and determine whether the white bloc vote is of a magnitude that usually suffices to defeat minority-preferred candidates.[81] Finally, they consider whether any of the electoral results should be discounted because of special circumstances.[82]

The same lack of evidence that concerned the Court in *Bartlett* would be relevant in identifying who exactly should be considered a

76. Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 303 (D. Mass. 2004).

77. *Id.* at 298.

78. *Black Political Task Force*, 300 F. Supp. 2d at 303.

79. Shirt v. Hazeltine, 461 F.3d 1011, 1020 (8th Cir. 2006).

80. *See Id.*; Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1118 (3d Cir. 1993); Collins v. City of Norfolk, 883 F.2d 1236 (4th Cir. 1989).

81. *Black Political Task Force*, 300 F. Supp. 2d at 298.

82. *See Gingles*, 478 U.S. at 51; *Black Political Task Force*, 300 F. Supp. 2d. at 303. *See also,* Jenkins v. Manning, 116 F.3d 685, 691 (3d Cir. 1997) (outlining a similar inquiry).

candidate of choice. In the coalition district context, it is unclear what threshold should be required for communities to be considered politically cohesive and which elections should be used to make that determination. Already the various circuit courts use differing processes to identify candidates of choice.[83] Specifically, they disagree on the role of analyzing primary elections[84] and how to factor in the race of the candidate.[85] These discrepancies and complications will only grow and may even threaten to implode the entire *Gingles* framework without additional methodological and conceptual developments.

In order to satisfy the second piece of the Section 2 inquiry, plaintiffs must present evidence that satisfy the so-called Senate Factors, "a non-exhaustive and non-exclusive list of factors set forth in a Senate Judiciary Committee Majority Report that accompanied an amendment to Section 2, which aid courts in assessing the totality of the circumstances surrounding the challenged voting schemes."[86] These factors include

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively

83. *Compare* N.A.A.C.P., Inc. v. City of Niagara Falls, 65 F.3d 1002, 1019 (2d Cir. 1995) (holding that "when a candidate receives support from 50% or more of minority voters in a general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election.") *with* Jenkins, 4 F.3d at 693 (reasoning that determining whether a candidate is "as a realistic matter, the minority voters' representative of choice [courts may look at whether] "the minority community can have said to have sponsored the candidate").

84. *Id.*

85. *See e.g.* Lewis v. Allamance Cty., 99 F.3d 600, 606 (4th Cir. 1996) (requiring plaintiffs to submit "a larger, more representative sample of elections" than just elections that involve minority candidates to meet the third *Gingles* prong); *Jenkins*, 4 F.3d at 1128 (holding that plaintiffs are not "required to present evidence on white versus white elections if they do not believe that those elections are probative."); Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 361–62 (7th Cir. 1992) (refusing to discount the election of a black Republican even though the majority of black voters were Democrats because the race of the candidate was of paramount importance).

86. Wright v. Sumter Cty. Bd. of Elections & Registration, 301 F. Supp. 3d 1297, 1312 (M.D. Ga. 2018) (citing Gingles, 478 U.S. at 37-38).

> in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.[87]

Many of these factors rely on demonstrating historical discrimination. While "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors bust still have failed to establish a violation of [Section] 2 under the totality of the circumstances,"[88] the Supreme Court's reasoning in *Shelby County* may signal that history of discrimination has an expiration date.[89] Plus, given much of the demographic change is driven by immigration, courts may begin to question whether the discrimination faced by a group historically also applies to co-racial relative newcomers.[90]

II. RETHINKING THE TOOLKIT

A. Build the Jurisprudence and Arguments for Coalition Districts

In response to accelerating demographic shifts and the increasingly complicated geographic distribution of communities of color, advocates have adopted a variety of techniques aimed at preserving the political power of cohesive multiracial coalitions. In large part, tactics have been driven by necessity. Despite the few favorable rulings, as discussed above in Part I(C), federal courts have not yet definitely interpreted section 2 of the Voting Rights Act as protecting the political power of cohesive multiracial coalitions.[91] Residential patterns, meanwhile, show that communities of color are becoming more diverse and living in closer proximity to each other.[92] For example, in 1980, the typical black individual lived in neighborhoods that were roughly 60 percent black.[93] In 2010, those neighborhoods were less than 50 percent black.[94] While black-white community integration

87. *Id.* at 1312–13; S. Rep. No. 97-417 (1982).
88. *Niagara Falls*, 65 F.3d at 1019 n.21.
89. *Shelby County*, 570 U.S. at 547.
90. *See* Nadra Kareem Nittle, *California Minority Groups Offer 'Unity' Redistricting Map,* EGP News, July 14, 2011, http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%98unity%E2%80%99-redistricting-map/; *see also The Unity Map: Redistricting for Fair Representation,* Asian American Legal Defense and Education Fund, https://www.aaldef.org/unity-map.
91. See *supra* notes 55–57.
92. John Iceland & Gregory Sharp, *White Residential Segregation in U.S. Metropolitan Areas: Conceptual Issues, Patterns, and Trends from the US Census, 1980 to 2010*, 32 Population Res. Pol'y Rev. 663 (2013) accessed at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3811941/.
93. *Id.*
94. *Id.*

over the last three decades helps explain this trend somewhat, it is mostly on account of the increased presence of Latino and Asian communities.[95]

To help preserve the political integrity of these complex areas and to work in solidarity with each other, black, Latino, and Asian groups came together to engage in unity mapping in certain jurisdictions.[96] The process brings together community leaders from various racial and ethnic groups that live in close proximity to each other to craft a consensus plan that is jointly presented to redistricting authorities. Typically, representatives of these groups begin by analyzing the demographic data and applicable legal frameworks. They then schedule extensive community hearings around the relevant area to understand the degree to which different groups share concerns and what district configurations would best preserve these coherent interests. Ultimately, they form a unified front and publicly unveil political districts that are justified by demographic commonalities and other shared interests. Overall, unity mapping makes it more difficult for mapdrawers to use these communities as pieces in games of political chess or to triangulate and pit different racial groups against each other. It also can provide counterweight to gerrymandering by offering what is perceived by the public and by courts as a legitimate alternative.

During the 2010 cycle, the Asian American Legal Defense and Education Fund, the Center for Law and Social Justice at Medgar Evers College, LatinoJustice PRLDEF, and the National Institute for Latino Police engaged in a unity mapping process to draw New York City's city council districts.[97] The original redistricting plan that was released by New York's redistricting commission had carved up the Asian communities in Queens and Manhattan, the black communities in Queens and Brooklyn, and the Latino communities in Manhattan.[98] Through the unity mapping process, these organization were able to put forth plans that met all legal requirements and helped keep these

95. *Id.*

96. Nadra Kareem Nittle, *California Minority Groups Offer 'Unity' Redistricting Map,* EGP NEWS, July 14, 2011, http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%98unity%E2%80%99-redistricting-map/.

97. *The Unity Map: Redistricting for Fair Representation,* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, https://www.aaldef.org/unity-map.

98. *See AALDEF and Civil Rights Groups Present "Unity Map" for Redistricting New York City*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (Oct. 6, 2011), https://www.aaldef.org/press-release/aaldef-and-civil-rights-groups-present-unity-map-for-redistricting-new-york-city/.

communities intact in ways that respected other legitimate redistricting criteria.[99]

A similar process played out last redistricting cycle in California. There, the Mexican American Legal Defense and Educational Fund, the Coalition of Asian Pacific Americans for Fair Redistricting, and the African American Redistricting Collaborative came together to jointly advocate for state legislative and congressional district recommendations to the independent redistricting commission.[100] The original set of maps released by the commission split up communities of color in ways that would have diluted their political influence. Latino communities around the state had grown by three million people between 2000 and 2010, representing nearly 90 percent of the overall population change in California.[101] But the initial proposal saw Latino communities gain no congressional or state assembly seats and would have resulted in the loss of a state senate district.[102] The commission's first plan also split up Asian and black communities in greater Los Angeles and the San Francisco Bay Area. The California unity plan provided the redistricting commission a valid alternative that advanced the ability of communities of color to elect candidates of choice while meeting the other redistricting criteria.[103]

Unity mapping has proven to be effective at preserving the political power of communities of color, at least in the few iterations that it has been used. But its utility is limited to the extent that mapdrawers care to consider the unity map suggestions. Many jurisdictions, particularly ones with legacies of significant redistricting abuses, are likely to be less susceptible to the pressures of accepting public mapping than states such as California and New York. Texas, for example, largely ignored redistricting suggestions submitted by groups like the Texas Latino Task Force.[104]

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99. *See id.*

100. *Asian Americans, Latinos And African Americans Submit Joint Mapping Proposal to California Redistricting Commission*, ASIAN AMERICANS ADVANCING JUSTICE (June 30, 2011), https://advancingjustice-la.org/media-and-publications/press-releases/asian-americans-latinos-and-african-americans-submit-joint-mapping#.XH1DcsBKjcs.

101. Nadra Kareem Nittle, *California Minority Groups Offer 'Unity' Redistricting Map,* EGP NEWS, July 14, 2011, http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%98unity%E2%80%99-redistricting-map/.

102. *Id.*

103. *See id.*

104. *See* Perez v. Abbott, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (discussing proposed redistricting plans).

To make such efforts enforceable, redistricting activists in an increasing number of states have advanced the next generation of race equity protections as part of state law. In all seven states, including California,[105] Florida,[106] Illinois,[107] Iowa,[108] Missouri,[109] Oregon,[110] and Washington,[111] have some provisions that protect the political power of communities of color.

These states have taken a variety of approaches. Washington passed a state voting rights act that makes it unlawful for local jurisdictions, such as cities and counties, to impair the ability of a protected class to have an equal opportunity to elect candidates of choice.[112] In others, such as Missouri and Illinois, the race equity language factors in as one of the redistricting criteria for state legislative and congressional districts.[113] In their best iterations, these provisions share features that help them extend beyond the protections offered by section two of the Voting Rights Act—they explicitly allow for crossover and, in certain instances, coalition districts.[114]

105. The California Voting Rights Act allows members of a protected class to sue local jurisdictions if an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." Cal. Elec. Code §§ 14027, 14032.

106. In Florida, it is impermissible for congressional or state-legislative "districts [to] be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." FLA. CONST. art. III, §§ 20(a), 21(a).

107. In Illinois, all congressional and state legislative district plans "shall be drawn . . . to create crossover districts, coalition districts, or influence districts. The requirements imposed by this Article are in addition and subordinate to any requirements or obligations imposed by the United States Constitution, any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act, and the Illinois Constitution." 10 ILL. COMP. STAT. ANN. 120/5-5 (West 2017).

108. In Iowa "[n]o district shall be drawn . . . for the purpose of augmenting or diluting the voting strength of a language or racial minority group." IOWA CODE ANN. § 42.4 (West 2011).

109. In Missouri, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice, whether by themselves or by voting in concert with other persons." MO. CONST. art. III, § 3(c)(1)(b).

110. In Oregon, "No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group." OR. REV. STAT. ANN. § 188.010 (West 2019).

111. The Washington Voting Rights Act allows members of a protected class to sue local jurisdictions if the "method of electing the governing body of a political subdivision [is] imposed or applied in a manner that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice." WASH. REV. CODE ANN. § 29A.92.020 (West 2018).

112. *See id.*

113. *See* MO. CONST. art. III, § 3(c)(1)(b); 10 ILL. COMP. STAT. ANN. 120/5-5 (West 2017).

114. *Id.*

The citizen-proposed constitutional amendment in Missouri, that voters overwhelmingly approved in November 2018, uses perhaps the most protective language. The relevant section reads:

> Notwithstanding any other provision of this Article, districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice, whether by themselves or by voting in concert with other persons.[115]

This language contains multiple standards: a plan may neither deny nor abridge the equal opportunity of racial and language minorities to participate in the political process nor diminish the ability of these communities to elect candidates of choice.[116] Perhaps, more importantly, the language explicitly contemplates multiracial coalitions by allowing one racial group to "vot[e] in concert with other persons."[117] To put this into practice, Missouri's state demographer will have to consider the minority's size and turnout, as well as the level at which other communities support the minority-preferred candidates.

Such enhancements are also being introduced, if not yet adopted, in federal policy proposals as well.[118] The Redistricting Reform Act of 2019, for instance, contains a federal analog to Missouri's criteria provision.[119] It would require Congressional Districts to "provide racial, ethnic, and language minorities with an equal opportunity to participate in the political process and to elect candidates of choice and shall not dilute or diminish their ability to elect candidates of choice, whether alone or in coalition with others."[120]

Such efforts, be they state voting rights acts or new racial fairness redistricting criteria, will provide important new tools for protecting voting rights as demographic changes continue to change the makeup of the country.[121] These new standards, however, only solve part of the problem. The dataset and methodological challenges identified in *Bartlett* must still be addressed to make sure that relevant communities can actually use these new laws to vindicate their rights. Securing

115. Mo. Const. art. III, § 3(c)(1)(b).
116. *See id.*
117. *Id.*
118. *See* For the People Act of 2019, H.R. 1, 116th Cong. § 2413(a)(1)(C) (2019).
119. *See id.*
120. *Id.*
121. *See* Jamal Hagler, *It Is Time to Update the Voting Rights Act*, Center for American Progress (Aug. 6, 2015, 9:03 am), https://www.americanprogress.org/issues/race/news/2015/08/06/118888/it-is-time-to-update-the-voting-rights-act/.

their success will require forming coherent legal inquiries and developing evidentiary approaches that courts find manageable.

B. Be Prepared to Give Teeth to Communities of Interest

If traditional race-based remedies are becoming harder to use, an important alternative could be the protections for communities of interest that a growing number of states are adding to their state constitutions.[122] The redistricting reform measure passed by California voters in 2008, for example, expressly requires to minimize the division of communities of interest "to the extent possible" and defines communities of interest as "a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation."[123] Voters in Colorado, Michigan, and Utah adopted similar protections for communities of interest with reforms passed in 2018, and communities of interest language is also a part of federal and state legislation being considered in 2019.[124]

Wielded well, a communities of interest provision can be powerful in enhancing representation, sometimes in unexpected ways. In California, for instance, the state's new independent redistricting commission chose to draw a district in the foothills of Los Angeles based on extensive citizen testimony about unmet needs related to wildfire prevention.[125] Communities of interest protections, likewise, can help communities of color making it possible to argue, without invoking race, that ethnically heterogenous neighborhoods with extensive socio-economic commonalities should be kept together in the same district.[126] This would avoid abuses like the aggressive fracturing of African American, Latino, and Asian communities that occurred this decade in places as politically different as Texas and New York.[127] In-

122. *See* Cal. Elec. Code § 21552(a)(4) (2012).

123. *Id.*

124. MI Proposal 2 (https://ballotpedia.org/Michigan_Proposal_2,_Independent_Redistricting_Commission_Initiative_(2018), UT Proposition 4 (https://ballotpedia.org/Utah_Proposition_4,_Independent_Advisory_Commission_on_Redistricting_Initiative_(2018)), CO Amendments Y and Z (https://www.cpr.org/news/story/colorado-amendment-y-z-redistricting-results), For the People Act of 2019, H.R. 1, 116th Cong. § 2413(a)(1)(C) (2019), New Hampshire HB706 (https://legiscan.com/NH/bill/HB706/2019).

125. Karin Mac Donald and Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U. CAL. IRVINE L. REV. 609, 632 (2013).

126. *Id.* at 633.

127. In Texas, Republican lawmakers, for example, refused to create any additional minority opportunity districts in North Texas despite growth of Latino and African American populations in the region. *See* Michael Li & Laura Royden, *Minority Districts: No Conflict with Fair Maps*, 15

deed, eighteen civil rights and good government groups, who often disagree about many aspects of redistricting, signed a common statement in 2014 stating that "[c]onsideration of communities of interest is essential to successful redistricting" and that "[m]aintaining communities of interest intact in redistricting maps should be second only to compliance with the United States Constitution and the federal Voting Rights Act.[128]"

But that is not to say communities of interest protections are self-executing. While protections for communities of interest can be a powerful tool for communities of color, the term – even with the added definitional language in California – is very broad. The challenges posed by this breath are compounded by the fact that where protections for communities of interest exist, they are often lumped in with protections for counties and political subdivisions.

Successfully asserting that a functioning community of interest exists requires both organization and factual evidence (subjective as well as quantitative). In the absence of either, the risk is that map drawers will fall back on easier to define political subdivisions or listen to better organized groups. Data from the Census Bureau's American Community Survey can provide a solid starting point for identifying possible communities of interest based on factors such as ethnicity, socioeconomic status, marital status, sprawl, and age.[129] But these are only a starting point because they flag only that people share common attributes, not that people so flagged see those common attributes as giving them a common identity.[130] To ascertain whether a community of interest exists, public input is essential. Although there are different forms that public input can take, the structured inquiry developed by California's independent redistricting commission is instructive of what map drawers found helpful. In both handouts and oral statements, the commission asked participants in the public testimony

(2017), https://www.brennancenter.org/sites/default/files/analysis/Minority-Representation-Analysis_0.pdf. (Similarly, in New York, the division of African American and Latino communities on Long Island was key to engineering a pro-Republican bias in the state senate.).

128. Common Cause, *Redistricting Principles for a More Perfect Union,* 9 (2014), https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#. The eighteen signatories to the statement are the Advancement Project, American Civil Liberties Union, Asian American Legal Defense and Education Fund, Asian Americans Advancing Justice, Brennan Center for Justice, Campaign Legal Center, CHANGE Illinois, Common Cause, Demos, Lawyers' Committee for Civil Rights Under Law, LatinoJustice, Mexican American Legal Defense and Educational Fund, NAACP Legal Defense and Education Fund, NALEO Educational Fund, Prison Policy Initiative, Sierra Club, and Southern Coalition for Social Justice.

129. Mac Donald, *supra* note 138, at 617.

130. *Id.* at 618.

phase to provide: (a) the geographic boundaries for the neighborhood or asserted community of interest, (b) a description of the shared interests, and (c) an explanation of why it should be kept together.[131] This is a very different type of evidentiary case than the one that civil rights advocates and communities of color are used to making with respect to traditional race-based remedies. The time to begin preparing is now.

C. Build on the Opening of *Cooper v. Harris*

Tackling the artificial race vs. politics distinction also would help challenge maps where politics is used as the excuse for maps that adversely impact communities of color. And this is an area where advocates might be able to look for help from a surprising source: the Supreme Court.

Although the Supreme Court helped greenlight the politics as an excuse for racial discrimination argument with its 2001 decision in *Cromartie II*, by the middle of this decade there were signs that the Justices may have had enough. When asked to decide whether race or politics drove the aggressive redesign of North Carolina's Twelfth Congressional District in 2011, the Justices faced a situation where the factual record was complicated, with evidence of both racial and political considerations at play.[132] The state defended the map as politics rather than race and argued that under *Cromartie II*, the African American voters challenging the map could not win unless they could produce an alternative map that had the same pro-Republican political effect as the state's reconfigured Twelfth District.[133]

Justice Kagan rejected North Carolina's arguments in a careful 6-3 decision in *Cooper v. Harris* that, on the surface, was an unexciting opinion about deferring to the not clearly erroneous factual findings of the district court that race had predominated in the drawing of the map.[134] But the opinion also signaled a broader turning away – albeit a tentative one – from the notion that politics can excuse adverse racial impacts.[135] First, the majority rejected the notion that *Cromartie II* required plaintiffs in a racial gerrymandering case to produce an alternative map showing that it was possible to meet the state's non-

131. *Id.* at 626.
132. Cooper v. Harris, 137 S.Ct. 1455, 1476 (2017).
133. *Id.* at 1479.
134. *Id.* at 1478.
135. *See generally id.*

racial objectives without using race (in this case a partisan advantage for Republicans).[136] The elimination of the alternative map requirement significantly undermines the viability of the politics defense in racial gerrymandering cases.[137] Because of the close alignment of race and politics in much of the South, it is very difficult to draw maps to give a partisan advantage to one party or the other without using racial minorities as the means. In many places, the high levels of racially polarized voting make it impossible. If the alternative map requirement in *Cromartie II* had survived as a hard and fast rule (rather than as a permissive means of showing predominance) then most racial gerrymandering claims would fail where the defense was politics.[138] But the Supreme Court did not stop there. In a footnote, Justice Kagan pushed the doctrine further, writing that "the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."[139] In other words, whether race is considered for racial reasons or for political reasons matters not.

Of course, the footnote is only dicta. But there is reason to hope that it signals a pragmatic opening. Racial gerrymandering cases have frustrated the high court almost from the outset, with the court not willing to go all the way and strike down section 2 of the Voting Rights Act on color blindness grounds but, at the same time, struggling to put limits on a doctrine that leading scholars have called "both misguided and incoherent."[140] *Cromartie II*'s alternative map itself is, in many ways, best seen as an attempt by the court to walk away from racial gerrymandering by creating a highly deferential standard for a state's non-racial redistricting objectives.[141] The problem, as the court found this decade, was that *Cromartie II* inadvertently opened the door to the politics defense to the use of race.[142] That, in turn, threw courts into the world of having to embrace the artificial dichotomy that race and politics are completely distinct. As the court found, however, untangling race and politics was cumbersome in the extreme, with Justice Breyer despairing at oral argument in *Cooper* that the question would

136. *Id.* at 1479.
137. *Id.*
138. *See generally Cooper*, 137 S. Ct. at 1455.
139. *Cooper*, 137 S. Ct. at 1473 n. 7.
140. Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996).
141. *See generally* Easley v. Cromartie, 532 U.S. 234 (2001).
142. *Id.*

have the court "spending the entire term reviewing 5,000 page records."[143] The challenge for advocates in the next round of redistricting will be to see if they can build on the opening. If they can, it will be a victory for both communities of color, who often bear the heaviest share of burden of partisan gerrymandering, and for opponents of partisan gerrymandering more broadly. If courts are reluctant to embrace Justice Kagan's footnote, a more direct approach may be needed.

D. Embrace Partisan Gerrymandering Claims as a Tool for Racial Fairness

The race vs. partisanship conundrum might be solvable another way – namely by taking partisanship squarely off the table. The Supreme Court has long wrestled with partisan gerrymandering. On the one hand, the court has repeatedly said that partisan gerrymanders are "incompatible with democratic principles."[144] On the other hand, it has just as steadfastly failed to put in place limits on excessive partisanship, and its fractious deadlock has been blamed by many for fueling the rise of extreme gerrymandering this decade.[145] Things, however, likely will be different by the next round of redistricting in 2021. For better or worse, it seems all but certain that a dispositive showdown on partisan gerrymandering is coming in one of a series of cases at or headed to the Supreme Court (including three cases in October Term 2018).[146]

If, indeed, the Supreme Court does affirm that partisan gerrymandering claims are justiciable and articulates a standard for measuring maps for unlawful partisanship, it will be a victory that communities of color should embrace. In many instances, a theory of partisan discrimination, in fact, may be more viable than claims of race discrimination given the seeming reluctance of many courts to

143. Transcript of Oral Argument at 15, *Cooper*, 137 S. Ct. 1455 (No. 15-1262).

144. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (decrying "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power").

145. Thomas Wolf, *The Supreme Court Takes in Partisan Gerrymandering*, BRENNAN CENTER FOR JUSTICE (Mar. 12, 2019), https://www.brennancenter.org/blog/supreme-court-takes-partisan-gerrymandering.

146. The Supreme Court is scheduled to hear oral argument on March 26, 2019, in cases challenging congressional maps in North Carolina (Rucho v. Common Cause) and Maryland (Benisek v. Lamone). In addition, a district court in Michigan is expected to rule shortly on the partisan gerrymandering claims challenging legislative and congressional plans in that state, and partisan gerrymandering cases in Ohio, challenging the state's congressional map, and Wisconsin, challenging the state assembly plan, are set to go to trial as writing.

buy into claims of race discrimination. At a minimum, having a legally cognizable claim of partisan gerrymandering would allow claims whose fact patterns more closely align with theories of political discrimination to be brought as political claims rather than shoehorned (sometimes aggressively and awkwardly) into theories of race discrimination. This would leave race discrimination claims for those cases that actually and truly are about the race. If this happens, jurisprudence would be strengthened all around.

But communities of color also should be cautious. Invidious discrimination on the basis of partisanship ought rightfully be condemned. But care also must be taken to ensure that the notions of partisan fairness are not used to trump the often precarious ability of communities of color to participate meaningfully in the political process (to use the language of Section 2). Metrics of partisan bias, for example, can be powerful tools for helping to ascertain when a map is an outlier and therefore suspect as a partisan gerrymander.[147] But it is important that those same metrics not be used to constitutionalize requirements that a map have the lowest possible level of partisan bias or to require that every district be competitive. Just as in the corporate world, there is a wide range of reasonable choices that the management of a corporation can make under the business judgment rule, so too there is a range of reasonable maps. Protecting the ability to maneuver within that zone of reasonableness is vital to ensuring that communities of color can be at the table. Done right, however, partisan gerrymandering claims can be a powerful additional tool for communities of color.

CONCLUSION

Protecting the interests of communities of color in redistricting has always been challenging. But for reasons rooted both in changing courts and in a changing America, that task could be more difficult than ever in 2021. At the same time, a fluid landscape provides a rare opportunity to break away from constraining orthodoxies and to rethink and recraft tools that have long shown their limitations. There is reason both for fear and hope. What there is not, is time for compliancy.

147. Bernard Grofman and Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018)*, U.C. ELECTION L. J. 1, 13 (Sept. 2018).

The Dignity Problem of American Election Integrity

ATIBA R. ELLIS†

INTRODUCTION

Recent election-related litigation has once again raised the question of whether the right to vote is at risk. Litigation concerning more stringent rules regarding voter participation (such as voter identification laws) has raised the question of whether some states are incidentally (or purposefully and with an intent to discriminate) disenfranchising voters. Moreover, litigation around the exclusion of felons from voting during the 2016 election cycle has brought to the fore concerns about the dynamics of inclusion and exclusion in the administration of the right to vote.

Yet the laws that gave rise to what is now a decade of litigation over voter qualifications and the right to participate stem from the view that these laws are necessary to protect the integrity of the electoral process. Although facially neutral voter identification laws are presumptively constitutional under the Court's test in *Crawford v. Marion County*,[1] these recent voting regulations have been questioned in numerous lawsuits around the country.[2] These lawsuits have raised

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1. Crawford v. Marion Co. Election Bd., 553 U.S. 181, 189–90 (2008).

2. Frank v. Walker, 819 F.3d 384, 388 (7th Cir. 2016) (holding that plaintiffs who could not obtain qualifying voter identification through reasonable effort were entitled to relief); *see generally* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (holding that Texas's voter identification law

concerns that these laws may disproportionately affect the poor, minorities, and thus arguably violate the Fourteenth[3] and Fifteenth[4] Amendments to the United States Constitution and the Voting Rights Act of 1965.[5]

Additionally, felon disenfranchisement laws have been put to the test in recent litigation[6] and policy debates.[7] The claim regarding felon disenfranchisement is that these laws needlessly exclude ex-felons from the franchise, and thus work a punishment beyond the term of imprisonment and supervision contemplated by the criminal justice system.[8] These laws have been contested not for their constitutionality (which was settled by the Supreme Court in *Richardson v. Ramirez*[9]) but for their scope.[10] During the 2016 election cycle, legislators debated the extent to which the collateral effects[11] of felony convictions may nonetheless be expunged by executive action.[12] And while some states have recently reaffirmed their felon disenfranchise-

violated § 2 of the Voting Rights Act through its discriminatory effects because it "imposed significant and disparate burdens on the right to vote", and the provisions failed to correspond to any meaningful interest); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248–249 (4th Cir. 2014) (finding that the district court should have considered North Carolina's previous history of discrimination and that N.C. GEN. STAT. § 163-82.6(c) and H.R. 589 (N.C. 2013) had a discriminatory impact on minority voters because same-day registration and out-of-precinct ballot counting are used more by minority voters); *see generally* Lee v. Va. State Bd. of Elections, 2015 U.S. Dist. LEXIS 118647 (E.D. Va. Sept. 4, 2015).

3. U.S. CONST. amend. XIV.

4. U.S. CONST. amend. XV.

5. 52 U.S.C. § 10101 (2012).

6. *Lee,* 2015 U.S. Dist. LEXIS 118647 at *3–*4.

7. *See* Atiba Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI. KENT L. REV. 463, 464 n. 10 (2015) [hereinafter Ellis, *Tiered Personhood*]; *see generally* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010). *See e.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

8. Pinard, *supra* note 7, at 469.

9. Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

10. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

11. The collateral effects of felony conviction include difficulty procuring housing, employment, and other basic necessities needed to function as a full member of society. *See* Ellis, *Tiered Personhood*, *supra* note 7; *see also* STEPHEN C. RICHARDS & RICHARD S. JONES, BEATING THE PERPETUAL INCARCERATION MACHINE: OVERCOMING STRUCTURAL IMPEDIMENTS TO RE-ENTRY, IN AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 201, 204 (Shadd Maruna & Russ Immagrigeon eds., 2004).

12. Howell v. McAuliffe, 788 S.E.2d 706, 710 (Va. 2016).

ment rules,[13] one state has abolished its felon disenfranchisement provision.[14]

Furthermore, three states have recently passed proof of citizenship laws,[15] which require citizens of those states to present proof of their citizenship through a birth certificate or some other documentation to vote in state elections.[16] These laws have been contested as creating a needless and discriminatory burden on access to the right to vote.[17] While proponents of these laws see the additional proof requirement as a means to preserve the integrity of the electoral process,[18] opponents of these laws consider them to create a two-tiered system of voting, thus effectively granting those who are able to present these credentials a heightened status as citizen than those who are not able to present these credentials.[19]

If one considers these regulations overly restrictive and needless, it is plausible that one would consider that the regulations create an actual harm of denying the vote to voters who would otherwise be entitled to vote. Such a perspective would also plausibly consider the regulations to create an expressive harm[20] of demeaning the nature of the franchise for the individual and for the collective.[21] However, there are those who consider such regulations as necessary to preserve

13. Iowa and Kentucky are the only two states that ban all persons with a felony conviction record from voting. Moreover, as recently as 2016, the Iowa Supreme Court upheld the felon disenfranchisement ban. *See* Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016) (holding that all felony crimes qualify as "infamous crimes" for purposes of the voter disqualification provisions of the Iowa Constitution). Virginia also makes a "permeant" ban, but it has recently instituted a policy of aggressively using the commutation power to mitigate the effect of the permeant disenfranchisement ban.

14. Florida banned all persons convicted of a felony until the recent passage of Amendment 4 to the Florida Constitution. This amendment, which came into force in 2019, automatically restores voting rights to non-violent felons upon the completion of all terms of their sentence. *See* FLA. CONST. art. VI, § 4.

15. Kansas, Alabama, and Georgia. These laws were recently blocked by a federal appellate court before the 2016 general election. Spenser S. Hsu, *U.S. Appeals Court Leaves Proof-of-Citizenship Voting Requirement to Federal Panel*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/local/public-safety/us-appeals-court-leaves-proof-of-citizenship-voting-requirement-to-federal-panel/2016/09/26/393be7c6-8407-11e6-ac72-a29979381495_story.html?utm_term=.c4451ba7b4d6.

16. *Id.*

17. Ellis, *Tiered Personhood*, *supra* note 7, at 480.

18. *Testimony of Kris Kobach Before the Kansas Senate Committee on Ethics and Elections on House Bill 2437*, (Mar. 15, 2012), https://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

19. Ellis, *Tiered Personhood*, *supra* note 7, at 487.

20. *Id*. at 479.

21. *Id.* at 480.

the integrity of the democratic process.[22] From this point of view, the ultimate priority should be thoroughly policing the boundaries of the right to vote to ensure that no illegitimate voters may participate.[23] This then preserves the collective's actual and expressive interest in voting rights.[24] These contrasting positions—the individual right of the voter verses the integrity of the election system—represent the poles of a longstanding debate among scholars, policymakers, and advocates in election law circles.[25]

This Article argues that these positions may also be framed as concerns about the dignity of citizens (and of institutions) within the political process.[26] Dignity as a philosophical and jurisprudential concept is an admittedly amorphous idea. Dignity may mean many things, yet its subjectivity is often the result of applying a broad idea—that there is intrinsic worth in the human and that such intrinsic human worth ought to be represented in the way that humans treat each other.[27] While this concept is applicable in a number of interpersonal contexts (particularly, the contexts which speak to human rights), this paper will seek to explore it specifically within the concept of the right to vote. That is, when it comes to the right to vote, there is–or should be–a conception of dignity that underlies the ways the process is animated and thus should inform our analyses of right to vote questions, including the aforementioned contemporary controversies.

Few scholars have systemically applied a jurisprudential conception of dignity to the right to vote. While a number of scholars have used dignity to describe the larger individual rights tradition regarding

22. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U.L. REV. 1023, 1051 (2009) [hereinafter, Ellis, *Cost of the Vote*].

23. *See generally* Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879 (2014) [hereinafter Ellis, *Meme of Voter Fraud*].

24. Ellis, *Cost of the Vote*, *supra* note 22, at 1051.

25. *Id.*; *see generally* Claire Foster Martin, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95 (2012).

26. As I will discuss below, one way of reading the history of the contest over the right to vote is as a dispute about the struggle to prioritize the dignity of individuals excluded from the political process by laws that have created cumulative burdens which either explicitly or by their impact excluded voters from the political process due to their identity. This "civil rights" approach continues to be the focus for advocates who seek to expand and maintain a more liberalized approach to the right to vote. On the other hand, the rhetoric of equal dignity has been used to force a deference to state authority concerning elections. *See generally* Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013). Yet, these discussions regarding the dignity of the political process are best thought of as dignity talk rather than a rigorous application of the jurisprudential conception of dignity.

27. Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 206 (2008) [hereinafter Rao, *Use and Abuse*].

right-to-vote jurisprudence,[28] and certainly the rhetoric of dignity is familiar in the context of civil rights advocacy,[29] Ellen Katz's work regarding dignity and the right to vote suggests strongly that principles of human dignity may be directly applicable to the right to vote.[30] In contrast, James Gardner has argued that dignity in its jurisprudential conception is ill-fit right-to-vote concerns.[31] Further, Joseph Fishkin in his work has rehearsed the arguments that concern dignity as a basis for considering right-to-vote issues.[32] This Article seeks to make an additional contribution to this law review literature which will lay out a path to recognizing a dignitary interest among citizens which may translate towards a more participation-oriented conception of the right to vote.

My own claims regarding this topic have longstanding roots in my research, which seeks to undertake theoretical explorations that will articulate a robust "political philosophy of inclusion" within the American political process.[33] Nonetheless, this paper also seeks to complement and enter into dialogue with this literature and to provide an account of dignity as the animating concern regarding the right to vote. Unlike the other law-of-democracy scholars who have recently discussed dignity in relation to right to vote concerns, the analysis in this article will begin with a survey of recent law review literature on the philosophical conception of dignity to connect these right to vote concerns with the philosophical concern about human flourishing and its relationship with inherent status, whether that status is in reference to the individual citizen or to the political commu-

28. *See generally* Pinard, *supra* note 7; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 189 (2011) [hereinafter Rao, *Three Concepts*].

29. To point to one exemplar, Representative John Lewis of Georgia, a well-known civil rights activist, frequently links voting rights with the dignity of African Americans. *See*, *e.g.*, John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, Human Rights Magazine, Vol 32, no. 2 (2005), https://www.jstor.org/stable/27880470. In this piece, he drew on the words of President Lyndon B. Johnson when, in a speech to Congress on March 15, 1965 to advocate for the Voting Rights Act, Johnson said that he spoke "for the dignity of man and the destiny of democracy." *Id.*

30. Ellen D. Katz, *What the Marriage Equality Cases Tell Us About Voter ID*, 2015 U. CHI. LEGAL F. 211, 238 (2015).

31. James Gardner, *The Dignity of Voters—A Dissent*, 63 MIAMI L. REV. 435, 441 (2010).

32. *See* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1333–34 (2011).

33. Ellis, *Tiered Personhood*, *supra* note 7, at 493 (recognizing that "[f]urther theoretical work will be necessary to articulate [a] political philosophy of inclusion" necessary to fully implement a value of inclusion within American democratic politics). It is my position that the first logical philosophical exponent for "the political philosophy of inclusion" is to focus on the common dignity that all persons possess as persons and as citizens. This paper is a specific step in that direction.

nity. By this, I mean that a concern for dignity is inherently and inextricably linked to status as a human and status as a human within a community. In particular, this paper seeks to locate citizenry as a status worth respecting within the American community, and moreover that the American political community's own inherent worth, that is, its dignity, is dependent on how it treats individual citizens through the ways it incentivizes or disincentives their participation in the political process. An articulation of concepts of dignity relevant to this query will be this paper's first goal.

The paper will then argue that these concerns have (and do continue) to animate analyses around the right to vote, and thus ought to form a significant reference point for right to vote analyses. Although the Supreme Court and state and federal legislatures have not considered the right to participate in the political community explicitly through the lens of dignity, the dignitary concerns nonetheless exist and are under-articulated and less than fully formed in modern right to vote jurisprudence. An express application of a particular set of dignitary concerns, concerns related to the individual right to vote and its interrelationship with core civil rights concerns about identity and the nature of citizenship, will bring focus to the way dignity plays out within the right to vote jurisprudence. The express application of dignitary concerns within the right to vote context may then offer a more grounded, individual–focused approach to considering the right.

These dignitary concerns do apparently (and from my point of view, quite consciously) root this analysis as one focused on an individual-centered, fundamental interest-conception of the right to vote. However, the thesis of this paper is not limited to the "rights" side of the now deeply familiar rights/structure debate in Election Law.[34] For those scholars like Gardner who are focused on the regulation of the right to vote from a collective or structural standpoint,[35] a focus on dignity as a substantive outcome towards which structural interventions ought to be directed will give a way to articulate the strengths

34. Admittedly, there is substantial literature regarding the nature of the right to vote and the propriety of conceptualizing the right to vote as precisely a right within this debate. Yet, there is also a structuralist concern which, according to some, appeared (within the context of the Roberts Court that handed down *Shelby County*) to have won this debate. Yet, the ultimate debate about rights verses structure may become ripe again in light of the continued reconsideration of the viability of statutes like the Voting Rights Act of 1965 and the constitutional approaches towards vindicating the right to vote. In that spirit, this article seeks to apply a view which may provide a more robust analysis of the underlying concerns in the debate despite whether one takes a rights-focus, a structural-focus, or a hybrid of the two.

35. Gardner, *supra* note 31, at 441.

(and shortcomings) of the collective focus. This is to say that a focus on a collective entitlement to election integrity is ultimately incomplete when there may be actual and expressive harms created that are tantamount to an effective "tyranny of the majority."[36]

Current events alluding to the enduring prevalence of voter suppression activities (and by contrast, activities of campaigns and institutional actors which more credibly amount to threats to election integrity) raise once again the need to discuss these first principles and their role as guideposts for the structure of American democratic practice. These campaigns, and even the doctrines articulated by the Supreme Court in this vein, are grounded in claims of "election integrity," but such claims are problematic when the laws made to accomplish this end are vulnerable to credible claims that they offend the dignity of individual citizens. By clearly articulating the interrelationship of dignity and election integrity, transaction theorists about the election system will be forced to sharpen their considerations on how the right to vote should be regulated, and rights theorists like myself will be forced to articulate content about the scope of the right beyond mere rhetoric.

This Article will address these concerns in the following manner. The Article will begin in Part I by examining dignity as both a philosophical and jurisprudential concept. Although the Article will note the ambiguities and limitations of the broad conception of dignity, it will nonetheless argue that dignity is a useful concept in connection with the voting rights concerns listed here when one focuses on dignity's interrelationship with the status of citizenship. This section will ultimately argue that the jurisprudential conception of dignity relevant to the law of democracy is one that enables and equalizes the status of each citizen.

Yet, it will also acknowledge that, as some scholars recognize, there is also a communal conception of dignity that focuses upon the status given to institutions, and thus Part II will then explore the his-

36. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 6–10 (1994) (explaining how tyrannical majorities have the ability to exclude minorities from the political process and thus lose their legitimacy). While Professor Guinier's broad ranging thesis looks towards innovative ways of addressing the continuing transformations regarding vote dilution and the ultimate dynamics of responsiveness of majorities to minorities, this analysis focuses on what Guinier called the first-generation concern of direct vote denial in terms of how majorities manipulate the basic rules of participation to modulate their electorates and thus create actual and expressive harms in relation to the political process.

tory of the law of vote denial to argue that a strong conception of dignity was absent from this area of law due to the deference given states. This conception emerged with the enablement of the constitutional amendments which limited discrimination through gender, class, and age, the enablement of the Fifteenth Amendment's prohibition against racial discrimination in voting through the Voting Rights Act of 1965, and the jurisprudence of the Warren Court during this era which sought to articulate a strong conception of political equality. This conception also, arguably, emerges within the context of maintaining election integrity and the advocacy for stricter voter qualifications legislation in the name of preventing fraud. It is these conceptions which are in conflict with each other in the so-called modern "voting wars." This Article will address this issue of election integrity in its current incarnation and its incompleteness from the perspective of the dignitary concern regarding the right to vote.

Moreover, this dignitary conception of the right to vote has suffered from decisions that have re-centered the right to vote on a rational basis that tends to defer to the states regarding their voting decisions. I have argued elsewhere that this is a shortcoming in the Court's jurisprudence.[37] In Part III, this Article seeks to extend that analysis through looking at contemporary right-to-vote controversies and considering how they have been and, where appropriate, could be further analyzed through an express dignitary analysis. Specifically, by examining the dignity concerns at the heart of modern-day second-generation vote denial, we can see how two core dignitary concerns—the instrumentality concern and the exclusion concern—manifest themselves in these modern debates about the right to vote. Part IV of this Article adds a significant other part to this account by considering how the dignity of institutions, made relevant by the Court's opinion in *Shelby County v. Holder,* informs the scope of the dignity analysis and arguably trend the Court away from considering the dignity of the voter.[38]

This account does not ignore the fact that extant law addresses dignitary concerns regarding the right to vote. Where when some separate identity concern is at stake, for example—and most notoriously—race, there is some (arguably limited) redress. But the deeper concern is that where there is no such identity concern (aside from

37. *See generally* Atiba Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 Sw. L. Rev. 549 (2014) [hereinafter Ellis, *Price Too High*].

38. *See generally Shelby Cty, Ala.*, 570 U.S. at 529.

identity as a citizen) the law is limited to an effective rational basis analysis of the right to vote concern. Part V of this Article will explore how a reassertion of dignitary concerns–regardless of what one's conception of the theoretical approach to accomplishing the judicial regulation of the political process may lead to stronger, more inclusive outcomes in developing and refining policy regarding the right to vote. But to reach these conclusions, we must first examine the applicability and limitations of the philosophical and jurisprudential conception of dignity. It is to this task this Article will now turn.

I. DIGNITY AS JURISPRUDENTIAL CONCEPT

Dignity is an inherently broad concept. This section will seek to utilize the work of recent scholars who have articulated the ways that dignity is useful as a concept that informs and transforms constitutional law. It will discuss briefly the general philosophical meanings of dignity with a focus on dignity of the individual. It will turn to the evolution of the jurisprudential meaning of dignity and argue that there are two conceptions of dignity relevant to our considerations. The first conception is respect for the intrinsic status as a citizen, and that status as citizen should not be cabined by a perception of possessing an identity or status that lies outside of the accepted norm of the political community. The second is respect for the dignity of institutions as a manifestation of the dignity possessed by the collective political community. As we shall see, these two forms of constitutional dignity inform each other and must necessarily be linked in considering fundamental rights generally and the right to vote in particular.

A. The Meaning and Critiques of Dignity

Dignity is an ancient,[39] amorphous concept. It is considered by some to be the bedrock of modern human rights.[40] Others[41] consider dignity a conflicted or even an empty concept.[42] Nonetheless, it is a

39. Rao, *Three Concepts*, *supra* note 28, at 189.

40. *Id.* at 186.

41. For example, Justice Scalia wrote that the use of "dignity" as a concept in *Casey* was empty and "simply decorate[d] a value judgment and conceal[ed] political choice." Planned Parenthood v. Casey, 505 U.S. 833, 916 (1992) (Scalia, J., concurring in the judgment and dissenting in part).

42. In this sense, some scholars believe that dignity does not have its own content. It is instead an adjective to intensify interests that other more specific rights seek to accomplish. Thus, when one talks about offending dignity, one is actually talking about offending some other norm, but we use dignity as a synonym for that other interest to bolster the claim. Dignity claims

concept that is gaining currency within the Supreme Court's jurisprudence, and, as one scholar has suggested, it has staying power.[43]

Given the breadth of the concept of dignity, this discussion of dignity must necessarily begin by defining the concept. Dignity has a variety of definitions depending on the scholar and the subject matter discussed regarding dignity. This amorphous concept has its roots in individual autonomy and the right to respect bestowed on every individual simply by being alive. Neomi Rao observes that in its most basic form, dignity recognizes the intrinsic worth of each human being.[44] In other words, dignity arises because each human being has intrinsic worth.[45] In this sense, then, dignity is intrinsic to all human beings.[46] The individual is worthwhile because of his or her status as an individual. In this sense, personhood must be respected.[47]

This expression of dignity takes its most important manifestation when considering human rights, and in particular the rights that ought to exist in a free society.[48] This expression emphasizes the notion that human dignity is intrinsic to all human beings.[49] At the heart of this conception is Immanuel Kant's idea that human dignity is the basis for human rights–the fact that an individual has autonomy makes her worthy of respect.[50]

Notions of dignity are intertwined with conceptions of identity. In the broadest sense, the concept of identity is the status intrinsic to existing as a human being who is distinct from other human beings, and this innate status is intrinsically valuable to that human.[51] Individual identity allows each human to be unique because of one's char-

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bolster some other pre-existing right that one has, independent of being a dignified human being innately right.

43. *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

44. Rao, *Three Concepts*, *supra* note 28, at 187.

45. *Id.* at 197.

46. *Id.* at 202.

47. *Id.* at 195.

48. *Id.* at 202.

49. *Id.* at 204.

50. *Id.* at 206 n.45 (citing IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 41 (James W. Ellington trans., 1981) (1959)). For a further exploration of Kant and his interrelationship with dignity, as well as deep insight into the meaning of dignity generally, see RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 191-218, at 255–75 (2011).

51. This approach would necessarily consider the characteristics that make one particular human unique from another, whether those characteristics be innate, socially constructed, or discovered through some organized human process. Yet, once they are active as attributes, they should nonetheless be honored and recognized. Of course, these concerns become heightened when power is organized around minorities within the political process and thus the majorities in the process use their majoritarian status to oppress such minorities. *See* GUINIER, *supra* note 36.

acteristics, but nonetheless it allows each human to be deserving of the qualities that comprise dignity simply because one is human.

Scholars who find dignity a useful concept generally root this concern in the issues raised by Immanuel Kant and his thinking about the categorical imperative.[52] The core of this idea is that human beings are ends, in and of themselves, and therefore should not be treated as means, with the implication that anything that treats a human being as a means would offend their intrinsic worth.[53] While Kant's view was mostly based on an individual's moral compass,[54] the modern idea of dignity is centered on an individual's right to self-determination and "requires active involvement by the state to create appropriate conditions for the realization of dignity."[55]

Since dignity as intrinsic human worth is the core of the broad dignitary principle, we must consider to what extent (if any) this broad concept should have boundaries, in order to make it applicable to modern jurisprudence. By doing so, we can also address whether and to what extent this analysis should be delimited by the need to find a specific meaning for dignity.

Leslie Meltzer Henry helpfully discusses how dignity in its core conception as concern for intrinsic human worth is often framed in two conceptual approaches. The first is reductionism, which contends "that dignity's features are so well aligned with some other concept that dignity is in fact reducible to that concept."[56] In contrast, essentialists inquire about what is unique about dignity "by searching for the root or basic meaning of dignity."[57] Henry then argues that both approaches are problematic because they both fail to explain the more nuanced and broader-reaching uses of dignity in a variety of contexts.[58] Reductionists and essentialists fail to grasp the more complicated notions of dignity that come into play when either equating dignity concerns with some other fundamental concern or when deploying a core meaning of dignity in a more complex situation.[59]

Such groups may be entitled protections in the process in order to affect their rights. *See* United States v. Carolene Products, 304 U.S. 144 n.4 (1938).

52. Rao, *Three Concepts*, *supra* note 28, at 200.
53. *Id.*
54. *Id.*
55. Rao, *Use and Abuse*, *supra* note 27, at 206.
56. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 181–82 (2011).
57. *Id*. at 182.
58. *Id.*
59. *Id.* at 183–84.

Henry then critiques the traditional philosophical approaches by claiming they draw the boundaries of dignity too narrowly or too broadly.[60]

Henry rejects the reductionialist and essentialist positions by suggesting a conceptualization of dignity based on Ludwig Wittgenstein's approach to language.[61] Wittgenstein views meanings in words in particular as "its use in the language," and not some "abstract link between the word and what it signifies."[62] In this sense, Henry advocates for a functional view of the meaning of dignity that rejects what she calls "semantic essentialism" to instead focus on the uses of the word (and the idea of) dignity in relation to its contexts.[63] Thus, dignity ought to be thought of as a concept with various intersecting meanings that manifests in various ways in practice.[64] She uses this idea to claim that "[d]ignity is not a fixed category, but rather a series of meanings that share a Wittgensteinian family resemblance."[65] When one examines the jurisprudence of the Court, as Henry did, the many faces of dignity are revealed.

Thus, while dignity is elusive because it may mean a number of things in different contexts, Henry's contextual approach may provide us a particular frame through which one may consciously confront and apply dignity principles to right-to-vote concerns. While the Court has not applied a notion of dignity based on a conception of the right to vote explicitly, a brief examination of exactly how the Court has used dignity may point to ways the concept may be applicable to right-to-vote controversies.

B. The Many-Faced Jurisprudential Conception of Dignity

Admittedly, dignity as a jurisprudential concept is under-defined in the United States. The Constitution does not use the word dignity. Yet, the United States Supreme Court has invoked dignity as a lofty concept to amplify and persuade when it seeks to radically change law in relation to the relationships individuals have with the state.[66] The

60. *Id*. at 184–85.

61. Wittgenstein rejected strict definitions of words because these definitions distorted their meaning. *Id.* at 186. "To determine a word's meaning and function, Wittgenstein famously wrote, 'Don't think, but look!'" *Id.* at 186–87.

62. Henry, *The Jurisprudence of Dignity*, *supra* note 56, at 186.

63. *Id.* at 187.

64. *Id.* at 188.

65. *Id*.

66. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992); Roe v. Wade, 410 U.S. 113 (1973); Trop v. Dulles, 356 U.S. 86,

Court makes dignity claims to support particular substantive claims regarding either why a particular violation of the law is extremely offensive, or why constitutional law ought to be extended in a particular way, especially when that extension confers added rights.[67]

The Supreme Court has not provided a definition of dignity per se, but has used dignity to extend constitutional freedoms, including rights granted by the Fourth, Fifth, and Eighth Amendments.[68] Dignity has also been considered by the Court to be part of the liberty interests protected by the Due Process Clause.[69] As Rao wrote, "Dignity is associated with different, and sometimes irreconcilable, principles such as autonomy, equality, and respect."[70] Dignity can also be seen as an endowment of honor or validation.[71]

The autonomy interest emerges in Court decisions concerning bodily autonomy. For example, as Reva Siegel has explained concerning the abortion cases,

> Justice Kennedy speaks passionately of the dignity of autonomous decision-making, insisting that the Constitution guarantees an individual freedom to choose her own life course and not to live as the instrument of another's will. Justice Kennedy is eloquent also in describing the protections against subordination that human dignity requires, declaring the Constitution guarantees persons freedom from the denigration and humiliation of treatment as second-class citizens.[72]

Similarly, the equality interest that derives from dignitary concerns is well-established in the Court's jurisprudence.[73] Each human, as a human, is due respect and equal treatment by other persons, and the state must accord similar respect to each human. Indeed, it could be easily said that the long trajectory of Reconstruction and, in particular, the course of the Fourteenth and Fifteenth Amendments have

100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (invoking "dignity of the individual" in dissent against Japanese internment program). *See also* Rao, *Use and Abuse*, *supra* note 27, at 202.

67. *See* Rao, *Use and Abuse*, *supra* note 27, at 202.

68. *Id.*

69. *Id.* at 202–03.

70. *Id.* at 203.

71. *See, e.g.*, OXFORD ENGLISH DICTIONARY 679 (5th ed. 2003) (defining "dignity" as "1. The quality of being worthy or honorable; true worth, excellence; 2. Honorable or high estate, degree of estimation, rank, . . . ; 5. Elevated manner, fit stateliness.").

72. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1704 (2008).

73. *See* Rao, *Three Concepts*, *supra* note 52 and accompanying text.

been a resort to establishing norms of equality to demonstrate the equal dignity of disenfranchised minorities within the political process.[74]

Professor Christopher Bracey has, for example, illustrated how the trajectory concerning racial equality has been one which has been an effort to grant African Americans equal dignity within American life.[75] This, of course, implicates the anti-subordination principles that the Court has pursued in its equal protection jurisprudence.[76] Of course, this jurisprudence has been criticized for failing to render full substantive equality.[77] Thus, in one respect, cases like *Brown v. Board of Education*[78] vindicate an antidiscrimination model intended to establish an equality norm (and implicitly vindicate the dignity of African Americans). The aims of *Brown* have been rightly critiqued as being socially contingent (which would implicitly question the sincerity of the dignity interest) and unnecessarily limited.[79] Nonetheless, the overarching project housed within the realm of equal protection doctrine can be fairly considered as one directed towards asserting a dignitary concern within constitutional law.

Probably the most prominent example of the dignity rationale being evoked within constitutional law is the quest for gay rights.[80] Over the past generation, the effort to remedy the inequalities of status of homosexuals has taken a premiere place within constitutional jurisprudence. This has proven true most recently in regards to homosexuals and marriage. Nearly a generation ago, in *Bowers v. Hardwick*,[81] the Court upheld a Georgia law that criminalized sodomy.[82] This represented a resistance to expand the rights guaranteed under the Due Process Clause in an unwarranted fashion. The resistance eschewed a conception of dignity relevant to homosexual conduct.

74. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).

75. Christopher A. Bracey, *Race Jurisprudence in the Supreme Court: Where Do We Go From Here?: Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005).

76. *Id.* at 671, n. 6.

77. *Id.* at 671–72.

78. 347 U.S. 483 (1954).

79. Bracey, *supra* note 75, at 712.

80. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Bowers v. Hardwick, 478 U.S. 186 (1986).

81. 478 U.S. 186 (1986).

82. *Id.* at 196.

The Court reversed course nearly a generation later. In *Lawrence v. Texas,*[83] the Court struck down a Texas sodomy law, with the effect of striking down similar laws across the United States.[84] Here, Justice Anthony Kennedy relied on the notion that individuals retained "the dignity of free persons" in engaging in private consensual conduct in their homes.[85] Just a decade later, in *United States v. Windsor*,[86] the Supreme Court struck down section 3 of the Defense of Marriage Act, which defined marriage for purposes of federal law as being only between one man and one woman.[87] As part of its analysis, the Court discussed at length the respect society attributes to marriage.[88] Because of this, the Court observed that marriage confers "a dignity and status of immense import."[89] The Court then determined that the antigay animus possessed by the government demonstrated how the government sought to single out homosexuals as a group for adverse treatment that makes them unequal to other citizens in society.[90] This treatment "demeans" gay and bisexual couples.[91] Based on this analysis and its underlying dignity rationale, the Court struck down the law.[92]

The Court extended this equal dignity rationale in *Obergefell v. Hodges*.[93] There, several committed same-sex couples sought access to state sanctioned marriage.[94] The Court determined that under the Due Process and Equal Protection Clauses, same-sex couples were entitled to access to the fundamental right to marry, and that state laws that did not guarantee such rights were unconstitutional.[95] The Court relied on the idea that the fundamental liberties protected by the Due Process Clause include those liberties that "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[96] Similarly, under the Equal Protection Clause, the classifications that excluded homo-

83. 539 U.S. 558 (2003).
84. *Id.* at 578–79.
85. *Id.* at 567.
86. 133 S. Ct. 2675 (2013).
87. *Id.* at 2683, 2696.
88. *Id.* at 2691–92.
89. *Id.* at 2692.
90. *Id.* at 2693.
91. *Id.* at 2694.
92. 133 S. Ct. at 2695–96.
93. 135 S. Ct. 2584 (2015).
94. *Id.* at 2594–95.
95. *Id.* at 2599.
96. *Id.* at 2597.

sexuals from marriage denied them their "equal dignity."[97] On this basis, the Court deemed homosexuals possessed the right to exercise marriage in the same way that opposite-sex couples could.[98] Moreover, the Court criticized the exclusion as one that teaches same-sex couples that they are unequal in the eyes of the law. To exclude them on the basis of sincerely held beliefs given the force of law would "disparage their choices and diminish their personhood."[99]

Ellen Katz has observed that the cases leading up to *Obergefell* demonstrate, for purposes of dignity jurisprudence analysis, how dignity is offended by overly burdening the exercise of a fundamental right.[100] It may be overburdened by expressly excluding a person or a group of persons from the right, but at the same time including a separate group of persons without an adequate basis in deference to the nature of the right.[101] By Katz's reasoning, one may be overburdened in regards to a right through the accumulation of so many burdens incident to the exercise of the right that one is effectively excluded from the exercise of the right despite it being nominally available to that person. In either case, a person who suffers such overburdening is effectively relegated to a second-class status in relation to the exercise of the right.[102] This, in itself, offends one's dignity in this jurisprudential sense.[103]

As this Article will show in the next sections, this argument may, as Professor Katz suggests, be applicable to the problem of voter identification laws (as well as proof of citizenship laws and felon disenfranchisement laws). While her insights about how the dignity rationale are applicable, and I would agree with them as far as they go, I will suggest later in this discussion that a particular focus on the dignity of the citizen as the primary concern regarding the right to vote would be necessary to accomplish this dignitary vision regarding the franchise. I will also argue that these concerns overlap with concerns regarding the identity of the individual both as citizen and as human. Where this latter concern is developed yet artificially limited in significant respects, the former is not developed at all.

97. *Id.* at 2603.
98. *Id.* at 2602.
99. 135 S. Ct. at 2602.
100. Katz, *supra* note 30, at 235–36.
101. *Id*. at 215.
102. *Id.*
103. *Id.*

Moreover, dignity jurisprudence is not limited to just individuals. The Court has extended the concern for dignity to communities and institutions. Dignity brings communities together and individual voters can shape the future of the places they call home.[104] "Through an analysis of the 'case law of dignity,' we have found many examples of the utility of institutional dignity, enabling a fledgling organization – be it a court or a nation – to function."[105]

This is especially true of the political process and the rules surrounding it. However, it is in this specific sense where dignity as a concept has rarely been stated expressly, and even when made express, it may arguably be a descriptor for the equality interest or represent either the individual dignity as respect or communal dignity concern. Moreover, it is here where dignity, as a framework for thinking, has not been applied, which I believe is the corrective to be offered by this dignity discourse.

C. Dignity, Identity, and Instrumentality

From this very brief exploration of the core meaning of dignity, we may derive several key principles about the philosophy and jurisprudence of dignity. First, despite the debate regarding conceptions of dignity, at its core is the idea that dignity is about the intrinsic value of the individual. Second, this concern is rooted in autonomy and liberty in as much as humans ought to be treated as ends and not as a means to an end. Thus, full agency and liberty to participate in the things to which humans ought to be deemed to be allowed to have access. Arbitrary exclusion from the communities and statuses that, by right, ought to be allowed to humans offends dignity in this autonomy sense. Similarly, dignity in the sense of equality as between human beings would reach similar conclusions. In this sense, if one, due to their identity, is excluded, the message from the person or the entity that this exclusion is sanctioned would offend our moral sense.

While these conceptions of dignity focus on the individual, and the concept of dignity in and of itself would focus primarily on the individual, there also is a sense of communal (or institutional) dignity.[106] In this sense, institutions that represent the communal ought to be accorded dignity and actions which disable the ability for an

104. Siegel, *supra* note 72, at 1702.

105. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927 (2003).

106. *Id.*

entity to function, especially when that entity represents the collective will, would represent an offense to collective dignity.[107]

And finally, these conceptions of dignity may be explicitly stated in the jurisprudence of the Court or implied as they are implicated regarding fundamental interests. The next section of this Article argues that within the sphere of the law of politics, these concerns for dignity have been addressed in a number of senses, including: (1) individual identity and the respect it is due, (2) dignity regarding individual agency and the prevention of arbitrary exclusion, (3) instrumentality and the prohibition against use of individuals to ends to which the individuals do not consent, and (4) the collective dignity represented by the hierarchy and status accorded the state have been implicitly addressed within the context of the law of democracy. To this, the Article now turns.

II. A DIGNITARY ACCOUNT OF THE RIGHT TO VOTE

One of the central claims of this Article is that dignity as a concept and animating force (if not by explicit jurisprudential principle) has informed considerations regarding the right to vote in the United States. Thus, any consideration of the bringing philosophical and constitutional considerations of dignity to the law of the political process must look back at the efforts to do so in the past. This is ultimately due to the fact that the right to vote has undergone an evolution over the existence of the United States.

This section will begin with a survey of the law review literature on this issue and will argue for the continued salience of dignitary considerations at the heart of right to vote questions. Then it will go further to provide an account of the jurisprudence of the right to vote to illustrate how these considerations animate election law jurisprudence.

A. Dignity and the Right to Vote Literature

Certainly, the literature in this area is, as I suggested in the Introduction, sparse. But it is worth reviewing notable recent considerations about this issue. For example, Joseph Fiskin helpfully summarizes the extant arguments around the use of dignity within the context of the right to vote. In *Equal Citizenship and the Individual*

107. *Id.*

Right to Vote, Fishkin describes the contours of the arguments surrounding the applicability of dignity concepts to voting rights.[108] In support of dignity-centered discussions, Fishkin cites Judith Shklar's observation that "[t]he ballot has always been a certificate of full membership of society, and its value depends primary on its capacity to confer a minimum of social dignity."[109] Shklar argues that the struggle for citizenship is marked not only by the desire to be included in the political process but also the "civic dignity" that arises from being "count[ed] as a full, equal citizen."[110] In the words of Rev. Dr. Martin Luther King Jr., "[t]he denial of vote not only deprives the Negro of his constitutional rights – but what is even worse – it degrades him as a human being."[111]

Fishkin also explores the alternative argument: that the discussion should be centered around "equality rather than dignity."[112] This claim is supported by political theorists such as Iris Young and Kenneth Karst, who suggest that the right to vote is at least a "necessary foundation"[113] and perhaps even "is at the heart of the idea of equal citizenship"[114] and should be viewed in such terms rather than through the lens of dignity.[115] This distinction does not, however, exclude the framing of dignity and equality separately, however, in light of Henry's observation of the intersectional understandings that one ought to afford dignity. Both the Young and Karst conception of equality and the Shklar conception of dignity as full membership seem to point to the same underlying concern, that equal citizenship requires a recognized status akin to dignitary privileging.

Such status is necessary given the origins of our deeply-embedded conceptions of the equality basis for the right to vote. As I have argued elsewhere, the right has evolved from being driven by ideology based upon an ideology of exclusion to that of an (oftentimes frus-

108. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote,* 86 Ind. L. Rev. 1290, 1334–36 (2011).

109. *Id.* at 1334 (quoting JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2 (1991)).

110. *Id.*

111. Martin Luther King, Jr., Speech Before the Youth March for Integrated Schools (Apr. 18, 1959), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 21, 22 (James Melvin Washington ed., 1986).

112. Fishkin, *supra* note 108, at 1335.

113. *Id.* (quoting IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 6 (2000)).

114. *Id.* (quoting Kenneth L. Karst, *The Supreme Court 1976 Term: Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 28 (1977)).

115. *Id.*

trated twentieth-century) ideology of inclusion.[116] These ideologies implicate the personhood of the citizens included or excluded from the electorate, and thus implicate the conceptions of dignity discussed in the prior section. This section will show how those same eighteenth century notions of dignity-as-status and twentieth and twenty-first century notions of dignity-as-equality have been at tension in our voting rights jurisprudence.

Of course, Gardner vociferously dissents from this view. His argument centers around the concept that dignity as a first-order notion is ill-fit to do the work of which we are asking it in the right to vote context. Gardner critiques the Court's then right-to-vote cases as inappropriately on the side of rights advocacy in the rights-structure divide, and he rejects the notion of first-order dignity in its application to these disputes. He would argue that if dignity is to be applied at all, it is to apply as a second-order principle that does not reach the expansive scope that is suggested here.[117] However, even this critique has been critiqued by scholars on the so-called individual rights divide concerning the right to vote like Richard Hasen.[118] Hasen sees validity in the application of rights, argues that Gardner mis frames what the Court is doing, and argues that there is nonetheless a place for the Court to uphold the core of political equality in its jurisprudence.[119]

These concerns ultimately center around the construct which ultimately ought to be applied here. As I suggested earlier, Katz's recognition that the dignity interests elevated by *Obergefell* arguably give new viability to the use of dignity considerations within constitutional jurisprudence. Of course, this argument does present the critique that

116. I discuss this thesis in Ellis, *The Meme of Voter Fraud, supra* note 23, at 893. There, I argue that the unsupported belief in the threat of massive clear and present voter fraud, and specifically, voter impersonation voter fraud, ought to be treated as a meme rather than a factual claim. As a meme, the belief in rampant, unchecked voter fraud in areas of the political process where fraud doesn't exist has served to distort election law policy through transforming the act of voting from the exercise of a right subject to penalty for abuse to one where one must prove their lack of criminality prior to exercising the right. *Id.* at 911 ("[T]he meme [of voter fraud] has shifted the presumption for enfranchisement against the ability of a citizen to vote."). This occurs when policymakers dictate policy based on these types of exclusionary beliefs rather than based upon data. The recent effects have been to heighten voter identification requirements, curtail liberalized voter access laws, and otherwise delimit laws designed to foster inclusion in the voting process. This belief has existed throughout American history in various forms, and thus I draw on my insights regarding the history and ideology of exclusion from the franchise in this section, as they directly implicate the personal dignity interests raised in this Article.

117. Gardner, *supra* note 31, at 446.

118. Richard L. Hasen, *You Don't Have to be a Structuralist to Hate the Supreme Court's Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465, 465-66 (2010).

119. *Id.* at 473.

this reasoning was based on Justice Anthony Kennedy's thinking and jurisprudence, which is now arguably not persuasive to the present court without a Justice Kennedy. But I do believe that these core notions of dignity-as-equality, whether framed as Hasen's core political equality or Katz's affrontive offense that may arise when a fundamental right like voting is unduly burdened still remain at the heart of the extant jurisprudence around the right to vote. Moreover, from a moral perspective, it would be illogical to deem a moral principle useless even though the Court or others may not apply it in the present time. In this sense it is nonetheless important to focus our conversations about dignity, and specifically, the dignity of the voter as voter exercising their rights as the *sine qua non* of citizenship.[120]

Moreover, within the voting rights debates, these notions of dignity have been at tension with the dignity of institutions. As others and I have argued elsewhere, another major theme concerning the right to vote has been the delegation of the right to the states and to the extent the state and federal governments ought to share power regarding the right to vote.[121] This federalism tension can be seen through the lens of dignity as well, and the Court in *Shelby County v. Holder*[122] made that implication explicit in holding unconstitutional that the formula that determines which states ought to be subject to preclearance under the Voting Rights Act is unconstitutional.[123] In this sense, *Shelby County* constitutionalized a dignity interests—in the states in relation to the federal government—that merits expanded discretion to the states.[124] This may be seen as a restoration of proper constitutional order or as the opening in a new era of conflict concerning the dignity of citizens verses the dignity of institutions—which is ironic given the fact that the right to vote requires the cooperation of government and the voter to be made effective.

120. In this sense, I would argue that such a dignitary approach is appropriate and also elides with Gardner's notion of second-order dignitary considerations regarding the right to vote. By this I mean that such dignitary concerns are not intrinsic to personhood in and of itself; they are instead intrinsic to citizenry and in particular the status of citizen enshrined in the Reconstruction Amendments to the Constitution. The Reconstruction-to-present jurisprudence on this point seems a strong indicator of this concept, and, as will be shown in the next subsection, ought to be the guiding star to these claims. It is *not* human dignity in this sense, but it is citizenry dignity. It is to this that the Article will turn to shortly.

121. *See, e.g.*, Ellis, *Price Too High*, *supra* note 37, at 565 (arguing to demonstrate "the doctrinal shift towards a state-centered utilitarian framework" that is structuring voting rights concerns).

122. *Shelby County*, 133 S. Ct. at 2612.

123. *Id.* at 2631.

124. *Id.*

Such a conversation requires an expanded lens concerning the meaning of dignity and equality in the law of democracy context. In an effort to expand this lens, this Article turns next to a retrospective account that articulates these concerns. In the next section, it will then examine how these concerns remain unanswered in current right-to-vote disputes. Then it will anticipate ways by which a more robust conception and application of the dignity concept may transform (and ultimately expand) our limited conception of the right to vote.

B. Dignity as Status and Ownership of the Political Process

At the time of the original U.S. Constitution, American society sanctioned the exclusion of many from full citizenship, and thus from participation in the political process, based upon their identities.[125] This legacy of excluding only those who have dignified status is as old as western civilization.[126] This legacy extended to the English tradition of allowing the landed gentry control of political power, which focused the right to participate in the political process on the Nobles, landed gentry, and real property owners.[127]

This tradition informed the crafting of the right to vote (and the power of states to exclude certain citizens from the vote) in the antebellum United States. Through the Elections Clause,[128] federal constitutional structure delegated to the states the power to determine who would vote for members of the House of Representatives to the citizenry.[129] Later, when early nineteenth century state legislators determined who had the right to vote, they did not consider citizenship a factor.[130] Instead, they focused on male property owners because the group that had the status of highest dignity in society.[131] Indeed, as historian Alexander Keyssar recounts, the expansion of the right to

125. KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA 21-22 (2d ed. 2013).

126. Indeed, the first democracy of ancient Greece recognized that only a certain group of persons, called "citizens," were worthy of participation in governing the polis. Strict standards determined entry into the group and denied entry to those who did not conform to specific qualifications. *See* PETTUS, *supra* note 125, at 21.

127. *See* Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG FOUND., (2007), http://www.history.org/Foundation/journal/spring07/elections.cfm (claiming that "[c]olonial [v]oting restrictions reflected eighteenth-century English notions about gender, race, prudence, and financial success, as well as vested interest.").

128. U.S. CONST. art. I § 4.

129. *Id.* at cl. 1.

130. Ellis, *Meme of Voter Fraud*, *supra* note 23, at 895.

131. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 5 (2009) (calling the restriction of suffrage to "adult men who owned property" the "linchpin" of early societies).

vote beyond male property holders to all white males was premised on the evolution of democracy to included citizens worthy of the franchise; however, the unworthiness of African Americans was also reaffirmed in the course of this evolution given the consensus around excluding Blacks from the political community as a precondition for (and defining of) universal white male suffrage.[132]

This eighteenth century notion of dignity in the political process was tied to those traits that prevailed in the social order. This social order dictated that propertied white men were the presumptive owners of society.[133] Their stake was sufficient and their ability to marshal skill, knowledge, and property was such that those propertied white men were deemed dignified enough through their status to own society and make decisions for all within society.[134] Women, minorities, and indigenous persons were implicitly, if not explicitly, excluded from the polis.[135] As a result, legislators created rules that favored white, male, propertied individuals in the electoral process.[136]

C. Dignity, the Invention of, and the Subversion of, Citizenship

Citizenship only became the paramount standard for voting in the Reconstruction period because it was only then when the idea of "citizenship" was placed in the Constitution.[137] The political consensus that drove the Reconstruction process centered around including men, regardless of race or status as a former slave, into the political process.[138] This recognizes that racial and property barriers were not uni-

132. *Id.*
133. *Id.*
134. *Id.*
135. *See* C. VANN WOODWARD, A HISTORY OF THE SOUTH: ORIGINS OF THE NEW SOUTH 1877-1913 331–32 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951) (claiming that wealthy white individuals were desirous to exclude both black voters and poor white voters).
136. *Id.* Property requirements created an economic barrier to voting privileges. Ideally, the voter was required to own real property in the relevant voting district. The underlying rationale for the barrier was that property ownership sufficiently indicated that the owner possessed the characteristics society wished to see in its voters. *See id.* at 331. Indeed, the belief was that those without property "constitute[d] a menace to the maintenance of a well-ordered community." *See id.* (quoting John B. Knox, the then-president of the Alabama constitutional convention as claiming that suffrage restrictions were intended to "place the power of government in the hands of the intelligent and virtuous."). By this reasoning, owning property proved a person's appropriate relationship to the established social and political order. *See* KEYSSAR, *supra* note 131, at 9. Accordingly, these provisions excluded persons included poor whites, women, and minorities because these groups could not afford property or were excluded from property ownership.
137. *See* U.S. CONST. amend. XIII – XV.
138. Ellis, *Cost of the Vote*, *supra* note 22, at 1039–40. *See also* Steven Mintz, *Winning the Vote: A History of Voting Rights*, GILDER LEHRMAN INST. OF AM. HIST., http://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights (last

versal across the antebellum United States.[139] Nonetheless, the Thirteenth and Fourteenth Amendments sought to extend citizenship to all men who were formerly excluded from citizenship.[140] Where these two amendments implied that all rights of citizenship, including voting, would be granted to all male citizens, Section 2 of the Fourteenth Amendment explicitly created a mechanism for protecting the right to vote by imposing on the states a penalty of loss of representation in Congress for any state that diminished the voting rights of its citizens on any grounds other than "rebellion or other crime."[141] The Fifteenth Amendment then went to explicitly prohibit discrimination regarding the right to vote on the basis of race.[142] Simply put, the majority in power following the Civil War deemed race-based exclusions from the electorate unconstitutional and unacceptable.[143] This implicitly constitutionalized a version of the dignity of all citizens regarding the franchise, and explicitly elevated a dignity interest in identity in relation to voting.

Thus, for the first time in the constitutional history of the United States, what we could call dignity-as-identity was given textual recognition.[144] That vision of the dignity of citizens who were able to vote was based on eliminating differences of racial identity.[145] Yet, this vision of inclusion based on the dignity of each citizen was stymied by the ongoing prevalence of the ideology of white supremacy.[146] This

visited Sept. 4, 2016) (noting that by 1790, six states "permitted free African Americans to vote.").

139. *Id.*

140. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1.

141. U.S. CONST. amend. XIV, § 2; Franita Tolson, *What is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 475 (2015).

142. U.S. CONST. amend. XV, § 1.

143. *See* Ellis, *Cost of the Vote*, *supra* note 22, at 1040 (explaining that "voters were guaranteed not to be discriminated against on the basis of race when it came to voting.").

144. *Id.*

145. *Id.*

146. As I have said elsewhere, "white supremacy," is "the system of racial subordination instituted to perpetuate the domination of African Americans and people of color generally." Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. OF GENDER, RACE & JUST. 315, 385 n.27 (1999). Scott's definition also borrows from Frances Lee Ansley's definition of white supremacy as "a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings." Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1077 n.129 (1989). It almost goes without saying that the legacy of race could be considered as one of the foundational legacies regarding the right to vote. Seen through a lens of considering the core value of dignity within the political process, the long legacy of dignitary concerns in and of itself centers around identity.

was the dominant social force within American society.[147] And it sought to restore the antebellum-era political hierarchy.

To accomplish this end of creating a political social order that reflected ideological social order of white supremacy and degraded the identity dignity and status dignity of African Americans, the ex-Confederate states formulated barriers of exclusion that targeted minorities without *explicitly* using racial considerations.[148] Through this process, the southern states sought to subvert the meaning of the Fifteenth Amendment (and they were successful in doing so until the mid-twentieth century). These states instituted requirements, such as poll taxes,[149] literacy tests,[150] and grandfather clauses[151] to target minority voters.[152] The Supreme Court upheld such regulations where they did not explicitly state a racial intent, but nonetheless disproportionately affected Black voters.[153] However, where a racial intention could be inferred from the purpose of the law, the Court of this era struck down the law.[154] This suggested the import of constitutional dignity interest in protecting racial identity from discrimination created by the Fifteenth Amendment.

But it also suggested that such interests could be subverted behind a veil of neutrality—through creating general rules, but then leaving the discretion to state and sub-state actors to implement the discrimination through the exercise of discretion. For example, state and local laws afforded substantial discretion to local registrars of

147. *See* KEYSSAR, *supra* note 131, at 110–13 (describing the successful tactics of white Americans to exclude minorities from enfranchisement). Some argue that white Americans remain in control of the political process. *See, e.g.*, Lani Guinier, *Keeping the Faith: Black Voters in a Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 394 (1984) (explaining that even if "[b]lacks may vote . . . it is whites who will govern.").

148. KEYSSAR, *supra* note 131, at 111–12. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 228–96 (2008) (discussing Southern sentiment at the time).

149. A poll tax was a fee that must be paid before a person could vote. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

150. Literacy tests were given at polls and "made the ability to read and write a registration qualification. . . . [t]hese laws were based on the fact that as of 1890 in [Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia] more than two-thirds of adult [African Americans] were illiterate." South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966).

151. Grandfather clauses enfranchised voters who were otherwise entitled to vote on a specific date and those voters' descendants. These clauses were meant to re-enfranchise white voters who may have been excluded from voting because of a failed literacy test. *See* Myers v. Anderson, 238 U.S. 368, 377–78 (1915); Guinn v. United States, 238 U.S. 347, 357–58 (1915).

152. KEYSSAR, *supra* note 131, at 111–12.

153. Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53–54 (1959); Giles v. Harris, 189 U.S. 475, 486–88 (1903).

154. *Harper*, 383 U.S. at 666.

elections to ensure that the negative impact of these rules applied specifically to minorities.[155] These same registrars (and the powerful political interests that supported the governmental structure) guaranteed that while Black voters were shut out of the franchise, poor white voters would be admitted (to the extent that their interests converged with the power establishment).[156] These policies diminished the African American voting electorate from approximately sixty to eighty-five percent of eligible black voters to single-digit percentages.[157] The black electorate remained at these staggeringly low levels until the mid-twentieth century.[158]

D. State Control of the Right to Vote and the Formalism of Exclusion

This veil of neutrality defined the right to vote for the twentieth century through laws neutral on their face but designed to frustrate egalitarian dignity. As we saw above with the example of race and voting in the nineteenth century, such laws were effective methods of suppressing otherwise eligible African American voters.

It is worth noting, however, that this formalism in voting—in both the formal application of laws designed to have a disparate impact and the formal commission of States as the arbiter of the right to vote across the federalism line—defined this period in the history of voting rights. This subsection will explore this dynamic separately as it proves a different permutation regarding dignity and the right to vote. Historically, when the states exercised their formal power to regulate the right to vote without any federal constitutional constraint, many of those same states sought to enforce identity hierarchies as a means of defining who was worthy to participate in the political establishment.[159]

This fact is most clear when examining gender and the right to vote. Women were explicitly excluded from the franchise by many states in ways that explicitly implicated their identity as women until

155. WOODWARD, *supra* note 135, at 332–33.

156. As Keyssar explained, *supra* note 131, at 110–14, the white power establishment (which was almost always the Democratic Party) ensured that other white voters, particularly poor whites vulnerable to exclusion because of these registration requirements would either: (1) be exempt from these requirements; (2) have enough political backing to meet the requirements; or (3) simply have the requirements waived outright.

157. *Id.* at 115.

158. *See id.* (noting that "the African American population remained largely disfranchised until the 1960s . . .").

159. *See id.* at 114.

constitutional change put an end to the practice.[160] Property requirements often excluded women from voting because they could not by law own land, and even when those requirements were not at issue, many state laws completely barred women from voting.[161]

The Supreme Court upheld these gender-based restrictions in *Minor v. Happerset*[162] as legitimate state regulations of voting rights.[163] Virginia L. Minor, a member of the Woman Suffrage Association of Missouri and a follower of Susan B. Anthony, sought to bring suit to gain her right to vote and to overturn Missouri's disenfranchisement law.[164] The Missouri law limited suffrage to men, and women were allowed to vote if their husband authorized their registration.[165] Mrs. Minor argued that because she possessed citizenship as a person under the Constitution, that status allowed her the right to vote since it was one of the "privileges and immunities of her citizenship."[166]

The Supreme Court rejected her claim on the theory that while women are citizens, and thus persons under the Fourteenth Amendment, the scope of those privileges entitled to citizens is defined under state law rather than federal law.[167] Thus, rather than seeing the Fourteenth Amendment as a separate guarantee of rights, those rights (including the right to vote) were located in state law.[168] Thus, as the right to vote had not been extended by the Fourteenth or the Fifteenth Amendments, the federal constitution left it up to the state to determine whether women could vote.[169] The Court held accordingly that the Missouri law excluding women like Mrs. Minor was properly within Missouri's power to pass.[170]

As a consequence, states were allowed to define the scope of the "privileges and immunities" that accompanied citizenship. This reasoning required the federal and the state governments to recognize persons within the meaning of the Fourteenth Amendment, but the reasoning then left it to the states to determine which persons were

160. *Id.* at 172–73.
161. *See id.* at 174–76.
162. Minor v. Happerset, 88 U.S. 162 (1874).
163. *See id.* at 172–73.
164. HISTORY OF WOMAN SUFFRAGE: VOLUME 3, 1876-1885 594 (Elizabeth Cady Stanton et al. eds., 1886).
165. *Id.*
166. *Minor*, 88 U.S. at 165.
167. *Id.*
168. *Id.*
169. *Id.* at 175.
170. *Id.* at 178.

accorded the full scope of those privileges and those persons who were accorded a lesser status.[171] This is the legalized mechanism of dignity-as-status applied to legal personhood.[172]

Yet, the ideological impact of these rules–which, as part of the assertion of the ideology of patriarchy, openly defined the dignity of one group of citizens over another–was not lost on American society.[173] From the decision in *Minor* in 1874 to the early twentieth century, American societal consensus shifted to including those groups excluded from the electorate.[174] The law deemed offensive many–though not all–laws that disenfranchised political minorities.[175]

This political change was embodied by the passage of the Nineteenth Amendment which banned discrimination in voting on the basis of sex, thus giving women the right to vote and overruling *Minor*.[176] This change was the result of decades of lobbying and protest by women's groups.[177] These groups not only demanded that women have the right to vote, but also argued that women were intrinsically entitled to participate in the political process.[178] Women had to fight the prevailing belief that females were incapable of wielding the vote.[179] Arguments against granting suffrage included a lack of economic autonomy, a legal subservience to men, and a virtual representation through husbands and fathers.[180] Put another way, the campaign to grant the right to vote to women embodied the struggle to recognize for women the political dignity granted men.

This dignitary concern manifested as well in regards to the relationship between wealth and the ability to vote. As noted above, property requirements defined the first boundary between citizens entitled the vote and citizens not entitled the vote.[181] That line transformed due to democratic and economic pressures in the mid- to late-

171. Ellis, *Tiered Personhood*, *supra* note 7, at 463.

172. I explained my views regarding the "dynamic of mediating the tiers of legal personhood" as an animating force in the Court's voting rights jurisprudence in Ellis, *Tiered Personhood*, *supra* note 7, at 464. This jurisprudence of deference to state authority regarding this question fits within this scope. I note a similar point regarding Minor specifically in Ellis, *A Price Too High*, *supra* note 37, at 553.

173. KEYSSAR, *supra* note 131, at 261.

174. *See id.* at 262–63.

175. *See id.*

176. *See* U.S. CONST. amend. XIX, § 1.

177. KEYSSAR, *supra* note 131, at 172–73.

178. *Id.* at 174.

179. *Id.*

180. *Id.*

181. *See id.* at 16.

nineteenth century to the use of poll taxes as the means for states to determine the ability for citizens to have a "sufficient stake" in the political process to participate.

In the first half of the twentieth century, the Court upheld the poll tax as a rational requirement states could impose to administer the right to vote.[182] With reasoning similar to that in *Minor*, the Court in *Breedlove v. Suttles*[183] upheld the Georgia poll tax. The plaintiff there, a twenty-eight-year-old white male, sued for his right to vote, which he was denied because of his inability to pay his poll tax.[184] The Court held that "the state may condition suffrage as it deems appropriate,"[185] and that the payment of poll taxes was "a familiar and reasonable regulation long enforced in many states."[186] Similarly, in *Butler v. Thompson*,[187] Jessie Butler, an African American female claimed that the Virginia poll tax was enacted with a discriminatory intent because it was part of the strategy instituted in the Virginia 1902 Constitutional Convention, a convention that sought to implement mechanisms designed to disenfranchise African Americans.[188] The *Butler* court, relying on *Breedlove*, found that the intent of the passage of the poll tax was irrelevant.[189] The *Butler* court found that the tax was fairly administered and neutral on its face, and thus does not violate the Constitution.[190]

Thus, similar to the exclusion of women from the right to vote, the exclusion of the poor from the right to vote in the Jim Crow era was decided on a rational basis. The tax was a neutral law and did not offend limitations set out in the constitution, and therefore, it was a valid exercise of the state's authority to regulate the franchise.[191]

Yet, the emergence of inclusion in the franchise ultimately rejected this formalism and embraced a vision of dignity-as-equality.[192]

182. Breedlove v. Suttles, 302 U.S. 277, 283 (1937).
183. *Id.* at 283–84.
184. *Id.* at 280.
185. *Id*. at 283.
186. *Id.*
187. Butler v. Thompson, 97 F. Supp. 17 (E.D. Va. 1951).
188. *Id.* at 19.
189. *Id.* at 22.
190. *Id.* at 21.
191. *See id.*
192. *See, e.g.*, Claire F. Martin, Comment, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 124–25 (exemplifying that the Court recognizes that "poor, elderly, and disabled voters are more likely to be unable to bear the costs and difficulties" of complying with voting regulation requirements); David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the*

In addition to the passage of the Nineteenth Amendment, constitutional and legislative intervention rejected the view that states have sole power over voting rights.[193] The Twenty-Fourth Amendment to the Constitution abolished poll taxes as a limit on federal elections.[194] The Supreme Court, in a series of cases including *Reynolds v. Sims*[195] and *Harper v. Virginia State Board of Elections*,[196] articulated that the right to vote is a fundamental preservation of all rights and an essential component of citizenship.[197] In this sense, cases like *Reynolds* (which mandated equal districts and an equally weighted vote) and *Harper* (which abolished poll taxes in state elections) articulated a standard of political equality that the Court enforced in a variety of other cases, including *Kramer v. Union Free School District No. 15*.[198] In particular, African American citizens were recognized as full, valid members of the community who were entitled to all rights guaranteed to such members.[199] "Further, the Voting Rights Act of 1965 (VRA) protected the right to vote against segregationist actions."[200]

Indeed, the Voting Rights Act served to transform the right to vote and elevate the status of African Americans from the caste status of second-class citizen. The primary sections of the VRA included Section 2, which provided a national cause of action against racial discrimination in voting.[201] This cause of action has served to reach racial discrimination that was both directed at individuals as well as discrimination which has the disparate impact of excluding minorities from the franchise.[202] Moreover, Section 5 of the VRA specifically sought to insulate minority voters from the political jurisdictions which had a history of passing laws which wrongfully disenfranchised

Second Great Disenfranchisement, 34 WM. MITCHELL L. REV. 483, 488–89 (reviewing the Supreme Court case that declared voting to be a right, thereby adopting an inclusive perspective).

193. Ellis, Cost of the Vote, *supra* note 22, at 1047.

194. *Id.*

195. Reynolds v. Sims, 377 U.S. 533, 563–64 (1964).

196. *Harper*, 383 U.S. at 667.

197. TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS' RIGHT TO VOTE 1–4 (2012).

198. Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969). *C.f. Lassiter*, 360 U.S. at 51.

199. This parallels the idea that full citizenship can be defined by the normative functions it accomplishes: communitarian equality and individual entitlement. *See* Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1347–48 (2011). Indeed, this suggests a social contractarian theory of American citizenship that focuses on the relationship between the state and its people as well as the idea that the state exists through agreement by the people. Accordingly, the rights of the people to constitute their government should be of paramount importance.

200. Ellis, Meme of Voter Fraud, *supra* note 23, at 899.

201. 52 U.S.C. § 10301(a) (2018).

202. *Id.*

minorities. It did so by imposing a "preclearance" requirement upon such jurisdictions, which is to say that these jurisdictions were required to gain approval of any voting law change from the Department of Justice or a three-judge panel of the U.S. District Court of the District of Columbia.[203] This process of preclearance solved a key problem of voting rights advocacy—that even with lawsuits and present relief, jurisdictions could nonetheless evade such rulings by virtue of the length of time of litigation and/or the ability to replicate discriminatory policies under a different guise and thus requiring the litigation to restart.[204] Preclearance ended this form of evasion by reinvention, but it did so at the cost of creating added burdens on the jurisdictions which had the comply with Section 5.[205]

III. INTEGRITY, DIGNITY, AND THE STATES

To this point, this Article has sought to demonstrate that an underlying dignity interest has animated concerns around the right to vote. Rather than treating this interest as merely descriptive of the underlying political equality concerns evoked by equal protection analysis, this paper has sought to show that protecting the individual and the collective so that voters at each level may exercise their role in the political process has been an end in and of itself.

However, the protection of the individual has, in contemporary times, has arguably come at the expense of protecting the integrity of the political process. The interest of the voter and the interest of the system have been pitted against each other under the guise of "election integrity." This call, to ensure the dignity of the electoral process, has often been touted as a justification for laws which sought to ensure that elections were free from irregularities that might cast doubt on the validity of the process.[206] However, those claims of fraud have

203. *What is Preclearance?*, ROSE INSTITUTE (Feb. 8, 2012), http://roseinstitute.org/what-is-preclearance/.

204. Sandhya Bathija, *5 Reasons Why Section 5 of the Voting Rights Act Enhances Our Democracy*, CTR. FOR AM. PROGRESS (Feb. 19, 2013, 9:18 AM), https://www.americanprogress.org/issues/courts/reports/2013/02/19/53721/5-reasons-why-section-5-of-the-voting-rights-act-enhances-our-democracy/.

205. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (Jun. 25, 2013), https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html.

206. VOTING AND ELECTION LAWS, https://www.usa.gov/voting-laws (last visited Mar. 23, 2019).

been seen as specious, thus, in itself, raising questions of the integrity of the electoral process.[207]

In this sense, the notion of election integrity is in itself based on the notion of the dignity of institutions yet reveals the expressive harm that comes when the dignity of voters is deemed to have been offended for instrumentalist reasons. This section of this Article will explore these concerns through examining the major post-civil rights era jurisprudence defining the right to participate in the voting process.

A. Balancing of Harms and Election Integrity

Where the Warren-era Court and the Congress that passed the VRA offered a broad vision of dignity as political equality among all citizens through the Equal Protection Clause and statutory transformation, the Burger Court narrowed the scope of the right when it came to voting rights concerns that implicated individual but did not reach protected categories like race, gender, or wealth.[208] In *Anderson v. Celebrezze*,[209] *Burdick v. Takushi*,[210] and *Crawford v. Marion County*,[211] the Court held that to determine the constitutionality of a particular provision, harms alleged by election law violations must be balanced against the state's interest in propounding those laws.[212] "Importantly, the degree of harm must be assessed prior to the constitutional analysis, raising the standard for plaintiffs and creating a presumption in favor of the state."[213]

In particular, this balance of harms approach was used in *Crawford* to hold that the state of Indiana's interest in deterring voter fraud through voter identification laws outweighed the plaintiffs' speculative vote denial claims.[214] Thus, a version of election law equal protection has evolved to arguably place questions of communal election integrity over a bolstered conception of the individual right to vote. As the Court stated in *Crawford*, states have rational bases for protecting elections: ensuring election integrity and preventing voter fraud.[215]

207. *Is Voter Fraud a Problem?*, DEBATE.ORG (last visited Mar. 23, 2019) https://www.debate.org/opinions/is-voter-fraud-a-problem.
208. Anderson v. Celebrezze, 460 U.S. 780, 815 (1983).
209. *Id.*
210. Burdick v. Takushi, 504 U.S. 428, 441 (1992).
211. Crawford v. Marion County Election, 553 U.S. 181, 191 (2008).
212. *Id.*; *Celebrezze*, 460 U.S. at 815.
213. Ellis, *Meme of Voter Fraud*, *supra* note 23, at 899.
214. *Crawford*, 553 U.S. at 197-98.
215. *Id.* at 191, 203.

Invoking the term "election integrity" seems on its face appropriate and necessary to maintain the validity of the voting process. As a term of art, election integrity refers to the conditions necessary to ensure that elections are professional, impartial, and transparent.[216] More specifically, in the *Crawford* context, election integrity appears to be the protection of the reputation of elections so as to preserve public support for the voting process.[217] In this context, it appears that "preventing voter fraud" stands in contrast, thus pointing to a larger institutional reliability justification. Moreover, in the *Crawford* framing, this ability to rely on the institutional status of the election is contrasted with – rather than seen as complementary of – the interest in the voter in being able to cast a vote.

In *Crawford* the interests of the state to protect the integrity of elections won out. Yet, in the decade since the *Crawford* decision, the justifications offered by the Court in protecting election integrity were bolstered by ill-supported claims that voter fraud is endemic.[218] As I have argued elsewhere, this balancing deferred to state interests over the heightened risk of exclusion of the harm to the potential plaintiff, particularly when that risk is inchoate and based on perception or aggregate harm.[219] In effect, this deference to state authority implies a value of collective dignity at play in these decisions, a collective dignity which superseded the individual rights interest.

B. *Bush v. Gore* and the Reassertion of Individual Dignity

Despite this, the individual dignity of the vote rationale reemerged in infamous fashion in the case of *Bush v. Gore*.[220] There, the Supreme Court by a 5-4 decision declared unconstitutional the Florida Supreme Court's decision to continue a manual recount in counties where an undervote had occurred due to prior tallies.[221] Specifically, the majority held that this recount violated the Equal Protection Clause because the majority found that the procedures for recapturing the undervotes would have resulted in disparate treatment of similarly situated votes.[222]

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216. ELECTORAL INTEGRITY, ACEPROJECT.ORG (last visited Mar. 24. 2019) http://aceproject.org/ace-en/topics/ei/default

217. *Crawford*, 553 U.S. at 197.

218. *See, e.g.*, *id.*

219. *See generally* Ellis, *Tiered Personhood*, *supra* note 7.

220. Bush v. Gore, 531 U.S. 98 (2000) (per curium).

221. *Id.* at 100, 122.

222. *Id.* at 108–10.

In particular, the majority specifically invoked, without citation, the principle of dignity-as-equality to bolster its equal protection analysis.[223] "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[224] This sounds like the evocation of dignity-as-equality principle by its terms, but its ultimate outcome—the cessation of the Florida recount, the failure to count all votes cast in good faith, and the effect of swinging the entire election from Al Gore to George W. Bush—left the opinion open to criticism as unprincipled, partisan, and unnecessary in light of the deference presumably owed to the State of Florida regarding its own election rules. And while this opinion was deemed non-precedential, it nonetheless strongly evokes the dignity rationale and suggests a content regarding dignity directly relevant to the analysis of right-to-vote concerns. Indeed, a close reading of *Bush v. Gore* demonstrates how the Court looked to the *Harper* line of fundamental interest cases as well as the *Baker v. Carr* line of redistricting cases to demonstrate that arbitrary treatment by the state of either voters by individual exclusion or by dilution of their collective interests would violate fundamental principles of political equality, and thus harm the "equal dignity owed each voter." The point here is that *Bush v. Gore* deployed the language of dignity owed to the voter, yet that use of dignity departed from the conception saw in either the *Baker* or the *Harper* lines of cases. This disconnection, and the ultimate irony of *Bush v. Gore* in its failure to engage in a full recount in and of itself ultimately denied voters full expression of their votes, suggests that the application of an appeal to dignity as political equality was ill-thought out.[225]

223. *Id.* at 104.

224. *Id.*

225. Indeed, the added irony in the background of the *Bush v. Gore* decision is that the lens of dignity did not reach the indignity of the voter purges and felon disenfranchisement rules then in place in Florida which served to disenfranchise over a million voters. Certainly, the dignity accorded equal votes ought to extend to the dignity accorded to citizens in the act of casting such votes by virtue of their status as citizens. This recognition makes the *Bush v. Gore* opinion useful for the principle of the accordance of dignity to voters. However, it highlights the dignitary offense of arbitrary exclusion under felon disenfranchisement laws. More on this, *infra*.

C. Equal Dignity of the States and *Shelby County v. Holder*

Despite the aberration that was the presidential election of 2000, the ultimate shift in jurisprudence centered on a collective dignity rationale, or to put it more precisely, a rationale based upon the interests of the individual states as the center of power regarding administration of elections was given voice by the Court in *Shelby County v. Holder*.

There, the Court determined that Section 4(b) of the Voting Rights Act of 1965, which determined which jurisdictions should be subject to the preclearance requirement of Section 5, was unconstitutional.[226] Unlike the balancing in Crawford, the Court relied on the premise that each state is due "equal sovereignty," that is each state has power to regulate matters left to the states, including voting, to the same extent as other states.[227] This premise of equal sovereignty was in and of itself premised on jurisprudence of the "integrity, dignity and residual sovereignty" of the states.[228] The Court went further to say that based on this premise, the VRA was an extraordinary measure which offended this equal sovereignty,[229] and that "the original conditions that originally justified [the preclearance measures that justified differing treatment of states] no longer characterize voting in the covered jurisdictions."[230] The Court reasoned, "[c]overage today is based on decades-old data and eradicated practices."[231] The Court went on to say "[r]acial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity."[232] According to the majority, the covered jurisdictions – mainly the ex-Confederate South – have changed so sufficiently that the government must reconsider selective preclearance enforcement of race-conscious remedies despite the consideration they undertook when reauthorizing the Act in 2006. The message of the Roberts opinion (and the Thomas concurrence)[233] is that coverage formulas rooted to a past of racial discrimination in voting ignores racial progress.[234] Indeed, Roberts implied

226. *Shelby Cty.*, 133 S. Ct. at 2631.
227. *Id*. at 2616.
228. *Id.* at 2623 (quoting Bond v. United States, 131 S. Ct. 2355 (2011)).
229. *Id.* at 2618.
230. *Id.*
231. *Id.* at 2617.
232. *Shelby Cty.*, 133 S. Ct. at 2627–28.
233. *Id.* at 2631–32 (Thomas, J., concurring).
234. *Id.* at 2618–19.

that to hold to such formulas amounts to punishment of the states covered for their racial history.[235]

What matters here is that the notion of the dignity of the states – comparable to the dignity of institutions discussed earlier – was the stated rationale for the sweeping change *Shelby County*. Both the dissent[236] and commentators[237] have criticized the *Shelby County* decision as an unprincipled power assertion by the Court in contravention of Congress's authority under the Fifteenth Amendment. And the activist community has noted how this has empowered states to legislate in ways that effectively deny individuals the right to vote. These critiques make clear the conflict between collective dignity and individual dignity within the Court's jurisprudence. It is to this contemporary set of concerns this Article will now turn to.

IV. DIGNITY GAPS IN MODERN VOTING LEGISLATION

To this point, this Article has sought to demonstrate that an underlying dignity interest has animated concerns around the right to vote. Rather than treating this interest as merely descriptive of the underlying political equality concerns evoked by equal protection analysis, this paper has sought to show that protecting the individual and the collective so that voters at each level may exercise their role in the political process has been an end in and of itself.

However, both the individual and the collective dignity interests have been less than fully formed. Individual political equality within the context of a *Harper* fundamental interest analysis[238] has evolved into both the sliding-scale *Burdick* analysis[239] used in most individual right-to-vote cases (with the notable exception of the instrumentalist

235. *Id.* at 2628–29.

236. *Id.* at 2632–33 (Ginsburg, J., dissenting).

237. Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 933 n. 178 (2016); *see generally* Martha T. McCluskey, *Toward of Fundamental Right to Evade Law? The Rule of Power in Shelby County and State Farm*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 216 (2015).

238. In *Harper*, the Court found unconstitutional the use of poll taxes as a voter qualification in state elections. It determined that a fundamental constitutional interest existed for each citizen in relation to the franchise, and once extended by the state, that fundamental interest could not be withdrawn on arbitrary or overly burdensome bases. *See Harper*, 383 U.S. at 665-67.

239. *Burdick* requires that challenges to election regulations which otherwise do not implicate a protected category like race must be analyzed by comparing the interests raised by the harm alleged by the plaintiff voter against the proffered interest of the state in maintaining the particular voting regulation. *Crawford* also teaches that neutral regulations that are weighed against speculative or inchoate harms are ordinarily presumed to be constitutional.

evocation of *Harper* in *Bush v. Gore*). Equal sovereignty, suggesting a core dignity interest in the states in having ultimate control over election law, was the core rationale in *Shelby County*.[240] Thus, both jurisprudential forms of dignity consideration have converged on locating control of the political process by states without the robust protections of either the Fourteenth Amendment in the *Harper* era or the Voting Rights Act. Despite this, however, the *Crawford* analysis, Section 2 of the VRA, and federal statutory protections have been invoked to protect individual right to vote interests, suggesting that the dignity interests may be constrained by the trends noted above, but they are not completely nonexistent.

This paper has also suggested two ways of specifically naming the dignity interests as specific areas of concern. Two areas of concern that come to mind in modern voting rights litigation include the instrumentality concern, which seeks to avoid using persons as means to some other end, and the exclusion concern, which seeks to avoid the exclusion of some group of persons from participation on a wholly arbitrary basis.

Modern voting litigation has brought up several categories of apparent suppression or abridgment of the right to vote. This would suggest that the dignity interests regarding the tension between individual and collective dignity, the instrumentality concern, and the exclusion concern, have been invoked due to state action regarding regulation of voting opportunities. This section seeks to parse out these concerns to illustrate the underlying dignity interest and the extent that attention to those concerns has led to a robust effort to include (or exclude) voters who otherwise ought to be allowed to participate in the voting process.

While often evoked to maintain the integrity of the voting process (and thus appealing to the collective dignity concern evoked in *Crawford*), modern legislation regarding voter identification laws, proof of citizenship legislation, voter purges, and the regulation of felon disenfranchisement laws all arguably curtail the ability of individuals to participate in the political process and be treated as equal citizens.[241] Recent decisions in the Fourth Circuit and Fifth Circuit have concluded that voting regulation laws passed in North Carolina and Texas

240. *Shelby Cty.*, 133 S. Ct. at 2616.

241. *New Voting Restrictions in America*, BRENNAN CTR. (last visited Mar. 24 2019) https://www.brennancenter.org/new-voting-restrictions-america.

had a disparate impact on minority voters.[242] Litigation in Kansas has demonstrated the cumulative, disparate effects of proof of citizenship laws.[243] These three situations have underlying dignity interests at play, and this part will illustrate those interests and how a concerted focus on dignity interests of the individual and the collective may lead to a more equitable solution.

A. Voter Identification

The proffered goal of states implementing voter identification laws is to prevent voter fraud through creating a heightened regulatory complex designed to weed out persons who attempt to impersonate valid voters at the polls. The rationale that both the *Crawford* court and the Seventh Circuit have recognized is, in essence, the message of expressing a desire to maintain election integrity so that public confidence in the system can be achieved.[244]

This message about election integrity is often crafted within the rhetoric of voter fraud, and the passage of voter identification legislation is often deemed necessary because of (unfounded) allegations of voter impersonation fraud or the non-specific fear of *potential* voter fraud. To this end, legislatures (as Indiana did in *Crawford*) passed voter identification laws of varying sorts.[245]

However, as a rhetorical matter, voter identification laws serve to not only intimidate potential fraudsters, but these laws also impose entry costs that persons of the lowest socioeconomic status cannot bear.[246] Such barriers secure the franchise at the expense of dissuad-

242. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 238 (2016); Veasy v. Abbott, 830 F.3d 216, 265 (2016).

243. Bill Chappell, *Judge Tosses Kansas' Proof of Citizenship Voter Law and Rebuked Sec. of State Kobach*, NPR (Jun 19, 2018, 10:49 AM), https://www.npr.org/2018/06/19/621304260/judge-tosses-kansas-proof-of-citizenship-voter-law-and-rebukes-sec-of-state-koba.

244. *See Crawford*, 553 U.S. at 224.

245. But such a conversation must observe the fact that identifying voters has always been American law. Keyssar accounts for the early history of the American republic where identification was based on familiarity and the ability to know one's neighbors in agrarian early America. *See* KEYSSAR, *supra* note 131, at 5 (describing the evolution of identity and residency requirements in the first half of the eighteenth century). Voter registration laws, and their corollary requirements that a voter demonstrate their identity through devices such as signature matches, or a wide range of documentation have existed throughout the late Nineteenth and Twentieth centuries. Even poll taxes as receipts for voting are forms of identification. Indeed, the poll tax analogy does center the question of the strictness of such identification requirements, as I discussed previously in *The Cost of the Vote*, but the point here is that state elections have *always* required an identification mechanism. Rhetoric that implies that this is not true is misleading.

246. Sara Horwitz, *Getting a Photo ID so You Can Vote is Easy. Unless You're Poor, Black, Latino, or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/

ing rightful voters to vote, which, as Michael Gilbert observed, creates a consequence for voter identification measures that may not be appropriate given the lack of proven deterrence of bad votes.[247] Moreover, voter identification requirements cause unnecessary confrontation at the voting booth, which serves to further intimidate and dissuade participation in the political process by those who are least able to defend against such confrontation.[248]

These heightened costs imposed by these statutes raise exclusion concerns that prevent citizens—largely poor, elderly, and minority citizens—from exercising their right to vote.[249] These requirements infringe on citizens' dignity interests because individuals must show a document to vote, which does not prevent fraud and only infringes on citizens' voices at the ballot box. The increased time it takes to check voter identification has also led to long lines at polling places.[250] These cumulative barriers are the precise concerns that Katz raised in her article.

Voter identification restrictions cause harm to individuals because these laws prevent individuals from voting. There have been many instances of individuals who have voted for years, only to be told that they can no longer vote because they do not have a driver's license.[251] The amount of time it takes to amass the identity documents, proofs of residency, and other paraphernalia, require time that some citizens simply do not have.[252] To the most vulnerable in our society, time and documents represent a luxury.

05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?noredirect=on&utm_term=.6968703f4601.

247. *See* Michael Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 742 (2015).

248. Lois Beckett and Oliver Laughland, *Specter of Election Day Violence Looms as Trump Stirs Vigilante Poll Watchers*, THE GUARDIAN (Nov. 5, 2016, 6:00 PM), https://www.theguardian.com/us-news/2016/nov/05/election-day-violence-donald-trump-poll-watchers.

249. *See* Horwitz, *supra* note 246.

250. Lee v. Va. State Bd. Of Elections, 155 F. Supp. 3d. 572, 577–78 (E.D. Va. 2015).

251. Jasmine C. Lee, *How States Moved Toward Stricter Voter ID Laws*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html.

252. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 217–18 (Mo. 2006) (finding that Missouri's voter ID law violated Missouri's constitution because the law burdened the right to vote and was not narrowly tailored to meet a compelling state interest.). In *Weinschenk*, the Missouri Supreme Court cited the cost of obtaining a birth certificate or United States passport as burdening the right to vote because one of these two documents were required for voters to obtain a "free" Missouri voter ID. *Id.* at 208. The Court also cited the burden of a "six to eight week" waiting period for a birth certificate. *Id.* at 209. Routine processing times for United States passports range from four to six weeks. U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/passports/requirements/processing-times.html (last visited Dec. 27, 2016).

Moreover, scholars have illustrated how the purported anti-fraud interest is illusory because voter impersonation voter fraud is virtually nonexistent. While commentators like Hans von Spakovsky and John Fund argue that fraud, in a general sense, must be ferreted out, the broader scholarly consensus is that the voter fraud related to election-day voting deception is impractical, ineffective, and irrational.[253] However, the specter of these concerns and the concomitant concerns about rampant efforts to exclude voters most vulnerable to manipulation of voting rules generates strong political interest in and of itself. It is this effect that ultimately seeks to use the straw man of voter fraud as a means to motivate voters to participate and to foment anger rather than create a rational election system. As a result, the larger individual and collective dignity interests regarding voter fraud are ignored. Thus, the debate of voter fraud, in effect, illustrates the manipulation of voters so that voters may provide a means to secure power in a disingenuous basis. As a result, voters are an instrumentality because of these laws.

Yet, despite the so called "Voting Wars",[254] which have primarily resulted because of Republican-backed bills limiting the vote to individuals who can present "proper" identification, the dignity-as-equality interest in preventing racial discrimination regarding the right to vote has recently been vindicated in *NAACP v. McCrory*.[255] There, the Fourth Circuit rejected, at least in part, the detrimental effects of voter identification laws to the extent that they implicate race.[256] *McCrory* concerned North Carolina's omnibus voting bill, which provided for strict voter ID requirements, limited same day registration, restricted early voting, etc.[257] This bill had a particular disparate impact on minority voters in North Carolina. This squarely implicates the cumulative burdens problem that makes the effective exercise of the right to vote possible, thus implicating the autonomy concern in its classic sense—shutting out a group because of its identity (and allegiance to one party over the other). In its decision, the Fourth Circuit found that North Carolina's General Assembly had passed this omni-

253. Michael Harriot, *America's Biggest Conspiracy Theory is Real: The Racist Truth Behind the Myth of Voter Fraud*, THE ROOT (Sept. 10, 2018, 12:00 PM), https://www.theroot.com/america-s-biggest-conspiracy-theory-is-real-the-racist-1828691528.

254. Richard Hasen, *The 2016 Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 629 (2018).

255. *McCrory*, 831 F.3d at 204.

256. *Id.* at 240-42.

257. *Id.* at 216.

bus voting bill knowing that it would have a disparate racial impact.[258] The court applied the test of *Village of Arlington Heights v. Metropolitan Development Corp.*[259] and found that the General Assembly intentionally discriminated against minority voters on the basis of race and thus violated the Fourteenth and Fifteenth Amendments.[260]

The opinion further notes that North Carolina rewrote their voting laws following the *Shelby County v. Holder* decision that rolled back preclearance. This re-write was carried out after the General Assembly had evidence that certain provisions were benefitting African American voters.[261] Further, the voter fraud that the General Assembly sought to prevent was nonexistent.[262]

However, further voter identification bills have been upheld in Arizona and Alabama which continue to expose the dignity concern. In Alabama particularly, the legislature passed House Bill 19, which imposed a strict voter identification requirement in the name of election integrity.[263] Expert evidence found that among voters in Alabama, African American and Hispanic voters were more likely than whites to lack adequate photo ID with which they may satisfy the requirement.[264] Moreover, as I have discussed elsewhere, the division of motor vehicles offices where the majority of black voters live are closed due to economic exigency, creating a heightened barrier of having to navigate scarcity to obtain adequate identification.[265] Ultimately, this case ended in 2018 on the basis that the state's regulatory interests in passing the law were legitimate, nondiscriminatory, and "provided many other ways a voter can obtain a photo ID in Alabama."[266]

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258. *Id.* at 242.

259. Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252 (1977).

260. *See McCrory*, 831 F.3d at 219.

261. *Id*. at 230.

262. *Id.* at 235. In a curious move, the Fourth Circuit cited statements by Don Yelton, GOP Precinct Chair, who testified before the House Rules Committee that the photo ID requirement would "disenfranchise some of [Democrats'] special voting blocks [sic]", and "that within itself is the reason for the photo voter ID, period, end of discussion." *Id.* at 229 n.7. The Fourth Circuit's analysis did, in this sense, lay bare the identity politics that apparently coupled with the political desire to use election regulations to shape the electorate that the majority-Republican legislature sought to have. This in itself raises the instrumentality concern described above regarding the treatment of AfricanAmerican constituents within the political process in North Carolina.

263. ALA. CODE § 17-9-30 (2011).

264. German Lopez, *Voter Suppression in Alabama: What's True and What's Not*, VOX (Dec. 12, 2017, 3:10 PM), https://www.vox.com/policy-and-politics/2017/12/12/16767426/alabama-voter-suppression-senate-moore-jones.

265. Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY L.J. 607, 627 (2015).

266. Greater Birmingham Ministries v. Merrill, 321 F.R.D. 406, 412 (N.D. Ala. 2017).

Yet, in the name of such an election integrity rationale, the court failed to see individual voters as just that—individual people wishing to exercise their constitutional rights, who nonetheless face structural barriers towards the franchise. Thus, legislatures that have passed strict voter identification laws have excluded certain classes of persons through creating overly burdensome regulations that effectively prevent the exercise of the right to vote.[267] Decisions like *McCrory* have encouraged many who are interested in advocating for the individual right to vote. However, this positive outcome may be further encouraged by explicitly noting as a core value in the democratic process that individuals have worth and that they are owed dignity by virtue of their status as individuals and citizens in the United States. If legislatures and courts are governed by this core value recognition, they may more effectively help protect the voices of many over the objections of a few.

The implicit dignity interests in these decisions should guide future jurisprudence regarding the right to vote. By understanding the insidious, disparate impact voter ID laws can have on minority voters and their dignity, courts and legislatures can work to restore the dignity interests of all voters.

B. Proof of Citizenship Laws

A similar analysis may be made about proof of citizenship laws. Indeed, it is fair to say that these requirements are similarly rooted in a push to have citizens prove their identity. Yet, instead of the state-issued photographic identification requirement at the root of the voter identification debate, proof of citizenship requirements demand that citizens present their birth certificates or some other form of dispositive proof of United States citizenship as part of the registration process.

Like voter identification requirements, proof of citizenship requirements are intended to preserve election integrity by specifically creating a barrier against non-citizen voting. These laws require that voters present some proof of their United States citizenship (e.g., a

267. The "true cost" of obtaining an acceptable form of identification for voting purposes includes time spent learning about the requirements, time and money spent gathering documents, monetary cost of traveling, time spent traveling, and time spent waiting at a DMV or other government office. Richard Sobel, *The High Cost of "Free" Voter Identification Cards*, HARV. L. SCH. INST. FOR RACE AND JUST. (June 2014), https://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf. In all, a voter ID costs between $75 and $148. *Id.* at 2–3.

birth certificate or a passport) as a supporting document for their voter registration.[268] These laws are premised on the existence of a threat of alien voting that would supposedly overwhelm elections in certain areas of the United States. Such threats have been amplified in recent times by President Donald Trump, curiously both during and after his successful campaign for the presidency—as a way of rationalizing the result that he won the Electoral College but lost the popular vote by nearly three million.[269]

However, in its origin, the proof of citizenship debate has been premised on an exaggerated claim of a threat to the integrity of the electoral process. In Kansas, an unverified anecdote from Kris Kobach, then Kansas Secretary of State, served as the genesis for the demand for proof of citizenship laws. In his testimony before the Kansas House Elections Committee to urge passage of the Secure and Fair Elections Act (or SAFE Act), Kobach asked the committee to move the effective date of the proof of citizenship requirements forward to go into effect in time for the 2012 Presidential Election.[270] His rationale was:

> In 1997, a ballot issue was before voters concerning whether to allow a particular type of hog farming operation in Seward County. A few weeks before the election, a bus full of individuals believed to be aliens rolled up to the county clerk's office, where they were unloaded and told to register to vote. . . . Under Kansas law at that time, the clerk had to allow them to register as long as they filled out and signed a voter registration card.[271]

Kobach also cited another story of "voter fraud" in Kansas City, where Somali voters were "coached" by an interpreter and "stole" the election.[272] These isolated, unverified instances were the foundation for Kansas's strict proof of citizenship requirement. Nonetheless, the Kansas legislature passed the SAFE Act and implemented the law. However, it faced substantial litigation under the National Voter Re-

268. Rebecca Beitsch, *'Proof of Citizenship' Voting Laws May Surge Under Trump*, PEW (Nov. 16, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/16/proof-of-citizenship-voting-laws-may-surge-under-trump.

269. Chris Cillizza, *Trump Warns People to Beware of Non-existent Voter Fraud*, CNN Politics (Oct. 22, 2018), https://www.cnn.com/2018/10/22/politics/donald-trump-voter-fraud/index.html.

270. *Testimony of Kris Kobach Before the Kansas Senate Committee on Ethics and Elections on House Bill 2437*, (Mar. 15, 2012) (statement of Kris W. Kobach, Sec'y of State of Kansas), https://oversight.house.gov/wp-content/uploads/2015/02/Kobach-Testimony-House-OGR-21215.pdf.

271. *Id.*

272. *Id.*

gistration Act. Indeed, the Tenth Circuit found that the SAFE Act violated the federal statute.[273] Similarly, Arizona passed a proof of citizenship requirement in the "Arizona Taxpayer and Citizen Protection Act." Similarly, it was alleged before the Ninth Circuit that this act unduly disenfranchised voters. Indeed, analysis found that Native American and Latino populations (specifically in Maricopa County) were at higher risk of being forced to cast provisional ballots (which accelerates the risk of their votes not being counted) under the law.[274] The Ninth Circuit struck down the proof of citizenship requirements, holding in *Arizona v. Inter-Tribal Council of Arizona* that the proof of citizenship requirements were pre-empted by federal law.[275] Nonetheless, these proof of citizenship laws persist under state law in Kansas and Arizona.

Even if these alleged incidents in Kansas were true, the potential impact of these votes are miniscule compared to the severe impact proof-of-citizenship laws have on American citizens, particularly citizens of color, the poor, and the elderly. As many as seven percent of United States citizens do not have ready access to citizenship documents.[276] Citizens earning less than $25,000 per year are more than twice as likely to lack citizenship documentation as those earning more than $25,000.[277] Women are also particularly affected by the proof of citizenship requirements because of name changes after marriages or divorces.[278]

By requiring individuals to present ID or proof of citizenship, state governments are reducing citizens without proper documentation. Essentially, these governments are saying that in order to exist in the eyes of the state, it is necessary to have papers, not just a name and a residence in the jurisdiction. Where voting once required just a signature, it now requires papers, time spent searching for documents,

273. *See* Fish v. Kobach, 840 F.3d 710 (10th Cir. 2016).

274. Dianna M. Nañez and Agnel Phillip, *Maricopa County Residents Purged From Voter Rolls More than 1 Million Times in Past Decade*, AZ. CENTRAL (Nov. 4, 2018, 1:47 PM), https://www.azcentral.com/story/news/politics/elections/2018/11/04/minorities-poor-areas-most-affected-maricopa-county-voter-purges/1855248002/.

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

276. BRENNAN CTR. FOR JUST. AT NYU SCH. L., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006). The Brennan Center's survey defined ready access as possessing an unexpired identification document (government-issued photo identification, birth certificate, passport, naturalization papers) in a place where the participant could "quickly find it if [the person] had to show it tomorrow."

277. *Id.*

278. *Id.*

time at the DMV or other agency, and money. These concerns evoke the kinds of cumulative onerous burdens Katz noted as raising dignitary problems. Moreover, immigrant citizens may feel threatened by the specter of being subjected to added inquiry through the requirement of presentment of citizenship proof despite the lack of evidence for the need of such regulations. These cumulative costs thus raise the exclusion concern. Moreover, behind the rhetoric of proof of citizenship laws is the ideological view of a foreign threat. This threat explicitly speaks to creating a rhetorical other who is deemed not to deserve dignity within the political process. Thus, the ideological motivations behind proof of citizenship laws needlessly motivate their supporters to fight an enemy that does not exist, and thus these rules serve as fuel to polarize the citizenry to some political end rather than seeing the right to vote and its exercise as an end unto itself. This kind of polarization evokes the instrumentalist concerns raise by the dignitary lens.

C. Felon Disenfranchisement Laws

Where the cumulative burdens regarding proof of citizenship and voter identification have the effect of excluding citizens otherwise eligible to vote, felon disenfranchisement laws openly exclude citizens through automatic disqualification upon conviction of an infamous crime.[279]

Exclusion due to previous felony conviction not only implicates the exclusion concern, it also implicates the instrumentality concern and the core affront to dignity in the most basic sense of intrinsic human equality. Felon status has traditionally been a badge of exclusion from society generally, and disenfranchisement is one consequence of this general exclusion. Indeed, as one court has suggested, such exclusion implicates the ex-felon's dignity interests through stifling the former felon's re-integration with society.[280]

The status of felon voting has also been used as an instrumentality within other political contexts. Recently, in the state of Virginia, the governor sought to re-enfranchise the ex-felons in Virginia by executive order.[281] This action became the grounds for litigation over

279. The Sentencing Project: Felony Disenfranchisement, https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/ (last visited Mar. 14, 2018).

280. *See Griffin*, 884 N.W.2d at 203.

281. Dara Lind, *This Will be the First Election for Thousands of Virginians Who Thought They'd Never be Able to Vote*, Vox (Nov. 7, 2017, 1:50 PM), https://www.vox.com/policy-and-politics/2017/11/7/16618686/virginia-election-felony-vote-disenfranchisement.

the propriety of this order. The Virginia Supreme Court ruled that the governor could not grant pardons by a single executive order; instead, he must consider re-enfranchisement on an individual basis.[282] Given the stakes of the current political climate, the decision to re-enfranchise former felons and the political boundary-drawing evoked by that decision appear to be the means to foment conflict and suggest that these rules regarding disenfranchisement are largely political instrumentalities at the expense of the disenfranchised.

Felon disenfranchisement also has a disparate impact on minorities. An insidious byproduct of years of increased jail time for drug offenses and other violations is preventing a sizeable portion of the population from voting. These barriers to participation show that "with a criminal record comes official state certification of an individual's criminal transgressions; a wide range of social, economic, and political privileges become off-limits."[283] Preventing felons from voting, no matter how egregious their previous acts, violates their dignity interest because it provides a penalty that shows that their individual integrity is somehow flawed and disallows them from participating in society.

Yet there is a glimmer of hope concerning felon disenfranchisement. State level movements towards banning the practice are starting to gain traction. For example, in Florida, the passage of Amendment 4 banned post-incarceration felon disenfranchisement from state law.[284] Over 1.4 million Floridians were re-enfranchised with this measure.[285] The campaign focused on these concerns regarding unfairness and the dignity of individuals as citizens, especially in light of the fact that these former felons have paid their debt to society.

Ultimately, the restriction on the right to vote on ex-felons are arbitrary. There is no evidence to show that ex-felons will do anything with the right to vote except vote. Indeed, in Vermont and Maine prisoners are allowed to vote while incarcerated.[286] The ability of a

282. *Id.*

283. Pinard, *supra* note 7, at 460 (citing DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 33 (2007)); *see also* Richards & Jones, *supra* note 11 (discussing how collateral consequences of incarceration, including "disabilities, disqualifications and legal restrictions," impact reentry).

284. German Lopez, *Ex-Felons Can Now Sign Up to Vote in Florida*, VOX (Jan. 8, 2019, 11:10 AM), https://www.vox.com/policy-and-politics/2019/1/8/18173651/florida-amendment-4-felon-voting-rights-effect.

285. *Id.*

286. *Id.*

state to take away an individual's' suffrage based on an out-of-state, former felony conviction violates that individual's right to express themselves through the ballot box and affects their ability to participate in choosing how their community is governed.

V. DIGNITY AND THE TWIN AIMS OF THE RIGHT TO VOTE

To this point, we have considered how concerns around dignity have been accounted for within right-to-vote jurisprudence to date. As we have seen, these disputes center on federal constitutional standards being applied to prevent varieties of state-level discrimination concerning the right to vote. A robust literature exists around the formal analysis of these federalism concerns. The inquiry of this Article concerns whether an open recognition of dignity might offer further illumination regarding these concerns. As such, this part approaches these concerns from a more conceptual focus rather than a doctrinal focus.

At the heart of the modern right to vote is a concern for political equality, often expressed in the move to constitutionalize antidiscrimination norms in such a way as to provide remedies for (or, until Section 5 of the Voting Rights Act was made ineffective, to prevent such discrimination altogether) voter denial based upon racial, gender, age, and wealth. Yet modern (or so-called second generation) vote denial claims either fall outside of these constitutional protections or the constitutional protections themselves do not implicate this type of antidiscrimination approach.

Accordingly, as recent litigation regarding voter identification laws illustrates, a gulf exists in terms of the applicability of the dignity-driven constitutional doctrines in remedying vote denial claims. Some scholars would seek to address this gulf through structural approaches that would in and of themselves center the analysis of these questions on the power of the federal constitution.[287] Other scholars, including myself, would ordinarily resist the structural shift as we see value in the rights-based approach to vote denial issues, especially since such vote denial questions often have a disparate impact on minority com-

287. Garrett Epps, *What Does the Constitution Actually Say about Voting Rights?*, THE ATLANTIC (Aug. 19, 2013), https://www.theatlantic.com/national/archive/2013/08/what-does-the-constitution-actually-say-about-voting-rights/278782/.

munities (especially poor minority communities).[288] But the complaint about a rights-based approach that is based upon identity claims does not, in and of itself, speak to the *Crawford* kind of problematic voting qualification law. This qualification fails to raise a form of protected category discrimination (and thus cannot be litigated as such) but nonetheless may conceptually create a vote denial due to its effect through an overly-burdened right that becomes ineffective for persons situated at the economic and political margins of American society.[289]

Perhaps a dignity-driven approach to these kinds of claims may close the gap between these two types of approaches. Moreover, a dignity-driven approach may enhance the protections that traditional identity-driven right to vote claims possess.

Thinking through the lens of dignity requires us to focus on the idea of the dignity of each citizen as a baseline for inquiries concerning the topic.[290] Dignity as a concept is driven by the inherent value of each person in relation to all other persons. This inherent value is the irreducible minimum for considerations of the moral worth of a person or how to evaluate how a person is treated by another person or institution. Thus, to identify the irreducible minimum within the right-to-vote context, we must look towards where in the constitutional structure such a minimum may be found. In the language of the

288. George Hornedo, *Now, As Ever, Voter Suppression Targets Communities of Color*, LET AMERICA VOTE (Sept. 19, 2018), https://policy.letamericavote.org/now-as-ever-voter-suppression-targets-communities-of-color-80791faf4359.

289. This is precisely the kind of concern that was raised in the era of poll taxes. While many focus on the racial exclusion effects that poor African Americans held in the Jim Crow era, the litigation around the poll tax recognized how such laws, which targeted poverty status, affected exclusion in and of themselves. Yet, analogous to the proffered rationale in Crawford, the Supreme Court of the Jim Crow era deferred to voting rights formalism, and thus accorded states the right to structure the franchise how they saw fit so long as they did not offend the Fifteenth Amendment. Thus, as this Article discussed above concerning *Minor v. Happerset*, the cumulative burdens problem and the diminishing of the dignity interest in having the autonomy as a citizen to cast one's vote is nonetheless allowed by the Court's focus on the structural concerns in allowing states autonomy to administer the vote. Consequently, states are afforded the power to exclude for purposes of maintaining a political underclass.

290. This presupposes that citizenry is in and of itself the just norm by which to consider questions of the allocation and exercise of political power within a democratic polity. This kind of conception is as old as the Western tradition itself, but it is certainly not the only tradition which could inform democratic practices. Moreover, it is fair to say that citizenship is itself a contested status. It is beyond the scope of this Article to analyze these questions outside of the boundaries of American citizenship, but it is worth recognizing that these contested questions exist and serve to raise similar concerns to the ones announced here. One need only point to the long American history regarding the rights attendant to persons who are citizens of the colonial possessions of the United States to recognize this dilemma. For more on this, see e.g., EDIBURTO ROMÁN, CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE (2010).

Constitution itself, that irreducible minimum is alternatively "The People," the "person," or "the citizen" (as in persons who are entitled to exercise the rights that come with citizenship). As we have ordinarily delimited voting to citizens (at least within the state and the federal context), this would seem to be the rational minimum to select.

Dignity is inherently intertwined with identity, and as we have seen previously, the manifestation of dignity-as-identity concerns, along with the liberty and equality interests that accompany it, has played the paramount role in right to vote jurisprudence. We have a societal consensus that the government should not diminish one's dignity due to one's identity. This is obvious as it pertains to race and gender, and now sexual orientation. Conceptually, if citizenship is a quality that all potential voters ought to share, then that irreducible minimum ought to hold a status of dignity. Instrumentalities that arbitrarily or needlessly deny one's dignity as a citizen (or deny a group of citizens' dignity) should then be disfavored. By this reasoning, it would follow that the right to vote, one of the component rights that compose the core of citizenship, should not be denied by devices that arbitrarily or needlessly deny the right to vote explicitly or by their cumulative effect.

Yet, as this Article has observed, dignity as a protective concept bolsters the status of individuals and groups. A class of persons may be denied dignity, and thus, the harm falls to each individual within that class. An institution may be denied dignity. Thus, the harm of that denial may flow to the institution itself and all of the individuals who are invested in the institution.

Those institutions may function to protect those individuals, or they may manipulate and use those individuals to achieve the institution's own ends (or the ends of those factions—in the Madisonian sense—who control those institutions).

While these two outcomes are theoretically possible, a dignitary analysis would observe that the protective outcome would be preferable over the instrumentalist outcome. The dignitary concern over the autonomy and identity of an individual comes from a concern that an individual not be treated as a means to some other end. If the irreducible minimum is that of the individual and their status as citizen, then the institutions who are responsible for enabling the individual citizen and their specific rights should not do so in a way that either directly or indirectly infringes on individual dignity. As the Court has recog-

nized in *Carolene Products,*[291] this is particularly true when it comes to minorities who are vulnerable to the vagaries of the political process. The Court's command to protect political minorities, seen through a dignitary lens, ought to lead the Court to robustly hold lawmakers accountable for the exclusion of particularly vulnerable minorities and for the manipulation of, and barriers erected against, the entirety of the citizenry. This is especially true if some group of citizens, who are legitimately exercising their rights as citizens, no matter what their identity, cannot surmount the barrier. This would motivate an aggressive kind of litigation against aggressive voter suppression, and arguably, the kinds of political gerrymandering that lock out the minority party in a state so that the majority party may benefit. The collective possesses these concerns as much as the collective possesses the concerns for the dignity of a state or other political jurisdiction.

Rights claims that do not balance this dual existence regarding the right to vote may ultimately come up short. Fishkin, as we have discussed above, has recognized this dual existence and their overlapping nature.[292] However, I would assert that consideration of the overlap and interplay of the collective dignity interests and the individual dignity interests regarding the right to vote would aid in bringing clarity to the consideration of the right to vote concerns in present day litigation.

This reasoning can both bolster the identity-based dignitary claims we protect within our jurisprudence and create a new category of dignitary right-to-vote claim based on the dignity status of all citizens. The ongoing debates about the mechanisms of felon disenfranchisement ultimately avoid the core substantive issue around the practice—whether ex-felons, who have completed their terms of punishment, are deserving of being treated as equals within the circle of citizens through, among other ways, having their right to vote restored. The majoritarian consensus throughout the history of the United States (and the colonies prior to that) has assumed that the answer is no. However, such settled questions are based on eighteenth-century notions of status in society, and they have not been considered in public debate through the lens of modern conceptions of dignity. This failing represents ongoing needless exclusion from the political process based upon unquestioned dignitary assumptions.

291. *See Carolene Products*, 304 U.S. at 144.
292. *See* Fishkin, *supra* note 32, at 1348-49.

By bringing the dignitary lens to voter regulation debates such as voter identification laws, ease-of-access voting regulations, and proof of citizenship laws, we can make abundantly clear the conflicting interests here and move more forthrightly to correct the overlap. Though framed as a debate between voter access and integrity of the electoral system, a dignitary view would suggest that there are intertwining interests at play. The arguments of those raising an individual rights focus would likely point out that accessibility without unnecessary burdens is essential to the collective. Similarly, ballot security is a need possessed by the individual, but when those needs for ballot security create a too-restrictive system, then the system fails to assist those for whom it was designed. And the design ought to be one of accessibility to all who are eligible. And such eligibility is premised on one's inherent status, and not the ability to prove one's status in a narrowly prescribed way.

CONCLUSION

This Article has argued for a more robust and concerted application of the jurisprudential conception of dignity to right to vote concerns. The concept of dignity, while amorphous, may serve as a way into deeper and more thoughtful inquiries about the nature of the right to vote and how needless exclusion and manipulation of the electorate as instrumentalities interferes with the core dignity of the individual. Similarly, this core value of individual dignity ought to be imbedded within considerations of a communitarian right to vote in the sense that the debates around the appropriate location of control regarding voting rights concerns ought to be seen as secondary to the use of the particular structure to ensure that those structures ought not arbitrarily exclude voters from voting or use voters to serve other ends that distort or diminish their role as citizens.

Nonjudicial Solutions to Partisan Gerrymandering

DEREK T. MULLER*

INTRODUCTION

"In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[1] So wrote Justice Felix Frankfurter in his dissenting opinion in *Baker v. Carr* in 1962.

It was, of course, a dissent. A majority of the Supreme Court in short order reorganized state legislatures according to its own understanding of fair representation—that population should be roughly equal in each legislative district. The majority's basis for doing so,

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1. Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

Justice Frankfurter's dissent chided, "ultimately rests on sustained public confidence in [the Court's] moral sanction."[2]

For decades, partisan gerrymandering has faced sustained challenges in the courts.[3] But the federal courts, while theoretically open to hearing partisan gerrymandering claims, have struggled mightily to articulate a basis or a manageable test for courts to remedy partisan gerrymandering claims.

This Essay offers some hesitation over judicial solutions to the partisan gerrymandering, hesitation consistent with Justice Frankfurter's dissenting opinion. This Essay argues that partisan gerrymandering reform is best suited for the political process and not the judiciary. First, it traces the longstanding roots of the problem and the longstanding trouble the federal judiciary has had engaging in the process, which cautions against judicial intervention. Second, it highlights the weaknesses in the constitutional legal theories that purport to offer readily-available judicially manageable standards to handle partisan gerrymandering claims. Third, it identifies nonjudicial solutions at the state legislative level, solutions that offer more promise than any judicial solution and that offer the flexibility to change through subsequent legislation if these solutions prove worse than the original problem. Fourth, it notes weaknesses in judicial engagement in partisan gerrymandering, from opaque decision-making to collusive consent decrees that independently counsel against judicial involvement.

I. THE LONGSTANDING PROBLEM OF PARTISAN GERRYMANDERING

"Partisan gerrymandering" has been held out as a crucial problem facing contemporary elections in the United States. Before delving into the topic, it is worth stipulating a few things.

First, an open acknowledgement: partisan gerrymandering is a problem. At least, it is a problem broadly speaking—that is, the unjustified entrenchment of a political party's interests that is engaged in redistricting. This term I use, "unjustified entrenchment," is hard to define, a theme that will arise throughout this piece. But broadly defined, I think, everyone can agree that it is a problem, and we can attempt to identify the problem with greater precision later.

2. *Id.* at 267.

3. *See generally* JoAnn D. Kamuf, Comment, *"Should I Stay or Should I go?": The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163 (2005).

Second, partisan gerrymandering is a longstanding problem. It is worth remembering that partisan gerrymandering is hardly new—it is named after Elbridge Gerry, a signer of the Declaration of Independence, a participant in the Constitutional Convention, and the fourth Vice President of the United States.[4] Its longevity, I think, suggests that we should have a humility and caution before engaging in solutions. Any solutions ought to have the perspective that this long and challenging problem might not be quickly and easily solved.

There are caveats to this caution. Federal courts have been thinking about judicially-manageable standards for partisan gerrymandering in a meaningful way since 1986,[5] and political scientists long before that. And we are in a new technological era where we can redistrict with greater precision than ever before, for good or for ill, which may accelerate the need for us to consider solutions, imperfect though they may be.[6] But, again, given how glaringly obvious this problem has been since the Founding, it is worth approaching what we might consider a solution with a sense of humility and caution.

Third, we should stipulate that sometimes, and perhaps even often, political solutions do exist. An examination of the political process in the several states reveals multiple opportunities to reform partisan gerrymandering. I use "reform" in the very broadest sense—improving redistricting to eliminate some of the "unjustified entrenchment" that might otherwise exist. Reforms need not be perfect, and reform efforts may certainly be contested in the political arena as to their efficacy or their desirability. But many opportunities do exist.

Redistricting mainly resides within the legislative chamber in most states,[7] and the legislature is susceptible to political pressure. First, are structural designs that impede a political party from achieving its desired end. In 49 of the 50 states, the legislature is bicameral, which requires two separate legislative chambers to agree to a redistricting plan.[8] Staggered elections in many such chambers prevent a single election before a redistricting cycle from turning over all offices

4. Davis v. Bandemer, 478 U.S. 109, 164 n.3 (1986); *see also* SFF-TIR v. Stephenson, 262 F. Supp. 3d 1165, 1208 n.57 (N.D. Okla. 2017).

5. Kamuf, *supra* note 3, at 171.

6. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 345–46 (2004) (Souter, J., dissenting).

7. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 416 (2006) (concluding that "a lawful, legislatively enacted plan should be preferable to one drawn by the courts" and emphasizing adherence to the "ordinary and proper operation of the political process").

8. Legislative Organization & Procedures, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/legislative-organization-and-procedures-overview.aspx.

in that one election. That means a party cannot as easily be swept into office in control of both chambers of the legislature. Further, some states require a supermajority to approve redistricting, another structural limitation on the ability of a single political party to control redistricting.

The governor—a statewide official elected without redistricting—has veto power in many jurisdictions. For those who worry that legislatures may entrench themselves, the governor is an ungerrymanderable office and can serve as a check on an entrenched legislature.

State constitutions contain restrictions on redistricting, including specifically anti-gerrymandering provisions in places like Florida.[9] And experiments in nonpartisan, bipartisan, or citizen redistricting commissions, like in California or in Arizona, have sought to remove some problems in the process. More such experiments are on the way.[10] Many experiments result from the citizen initiative, an opportunity for the people to enact legislation directly without requiring the approval of the legislature.[11]

These can be procedural reforms, things like getting the self-interested legislators or political partisans out so that someone else draws the lines, or substantive reform, like codified guarantees of representation baked into state law.

There are also alternative reforms that could be explored in the states, things like multimember districts with cumulative voting or proportional or parliamentary-style voting systems.[12] Those, of course, come at a risk or a cost of their own. But we love our single-member districts (and, indeed, Congress has compelled them in congressional elections,[13] for now, at least) and their advantages,[14] like

9. *See generally* FLA. CONST. art. III, §§ 20–21.

10. *See infra* note 53.

11. *See, e.g.*, Sara N. Nordstrand, Note, *The "Unwelcome Obligation": Why Neither State Nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2027 (2018).

12. *See, e.g.*, Aaron Stenz, *Proportional Representation: Ending Partisan Gerrymandering Without the Courts*, MINN. L. REV. DE NOVO (Dec. 30, 2018), http://www.minnesotalawreview.org/2018/12/proportional-representation/; Robert P. Davidow, *Response to Gerrymandering*, 63 WAYNE L. REV. 145, 146, 148 (2018); Robert E. Ross & Barrett Anderson, *Single-Member Districts Are Not Constitutionally Required*, 33 CONST. COMMENT. 261, 285, 297 (2018); Connor Johnston, Comment, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 259–60 (2015). *Cf.* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 485 (1993). *See generally* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 770, 832–55 (2013); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241.

13. *See* 2 U.S.C. § 2c (2018).

14. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002).

responsiveness of representatives and accountability to voters, suggest that more dramatic reform efforts in representation remain far off.

All that is to say, there remain many political avenues for handling redistricting. And that is all even before I get to the most powerful political check of all, the ballot box. The voters, after all, do have the power to dispose of elected officials whom they believe to be misusing or abusing their power.

Now, this gets to the heart of the partisan gerrymandering problem: but, how *can* I vote those elected officials out, if they've drawn district lines that unjustifiably entrench themselves? Of course, they can't do this for all offices—including governor. Legislative overreach could have a significant backlash.

Here, I think, is where the question of judicial review enters, *as a practical matter*. But I want to pause here at a point where we may want judicial review and ask, judicial review pursuant to what? It is not enough to say that partisan gerrymandering is a problem and the judiciary ought to get involved. One must point to a law that entitles the judiciary to do so. That has been an ongoing problem for the federal courts.

II. THE CHALLENGES OF FINDING A LEGAL FRAMEWORK

The complexity surrounding judicial involvement in partisan gerrymandering disputes begins with the political question doctrine or a question of the justiciability of partisan gerrymandering claims in federal court. Federal courts have typically held that there is no "case" or "controversy" under Article III if the matter is left to another branch of government or to the political process.[15] Impeachment, for instance, is a matter left to Congress and not the courts.[16]

For years, courts had determined that questions about redistricting were left to the political process. But in 1962, the Supreme Court issued its decision in *Baker v. Carr*.[17] *Baker v. Carr* dealt with malapportioned districts—the state legislature was supposed to redraw legislative districts every ten years but had not in sixty years, and some districts had a far larger population than others.[18]

15. *See generally* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist 'Rebuttable Presumption' Analysis*, 80 N.C. L. REV. 1165 (2002).
16. Nixon v. United States, 506 U.S. 224, 229 (1993).
17. *See generally Baker*, 369 U.S. 186 (1962).
18. *Id.* at 191–92.

The Supreme Court concluded that the federal courts could evaluate this claim under the Equal Protection Clause of the Fourteenth Amendment.[19] From that decision came a series of famous redistricting decisions articulating the principle of "one person, one vote"—when drawing legislative districts, states must include roughly equal numbers of people in each district.[20]

The redistricting cases were a prelude to the partisan gerrymandering cases. To return to an earlier question: when has a state legislature engaged in partisan gerrymandering, or the unjustified entrenchment of a political party's interests, such that a federal court ought to intervene? In *Baker*, the redistricting claim opened with something of a state constitutional right to have roughly equal populations in districts.[21] In the partisan gerrymandering cases, the claim is something different—that a party has gone too far in entrenching its own interest.

We can open with some questions about what the concerns are and how we ought to measure the problem. That could be a political science question, but it is also one that must ultimately be viewed through the lens of a constitutional provision at issue.

Should federal courts be concerned by the bad partisan *intent* of the legislature when drawing district lines?[22] Or the bad partisan *effect*, some outcome of the political process or some impact on voters? Or do we need both intent and effect?

Intent is a hard thing to measure—legislators always act for many reasons, and surely some are acting for partisan purposes in *every* redistricting system. Then again, some forms of intent may simply go too far—and the challenges determining legislative intent have not been a barrier to federal courts in other contexts. For instance, federal courts have readily determined whether a state legislature acted with impermissible racial intent when drawing legislative districts.[23]

19. U.S. CONST. amend. XIV § 1 (". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

20. *See* Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371, 372 (2016).

21. *Baker*, 369 U.S. at 187-88, 192-94.

22. *See, e.g.*, Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018).

23. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 633 (1993); Miller v. Johnson, 515 U.S. 900, 903-04 (1995); Bush v. Vera, 517 U.S. 952, 956 (1996); Shaw v. Hunt, 517 U.S. 899, 901-02 (1996); Easley v. Cromartie, 532 U.S. 234, 237 (2001); Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262 (2015). *Cf.* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 505–10 (1993) (identifying an expressive harm).

Effect presents its own challenges. How do we decide that the outcome is bad? Political scientists refer to *proportionality*, or *symmetry*, or the "efficiency gap," as some different ways of measuring the effect of the kind of partisan advantage that's unjustified. But each theory comes with some assumptions about what the best way to measure fairness is or what outcomes are unfair to voters.

Should federal courts look at each *individual district* and how it's drawn to determine whether that district was an improper partisan gerrymandering? Or should they look at the *state as a whole*, like an entire congressional delegation or the composition of a house of the state legislature?

Should federal courts look at a funny *process* as a sign of concern for a partisan gerrymander? For instance, we expect districts to be compact as a procedural value, and the less compact they are, the more we are convinced that the legislature has an ulterior motive for the districts it drew.[24]

Even before we look at how the Supreme Court has handled the issue, we should come up with some standard—and not just a standard that seems to make sense, or a standard that political scientists argue makes sense, but something *tethered to a provision of the Constitution*.

These are not remarkable or novel questions. The Supreme Court has been grappling with them since 1986. In *Davis v. Bandemer*,[25] the Court concluded that challenges about partisan gerrymandering were justiciable[26]—that is, courts could handle them, just like the Court agreed that malapportionment cases were justiciable in *Baker v. Carr*.

But *Bandemer* offered the same limitations as *Baker v. Carr*. The Court said that such claims were justiciable but did not identify what those standards would be. The concept of "one person, one vote" arose in the Court's jurisprudence just two years after *Baker v. Carr*.[27] Perhaps the Court expected that it could identify a judicially manage-

24. *Cf.* Shaw, 509 U.S. at 647 ("So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions. We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.").

25. *Bandemer*, 478 U.S. 109.

26. *Id.*

27. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

able standard to evaluate partisan gerrymandering claims shortly after *Bandemer*.

But the uncertainty was obvious in *Bandemer* because of the way the Court fractured, unlike in *Baker v. Carr*. Justice Byron White's controlling opinion in *Bandemer* concluded a few things. First, courts were to look at both intentional discrimination and an effect of discrimination on that group.[28] Second, Justice White rejected that proportionality was something the Constitution protected. Instead, partisan gerrymandering would only exist where it "will consistently degrade a voter's or a group of voters' influences on the political process as a whole."[29] Or, if the system "substantially disadvantages certain voters in their opportunity to influence the political process effectively."[30]

Words like "consistently" suggested a temporal element; "substantially" suggested a severity element; and "effectively" suggested a results-based element. But these adverbs offered little guidance to the lower courts, which were reluctant to find a partisan gerrymander in the decades following *Bandemer*.

In 2004, the Supreme Court revisited partisan gerrymandering in *Vieth v. Jubelirer*.[31] Four justices on the Court would have found partisan gerrymandering claims nonjusticiable. Justice Antonin Scalia's plurality opinion emphasized that in eighteen years since *Bandemer*, lower courts and the Supreme Court had failed to articulate judicially manageable standards for reviewing partisan gerrymanders.[32]

Four other justices divided among three separate theories, each with its own limitations. Justice John Paul Stevens proposed an intent-focused inquiry using a test much like racial gerrymandering claims in partisan gerrymandering claims[33]—but, of course, racial classifications are subject to strict scrutiny, while political classifications are subject to something less.[34]

Second, Justice David Souter proposed a five-step inquiry that looks similar to vote dilution claims in Section 2 of the Voting Rights Act—a cohesive group in a non-compact district, with deviations and

28. *Bandemer*, 478 U.S. at 127.
29. *Id.* at 132.
30. *Id.* at 133.
31. *Vieth*, 541 U.S. at 267 (plurality opinion).
32. *Id.* at 281.
33. *Id.* at 317 (Stevens, J., dissenting).
34. *But see* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

intentional manipulation demanding new districts.[35] He would have imported a congressional statute into a constitutional test, a fairly strong suggestion that the test lacks any meaningful basis in the text of the Constitution itself.

Third, Justice Stephen Breyer proposed a whole-factor test of "unjustified" and looked at the totality of the plan.[36] While Justices Stevens and Souter each proposed looking at individual districts, Justice Breyer suggested looking at the totality of the plan, similar to the original "one person, one vote" cases.

Justice Anthony Kennedy held the decisive vote, but his opinion simply postponed the issue.[37] He agreed with the four dissenting justices that partisan gerrymandering claims were justiciable. But he concurred in the judgment because he found that the challengers' claims failed to provide "clear, manageable, and politically neutral standards"—at least, in that case.[38]

Justice Kennedy emphasized two major problems for courts seeking to resolve partisan gerrymandering claims. First, there was no settled substantive definition of "fairness" to determine when partisan gerrymandering had crossed the line from ordinary politics into a constitutional violation.[39] Second, he found proposed tests lacked any limiting principles that might constrain judges when those judges were asked to engage in what had historically been a political question.[40] Perhaps in the future, he mused, more powerful computers could make improper partisan gerrymanders more evident to the judiciary.[41]

He also noted that the First Amendment might be a better source for courts to review such claims than the Equal Protection Clause.[42] After all, it is insufficient to say that under some theory of political science a map looks like a gerrymander (although, of course, some state could pass a law mandating that redistricting take place pursuant to certain criteria). Instead, it is a question of articulating what, under the Equal Protection Clause or the First Amendment, is the legal test—why *this* is the legal standard that judges are supposed to apply.

35. *Vieth*, 541 U.S. at 343, 347–350 (Souter, J., dissenting).
36. *Id.* at 355 (Breyer, J., dissenting).
37. *Id.* at 304 (Kennedy, J., concurring in the judgment).
38. *Id.* at 307–08.
39. *Id.* at 306–08.
40. *Id.* at 307–08.
41. *Vieth*, 541 U.S. at 312–13.
42. *Id.* at 314–16.

In its 2018 decision *Gill v. Whitford*, the Court again postponed addressing the major issue left open in *Bandemer* and *Vieth*. Instead remanding the case about allegations of partisan gerrymandering in Wisconsin for another day. But Justice Elena Kagan's concurring opinion emphasized the First Amendment route once again, pointing to the freedom of association cases.[43]

The freedom of association cases rest on the notion that candidates and voters have a First Amendment right to associate with one another by means of the ballot.[44] When a state enacts a law that makes it more difficult for voters and candidates to associate with one another, courts scrutinize that law in line with the character and magnitude of the burden placed upon that right of association. If, say, a law makes it too difficult for the Socialist Party's preferred candidate to appear on the ballot, or if a voter identification law makes it too difficult for voters to cast a vote,[45] then the law may fail.

But this longstanding line of cases deals with the ability or the inability of voters and candidates to associate with one another. It does not extend to the quality of that association. You could vote for the Socialist Party candidate, or you could show the proper form of identification and cast a ballot, but your candidate might ultimately lose. The typical associational election cases do not include some qualitative measure of association.

It would be a novel extension of the freedom of association cases into the domain of measuring the quality of association. But taking up Justice Kagan's suggestion, one federal district court addressing a challenge to Maryland's congressional redistricting found such a qualitative burden among Republican voters: "a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion."[46] Voters could associate with any candidate of their choice, but the court found an associational infringement because the map diminished the quality of that association.

43. *See, e.g.*, Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2173, 2204, 2206 (2018); Bertrall L. Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2189–90 (2018).

44. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 206 (2008); Burdick v. Takushi 504 U.S. 424, 438 (1992); Anderson v. Celebrezze, 460 U.S. 779, 787–88 (1983); *see also* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 714–40 (2016); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016).

45. *See* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 1, 25 (2019).

46. Benisek v. Lamone, 348 F. Supp. 3d 493, 523 (D. Md. 2018).

Justice Kagan articulated a version of this theory in *Gill* to provide future litigants a potential roadmap to a successful claim. But it seems unlikely that "a sense of disconnection" will be enough to attract five justices' support for the plaintiffs' theory. There has been little such empirical work on this topic, but new work continues to develop.[47] And if the Court were to go down this route, the line-drawing is no easier.

There are good reasons to doubt, then, that the Constitution—at least, the Equal Protection Clause or the First Amendment—have much to say about partisan gerrymandering, at least as the current partisan gerrymandering cases have bubbled up in litigation. Partisan wrangling is inevitably a part of any redistricting process. And even judicially constructed prohibitions on partisan gerrymandering imported into the clauses have been notoriously difficult to articulate. But just because judicial resolution may be inappropriate does not mean that partisan gerrymandering is an intractable problem. Nonjudicial solutions do exist.

III. NONJUDICIAL OPPORTUNITIES TO ADDRESS PARTISAN GERRYMANDERING

An alternative is to leave the question to the political process. Admittedly, the political process is messy and can be time-consuming. But in certain jurisdictions, the political process will assuredly differ after the 2020 census than the redistricting that took place after the 2010 census.

States like Maryland, Michigan, and Wisconsin had unified partisan control over the state legislature and the state governorship. But after the 2018 election, while Democrats still control the Maryland legislature (and may well control it after the 2020 election), a Republican now holds the office of governor. In Michigan and Wisconsin, while Republicans maintain control of the legislatures, Democrats have taken over the governors' mansions. Bipartisan agreement will precede any new map in those jurisdictions.

The political process also allows for competing proposals and fulsome debate over the best solutions, as opposed to a one-size-fits-all judicial solution imposed on every governmental unit. For instance,

47. *See, e.g.*, Christopher Warshaw & Nicholas Stephanopoulos, *The Impact of Partisan Gerrymandering on Political Parties*, SOC. SCI. RESEARCH NETWORK (Feb. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330695.

should partisan gerrymandering be addressed as a procedural problem or a substantive problem? Procedurally, removing self-interested legislatures and replacing them with commissions may be a way of curing the problem of self-interest.

Consider a pair of examples after the 2010 Census. Californians enacted a ballot initiative that handed over redistricting power to a fourteen-member citizen commission.[48] Arizonans enacted a ballot measure that gave redistricting over to a five-member commission.[49] The (sometimes complicated) procedures for choosing commissions varied.

The express guidelines given to the commissions differed, too. In California, maps could not favor or discriminate against incumbents or political parties.[50] But in Arizona, the Constitution expressly instructs the commission to make "competitive districts" when practicable.[51] And while both plans promised benefits, it isn't obvious that the commissions are working as desired, and the matter remains subject to debate.[52]

Depending on the values one has for redistricting, the instructions for the commission will inevitably differ. These political judgments are ripe for the political process to determine—and not the judiciary. And the diverging reforms continue: the 2018 midterm elections saw successful redistricting commission initiatives in Colorado, Michigan, Missouri, and Utah. Each differs from each other.

One may be tempted to draw upon the "laboratories of democracy" metaphor for allowing the states to experiment with different redistricting reforms.[53] But I'm reluctant to invoke that metaphor. "Laboratories" suggest a kind of scientific inquiry, and with enough

48. *See* CAL. CONST. art. XXI, §§ 1, 2, & 3.

49. ARIZ. CONST. art. IV, pt. 2, § 1.

50. CAL. CONST. art. XXI, § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.").

51. ARIZ. CONST. art. IV, pt. 2, § 1(14)(F) ("To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.").

52. *See, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Richard L. Hasen, *Assessing California's Hybvrid Democracy*, 97 CALIF. L. REV. 1501 (2009); Vladmir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. OF POLITICS & POL'Y 1 (2012).

53. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

time and enough experiments run, the states will develop some optimal solution that will inevitably be implemented on a widespread basis. I'm not persuaded that's the best way to think about redistricting. Redistricting requires consideration of several different competing values.[54] Different people acting in good faith may well dispute what they value most in redistricting and what outcomes are best. That may well vary from state to state, and we may never reach consensus about what those values are.

There is assuredly political science literature that suggests that the typical voter doesn't care about redistricting.[55] But the success of ballot initiatives in 2018 suggests that perhaps voters can be educated and persuaded to enact reform measures. (Whether the reform measures are the best route or will succeed in accomplishing their purported ends, of course, are other appropriate debates.)

And the fact that voters have the ability to pressure the legislature but choose not to do so suggests a mismatch between what political scientists and "reformers" believe the extent of the problem and the public writ at large. The voting public may decide something that reform advocates disapprove of—but that's hardly a reason to demand the judiciary step into the breach.

IV. PERILS OF JUDICIAL INVOLVEMENT TO ADDRESS PARTISAN GERRYMANDERING

A response to the claims of this Essay so far might be: yes, the political process may be responding to concerns about partisan gerrymandering, but what about including courts as an *additional* part of the process? After all, the courts might serve as a safety valve if this political process fails.

I've already identified the weaknesses of the substantive legal theories that purport to act as the constitutional hook.[56] And courts are unlikely to require the kind of sixty-year exhaustion that was present in *Baker v. Carr.* (Indeed, in all "one person, one vote" cases after *Baker v. Carr*, the extraordinary measures that were a touchstone of justiciability evaporated. Once a legal claim is found justicia-

54. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 612 (1998).

55. *See, e.g.*, Nicholas O. Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J. OF L. & POLITICS 331, 336–37 (2007).

56. *See supra* Part II.

ble, it is justiciable immediately, and the most impatient plaintiff can immediately challenge the map. Immediately, of course, subject to durability concerns in the partisan gerrymander.[57])

But even then, some might find these unconvincing—perhaps because judges might construct partisan gerrymandering claims as natural extensions of principles explained in the Constitution, or perhaps because if there is a constitutional right there need not be a time-delayed remedy.[58] And state judiciaries might offer opportunities that federal courts do not.

But there are at least a couple of reasons to find affirmative problems with judicial intervention in this quintessentially political question. First, courts might engage in opaque remedies that achieve their preferred outcomes without providing express guidance to the legislature. Second, parties might litigate the matter and enter a collusive consent decree to circumvent the legislative process.

A. Subversive Gerrymandering Reform

Litigation in state courts in Pennsylvania displays one possible weakness in judicial solutions to partisan gerrymandering.[59] Because the federal courts have been reluctant to engage in judicial review of partisan gerrymandering, state courts are an alternative route for challengers to seek redress under state constitution. Challengers claimed that Pennsylvania Republicans created an unconstitutional partisan gerrymandering that entrenched Republican members of Congress.

In 2018, the Pennsylvania Supreme Court issued a remedy in a partisan gerrymandering case over congressional maps.[60] The remedy was a map drawn by the court. And what was the Court remedying? A claim that the map was an unfair partisan gerrymander under the commonwealth's constitution.

But what was the remedy demanded by the court? It instructed the legislature and governor to agree on a plan that adhered to three values: compactness, contiguity, and avoidance of dividing jurisdictions.

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57. *Id.*

58. *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 239–240, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239681.

59. *See Subversive Gerrymandering Reform in Pennsylvania*, EXCESS OF DEMOCRACY (Feb. 20, 2018), http://excessofdemocracy.com/blog/2018/2/subversive-gerrymandering-reform-in-pennsylvania.

60. League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 817–18 (Pa. 2018).

That remedy isn't very much like the remedy to the initial problem: did Republicans unfairly advantage themselves too much under the commonwealth's constitution when drawing congressional districts? Certainly, a lack of these three traits could be signs of concern for the court. But the lack of compactness was not the underlying problem with the map.[61] And while the court asked the parties to draw maps with these three traits as a proposed remedy, the court offered no additional traits or specific guidance about what the map ought to include.

Remedies came pouring in. Unsurprisingly, partisan divisions in the Pennsylvania government meant that there was no unified agreement on a new map (along with a calculated gamble from Democrats that the court's map would be more favorable to them than a compromise with Republicans). In the end, the court issued its own map.

The map, of course, adheres to these three values, albeit not perfectly (few maps do), to make calculated tradeoffs. Those tradeoffs were a significant benefit to Democratic candidates' chances in the commonwealth.[62]

Something occurred beneath the surface of the Pennsylvania Supreme Court's order. Professor Nick Stephanopoulos noted that this remedy "promises actually to cure the underlying constitutional violation," unlike simply addressing the three values.[63] The *New York Times* emphasized, "The court's apparent prioritization of partisan balance is something of a surprise, since the court's order didn't specify that partisan balance was an objective for the new map."[64]

This subterranean action of the Pennsylvania Supreme Court does not call into doubt the sincerity of the justices on the court or those involved in drawing maps. Partisan fairness is as legitimate a political criterion to use when thinking about how to draw maps as partisan-blind or neutral criteria.

But the Pennsylvania Supreme Court did not act forthrightly in its opinion dictating criteria and its ultimate map. The criteria it enun-

61. *See, e.g.*, Nicholas Stephanopoulos, *Cutting-Edge Evidence and an Old-Fashioned Decision*, ELECTION LAW BLOG (Feb. 8, 2018), http://electionlawblog.org/?p=97422.

62. Nate Cohn, *Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania*, N.Y. TIMES: THE UPSHOT (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/upshot/democrats-did-better-than-on-hundreds-of-simulated-pennsylvania-maps.html.

63. Nicholas Stephanopoulos, *The Pennsylvania Remedy*, ELECTION LAW BLOG (Feb. 19, 2018), http://electionlawblog.org/?p=97606.

64. Nate Cohn, Matthew Block, & Kevin Quealy, *The New Pennsylvania Congressional Map, District by District*, N.Y. TIMES: THE UPSHOT (Feb. 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

ciated—its three values of compactness, contiguity, and avoidance of dividing jurisdictions—were never really going to cure the problem it had identified.

And the court likely recognized the dilemma of inserting a political judgment like partisan fairness into a rule mandated by the State Constitution with little textual basis for doing so. The Pennsylvania Supreme Court apparently did not want to include language like "seats-votes ratio" or "partisan fairness" into its construction of the commonwealth's constitution. Perhaps it's understandable—doing so would be controversial and perhaps even politically unpopular by all parties. It would have to articulate standards about how to achieve those results. It would need to spend more time explaining how it could go about achieving those ends, much less political actors in the state.

In the end, the court it didn't include that language. But there is no doubt, from every commentator looking at the outcomes, that partisan fairness was precisely the court's concern when drawing the new map. It consciously engaged in a partisan fairness inquiry of mapmaking, when that was not articulated expressly as one of the three criteria it asked the legislature to use in its new map, and when that was not expressly one of the criteria that it found required by the commonwealth's constitution.

It is subversive, in my view, for the judiciary to articulate one basis for a decision but then actually act on another, or to insist that the commonwealth's constitution demand one thing but act like it insists another. Or, even if the court did not believe that the constitution demanded it, the choice to overtly engage in a partisan fairness inquiry with no explanation or justification about how it made that choice.

Maybe, of course, we simply accept that a state judiciary like Pennsylvania's is made up of elected partisan-affiliated judges, and they are behaving like political actors, just as if they were legislators. But this is cold comfort for those who have argued that the judiciary would be the place to *remove* the political pressures attendant in the redistricting process.

Until then, we shall see if this process plays out in other states—opaque neutral criteria articulated by a state supreme court, then value judgments never previously articulated like partisan fairness incorporated into the final judicial remedy.

B. Collusive Consent Decrees

Michigan's congressional, state senate, and state house legislative districts faced a partisan gerrymandering lawsuit filed in federal court in 2017.[65] Challengers alleged that Michigan's Republican-controlled state legislature improperly engaged in partisan gerrymandering after the 2010 census.[66]

In the 2018 elections, however, a new Secretary of State, a Democrat, won the election and took office in 2019. The new Secretary of State proposed entering into a consent decree with the challengers to declare eleven Michigan House districts unconstitutional partisan gerrymanders, while leaving the state senate and congressional districts untouched.[67]

Concerns arose about a similar practice of "sue-and-settle" in federal environmental litigation. There, the alleged practice involved private parties suing the Environmental Protection Agency in federal court. The agency enters into a consent decree with the plaintiffs, sometimes the same day the suit is filed, which suggests a kind of collusion between the parties. The proposition has been debated in academic literature.[68]

Setting aside the merits of that debate, it remains a theoretical concern that parties could collusively consent to an enforceable agreement that circumvents the actions of the legislature. Indeed, Michigan's incoming Secretary of State helped lead the opposition against the Republican-controlled redistricting plan back in 2011.[69] Days after taking office, she proposed entering into the consent decree with the challengers to the map. The lawsuit presented an opportunity for a single elected official who believed the map to be unfair to enter

65. League of Women Voters of Mich. v. Johnson, 902 F.3d 572, 576 (6th Cir. 2018).

66. *Id.* at 575.

67. *See* Joint Motion To Approve Consent Decree, League Of Women Voters Of Michigan, Et Al. V. Jocelyn Benson, No. 2:17-cv-14148 (D.C. E. Mich. Jan. 25, 2019).

68. *Compare* David B. Rivkin, Jr. & Adam Doverspike, *Do Sue and Settle Practices Undermine Congressional Intent for Cooperative Federalism on Environmental Matters?*, 15 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 22, 41 (2014), with Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 937 (2014). *See also* Ben Tyson, Note, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 VA. L. REV. 1545, 1563 (2014) (finding increase in the practice of "sue-and-settle" but suggesting it is not about "secret rulemaking," or evading the requirements of the Administrative Procedure Act).

69. Joel Kurth, *Will Jocelyn Benson defend Michigan gerrymandering tactics she once fought?*, BRIDGE (Jan. 11, 2019), https://www.bridgemi.com/public-sector/will-jocelyn-benson-defend-michigan-gerrymandering-tactics-she-once-fought.

into a consent decree with challengers of the map. A justiciable claim created the opportunity for this type of agreement.

In the end, a collusive consent decree never materialized, because a federal court considered the proposed consent decree and rejected it.[70] It concluded that the Secretary of State lacked the power to bind the Michigan state legislature. While a collusive consent decree didn't occur there, it remains a possibility for future litigation. Of course, perhaps the whole point of having the judiciary engage in fairness inquiries into consent decrees and robust third-party intervention will minimize these concerns in the future.

CONCLUSION

Partisan gerrymandering is a problem. But there are good reasons to think that the political process is the better place to address this problem. The federal judiciary has struggled to develop standards to remedy partisan gerrymanders and to identify how the Constitution controls those standards. More importantly, the political process offers unusual flexibility for advocates for reform, and the judiciary offers its own perils if it finds itself injected into reform efforts. And the political process has been the source of most reform efforts in the last decade. In the event the Supreme Court chooses to overrule *Davis v. Bandemer* and returns the matter of partisan gerrymandering to the political process, we should expect the political process to continue to respond. The political process may not operate as quickly as reformers may prefer, but after more than two hundred years of partisan gerrymandering, slow and incremental change is to be expected.

70. Paul Egan, *Gerrymandering Case Heads to Trial After Court Rejects Michigan Secretary of State's Settlement*, TRIBUNE NEWS SERV. (Feb. 4, 2019), https://www.governing.com/topics/politics/tns-benson-michigan-secretary-of-state-judge-gerrymandering.html.

Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation

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INTRODUCTION

In *Yick Wo v. Hopkins*,[1] the United States Supreme Court memorably observed, almost orthogonally, that voting is "a fundamental political right, because it is preservative of all rights."[2] *Yick Wo* was a peculiar place for the Court to essentially announce what one could

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We are very thankful to Jennifer Morgan, librarian at Maurer, for her help in locating government documents.

1. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
2. *Id*. at 370.

fairly characterize as a positive universal right of political participation. The case was not about voting but racial discrimination in the laundry business.[3] Chinese laundry operators were denied permits to continue the operation of their laundry businesses by the San Francisco Board of Supervisors.[4] The operators continued to operate their business, were fined and eventually jailed.[5] The issue before the Supreme Court was not whether they were improperly imprisoned, but whether the ordinances, pursuant to which they were denied their permits, were administered in a racially discriminatory manner and thus violated the Equal Protection Clause of the Fourteenth Amendment.[6]

Writing for the Court, Justice Matthews objected to the ordinances on the ground that they permitted the decision makers to exercise their discretion on mere whim, or what he branded "purely personal and arbitrary power."[7] Justice Matthews argued that this unfettered discretion was contrary to the very freedom canonized by the Reconstruction Amendments. In his words, "the very idea that one man may be compelled to hold his life, or the means of living, or any material essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails."[8] Poignantly, considering that the Thirteenth Amendment had been ratified only twenty years earlier, he analogized this system of decision-making unconstrained by any limits other than caprice as "the essence of slavery itself."[9]

To illustrate the truth of this proposition—that it is "intolerable" that "one man may be compelled to hold . . . any material essential to the enjoyment of life[ ] at the mere will of another"— Justice Matthews offered as his first example the "case of the political franchise of voting."[10] This is a remarkable shift in the life of the nation and its understanding of rights as conduits of liberty. Barely 20 years before, a conception of freedom, as codified in the Civil Rights Act of 1866, focused only on the narrow question of free labor and economic

3. *See id*. at 366.

4. *See id*.

5. *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts about Yick Wo*, U. ILL. L. REV. 1359, 1362 (2008).

6. *Yick Wo*, 118 U.S. at 373. For a contrary view, see Chin, *supra* note 5.

7. *Yick Wo*, 118 U.S. at 370.

8. *Id*.

9. *Id*.

10. *Id*.

agency in the marketplace.[11] Yet by the time of *Yick Wo*, voting had become "essential to the enjoyment of life."[12] To be sure, Justice Matthews acknowledged that voting is "not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions."[13] And he further conceded that a legislature may "adopt any reasonable and uniform regulations" to administer a political right or privilege.[14] What a legislature may not do is implement regulations that "should subvert or injuriously restrain" these rights or privileges.[15] Consequently, state courts may review whether regulations "were or were not reasonable regulations, and accordingly valid or void."[16] For support, he cited a voting discrimination case, *Monroe v. Collins*,[17] decided by the Ohio Supreme Court in 1867, before the ratification of the Fifteenth Amendment.

Yick Wo is a remarkable case, not least of which because the Court deduced the principle that arbitrary deprivation of a fundamental right was incompatible with freedom. More importantly, the Court understood voting as the archetypal example of a fundamental right and expressed its fundamentality in the language of universality. Though allowing that voting was not "strictly" a natural right, Justice Matthews minimized the cost of that concession by imposing limits on how the government could regulate the right.[18] It was in this context that Justice Matthews expressed the now iconic view that the right to vote "is regarded as a fundamental political right, because preservative of all rights."[19]

Justice Matthews's observation in *Yick Wo* had its most famous expression almost one hundred years later in another landmark case, *Reynolds v. Sims*,[20] which examined the malapportionment of Alabama's legislature. Citing *Yick Wo*, Chief Justice Earl Warren memorably exclaimed in *Reynolds* that "[u]doubtedly, the right of suffrage is a fundamental matter in free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is

11. Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27 (1866); *see* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN (1970).
12. *Yick Wo*, 118 U.S. at 370.
13. *Id.*
14. *Id*.
15. *Id*.
16. *Id.*
17. Monroe v. Collins, 17 Ohio St. 665 (1867).
18. *Yick Wo*, 118 U.S. at 370.
19. *Id*.
20. Reynolds v. Sims, 377 U.S. 533 (1964).

preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[21] Following *Reynolds* and the malapportionment cases, every state would have to draw its legislative districts consistent with the constitutional maxim of one-person one-vote.[22] Population inequality in apportionment was a violation of the individual citizen's "right to exercise the franchise in a free and unimpaired manner."[23]

Yick Wo and *Reynolds* appear to stand for a fundamental axiom, akin to a universal truth, at the heart of the American democratic experiment: voting is a positive, universal, and fundament right. As Alex Keyssar put it in his definitive history of the right to vote: "the image of a democratic United States is that of a nation with universal suffrage."[24] However, to the extent that *Yick Wo*, *Reynolds*, and other similar examples purport to offer a descriptive account of the practice of democracy in the United States, that account is woefully inaccurate. Consider some examples.

We are currently in the midst of a decentralized and unorganized debate over the preconditions that states can impose as prerequisites to democratic participation. Some argue that state laws requiring voters to present photographic voter identification at the polls or when they register to vote before they are allowed to cast their ballots are designed to impede the exercise of the right because they are not related (rationally or otherwise) to any legitimate or important state objective. Are these laws designed to facilitate the voter's ability to exercise the franchise in a free or unimpaired manner, or do they subvert or impede the right? Consider also North Carolina's omnibus voting reform law. The law eliminates same-day registration, straight party voting, out-of-precinct voting, and teenage pre-registration.[25] It bars county election boards from ordering polls to stay open an extra hour if problems arise.[26] It shortens early voting days.[27] Notably, the

21. *Id*. at 562.

22. *Id*. at 589–90 (Harlan, J., dissenting) ("In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate.").

23. *Id*. at 562.

24. Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States xx (Basic Books 2009).

25. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 217–18 (4th Cir. 2016).

26. *See id*.

27. *See id.*

56-page law was passed in the last 72 hours of the 2013 General Assembly.[28] Similar laws have passed across the states.[29]

In a different vein, consider the modern debate about political gerrymandering. Should the government be permitted to draw lines in a way that maximizes the electoral prospects of the party in charge of the line-drawing and minimizes the electoral prospects of the opposing party? Should the government be allowed to move voters in or out of districts in order to dilute their vote simply because the voters are likely to vote against the government's preferences?

Finally, consider debates about the denial of the vote to certain classes of people. United States citizens living in Puerto Rico have neither a right to vote for a member of Congress nor are they not entitled to representation in the Electoral College.[30] This is because Puerto Rico is not a state and federal representation remains largely within state authority. Similarly, residents of the District of Columbia cannot vote for members of Congress but can vote for presidential electors by grace of the Twenty-Third Amendment. And felons or ex-felons, even if citizens of the United States, may be denied the right to vote in both federal and state elections.[31]

The Court's declaration in *Reynolds,* and by extension *Yick Wo*, assumed that voting was a right and declared confidently that the right was fundamental. But American democratic practice has yet to reconcile itself with the lofty theoretical language of universality and fundamentality expressed in *Reynolds* and *Yick Wo*. Since at least the advent of the Voting Rights Act, we have generally viewed our struggles about voting through the prism of race. This is, in part, because voting and political participation in the United States have always been imbricated with the struggle for racial equality.[32] The history of voting in the United States and the struggle for racial equality are not the same phenomena, but they are related. In fact, we argue that one

28. *See* William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

29. *See* Max Garland et al., *New Voting Laws in the South Could Affect Millions of African Americans*, NBC NEWS (Aug. 29, 2016), https://www.nbcnews.com/news/nbcblk/new-voting-laws-south-could-affect-millions-african-americans-n639511; Ari Berman, *The GOP War on Voting*, ROLLING STONE (Aug. 30, 2011), https://www.rollingstone.com/politics/politics-news/the-gop-war-on-voting-242182/.

30. Igartua De La Rosa v. United States, 229 F.3d 80, 83 (1st Cir. 2000).

31. Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

32. Is it simply an accident of history that *Yick Wo*, the case in which the Court declares the fundamentality of voting is a case about racial discrimination?

cannot understand the scope and contours of the legal status of voting apart from race. Race has mediated our engagement with voting.

In this brief history of race and voting in the United States, we look at five distinctive yet interrelated moments. The first is the founding period, a moment when the framers put our constitutional structure in place and set the initial federalist calculus in favor of the existing states.[33] This is perhaps the most important moment in the story. The framers chose to allow the states to define the criteria for voting qualifications for federal elections.[34] Instead of uniformity and centralization, they opted for diversity and decentralization.[35] This is a choice that reverberates to this day. The second moment is the Civil War and Reconstruction, a moment acknowledged by many as a time when congressional leaders reset the federalism calculus towards the national government. The third moment is the expected retrenchment by the turn of the century, beginning in 1890 with the Mississippi plan. The fourth is the Second Reconstruction, which, for our purposes, culminated in the passage of the Voting Rights Act of 1965. The final moment is the concomitant retrenchment, exemplified by the recent *Shelby County*[36] decision, and what commentators have labeled the new voter suppression. We take up each moment in turn.

From this brief history, we distill three lessons. First, we underscore that this is not a whiggish history of inevitable progress. Second, this is a story that highlights the underappreciated role of social movements, the complementary role played by the United States Supreme Court, and the limits of constitutional norms, even explicit ones. Finally, and what we take to be the most important point of this history: The history of the right to vote in the United States is a history of battles over political power fought on a distinctively racialized canvas. Race has been the archetype for our understanding of voting. This is crucial if under-appreciated. Rather than debate the merits or costs of expanding political rights, we have instead litigated these issues on racial terms. There has been a distinctive benefit of viewing questions of voting and political participation through the lens of race. It is because of our thinking about race and voting that we as a society are slowly coming to the realization that restrictions on voting and politi-

33. *See* U.S. CONST. amend. X.

34. *See* U.S. CONST. art. 1, sec. 2.

35. *Id.* (illustrating that the new national government placed on the states the authority to define who "the people" were).

36. Shelby County v. Holder, 570 U.S. 529 (2013).

cal participation are hard to justify, whether they implicate race or not. It is thus ironic, as we conclude, that because of race, we are slouching toward universality.

I. THE FIRST MOMENT: THE FOUNDING, REPRESENTATION AND OUR FEDERALISM

The original U.S. Constitution – understood as the document ratified in 1787 plus the Bill of Rights – is curiously silent on the nature and scope of the nascent American political community. Though surprising to modern political sensibilities, the original Constitution says precious little about the right to vote. This silence is consistent with the amount of time the convention delegates devoted to the issue. The delegates focused on the defect of the existing confederation, such as securing against foreign invasion, checking the quarrels between the states, and failing to attain any advantages that their union would bring.[37] These were all classic defects inherent to collective action. Drawing the political boundaries of the new nation – that is, deciding how far to extend the right to vote – was not at the forefront of the debates.

The Constitutional Convention reached a quorum and opened for business on May 25.[38] And for the first two months, convention delegates took up and debated the big questions.[39] Finally, on July 26, the day before the convention recessed for two weeks, the issue finally arose.[40] George Mason moved "that the Committee of detail be instructed to receive a clause requiring certain qualifications of landed property & citizenship ⟨of the U. States⟩ in members of the Legislature."[41] Mason also moved to disqualify anyone "having unsettled Accts. with or being indebted to the U. S." from serving in the new Congress.[42] These proposals went to the heart of the delegates' conceptions of political equality. Should the Constitution set any limits on the political community, on either the electors or the elected? And more importantly, what role should property ownership play in this debate? This was no idle question. The question was not whether the

37. MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 4 vols., rev. ed. (New Haven, Conn.: Yale University Press, 1937, repr. 1966).
38. *Id*.
39. *Id*.
40. *Id*.
41. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. 2 121 (Max Farrand ed., 1911).
42. *Id*.

right to vote was a right of citizenship – it was – but how to properly define citizenship, or how to determine the necessary attachment to the community. Property qualifications were prevalent across the colonies.[43] More importantly, property ownership demonstrated the requisite independence and free will that all voters must have.

It is here when we first see a discussion of voting qualifications by the convention delegates. It came in the form of Gouverneur Morris' brief answer to Mason's proposal: "If qualifications are proper, he wd. prefer them in the electors rather than the elected."[44] James Madison agreed on this point, "in thinking that qualifications in the Electors would be much more effectual than in the elected."[45] But this would not be an easy task, Madison recognized, due to "[the difficulty of] forming any uniform standard that would suit the different circumstances & opinions prevailing in the different States."[46] John Dickinson similarly remarked that he "was agst. any recital of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions."[47] While agreeing that this point had some merit, Dickinson argued that "The best defense lay in the freeholders who were to elect the Legislature. Whilst this Source should remain pure, the public interest would be safe. If it ever should be corrupt, no little expedients would repel the danger."[48]

The delegates accepted the first part of Mason's resolution as amended by Madison to strike out the word "landed" from the proposal.[49] This meant that the convention delegates were in favor of property and citizenship qualifications for voting. In contrast, the convention rejected the second part of Mason's proposal, disqualifying debtors and those with "unsettled accounts."[50]

The Committee of Detail took up the convention's work the next day, July 27, and met for two weeks.[51] The five committee members

43. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 168 (1969); Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787–1860*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 31 (Donald W. Rogers & Christine Scriabine eds., 1992).

44. FARRAND, *supra* note 41, at 121.

45. *Id.* at 124.

46. *Id.*

47. *Id*. at 123.

48. *Id.* at 123.

49. *Id.* at 124.

50. FARRAND, *supra* note 41, at 126.

51. *Id.* at 129.

met behind closed doors. They made clear the nature of their work on August 6, when they delivered a report of their work to the full convention. Notably, their draft began as follows:

> We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and of our Posterity.[52]

This is the draft of language that would become the preamble to the Constitution. At this stage in the process, this would be a union of states. Within a few weeks, "we the people" would provide its consent instead.

Of particular interest to us is Article IV of the draft report. In language familiar to modern ears, the committee of detail offered the following under section 1:

> The members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.[53]

This language clearly rejects the first part of Mason's resolution, which called for property and citizenship qualifications. The report also provided age, citizenship, and residency qualifications for membership in the new House of Representatives.[54] This language contravened the Mason resolution.

As expected, the delegates aligned on the same two camps. Gouverneur Morris first moved to strike the sentence about voter qualifications and instead to add language "which wd. restrain the right of suffrage to freeholders."[55] Otherwise, he argued, those without property "will sell [their votes] to the rich who will be able to buy them."[56] John Dickinson concurred, as he "considered [freeholders] as the best guardians of liberty."[57] To his mind, a property qualifica-

52. *Id.* at 177.
53. *Id.* at 178.
54. *Id.* ("Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.").
55. *Id.* at 201.
56. FARRAND, *supra* note 41, at 202.
57. *Id.*

tion would be "a necessary defense against the dangerous influence of those multitudes without property & without principle."[58] James Wilson disagreed; not only had this language been "well considered by the Committee," and difficult to improve, but it would also be hard to establish a uniform voter qualifications rule to apply across the states.[59] But this was "neither great nor novel," Gouverneur Morris responded.[60] Morris then raised a further objection: that the clause would improperly place the qualifications for voting for the national legislature in the hands of the states.[61]

The debate took up the rest of the day and the next.[62] Many delegates rose in defense of the language of the report.[63] Some delegates made a practical argument. They looked ahead to the upcoming ratification process and the need to secure popular approval of the work of the convention. According to Pierce Butler, for example, "There is no right of which the people are more jealous than that of suffrage."[64] As such, Oliver Ellsworth argued that "The people will not readily subscribe to the National Constitution, if it should subject them to be disfranchised."[65] And George Mason similarly offered that "Eight or nine States have extended the right of suffrage beyond the freeholders. What will the people there say, if they should be disfranchised."[66] More generally, Ben Franklin suggested that denying the "lower classes" of the right to vote "would debase their spirit and detach them from the interest of the country."[67]

In response, Madison recognized the right to vote as "certainly one of the fundamental articles of republican Government," and so the right "ought not to be left to be regulated by the Legislature."[68] He further argued that "the freeholders of the Country would be the safest depositories of Republican liberty."[69] Dickinson agreed, since "'[n]o one could be considered as having an interest in the government unless he possessed some of the soil."[70] Gouverneur Morris ad-

58. FARRAND, *supra* note 37, at 202.
59. *Id.* at 201.
60. *Id.*
61. *See id.*
62. FARRAND, *supra* note 37, at 202.
63. *Id.*
64. *Id.*
65. *Id.* at 201.
66. *Id*. 201–02.
67. FARRAND, *supra* note 37, at 210.
68. *Id*. at 203.
69. *Id.* at 203.
70. *Id.* at 209.

ded that to allow all freemen to vote would lead to aristocracy.[71] Madison agreed.[72]

In the end, most of the delegates accepted the committee's recommendation.[73] Federalism won out. Under Article I, the delegates entrusted the states to extend the right to vote to those electors with the "qualifications requisite for electors of the most numerous branch of the state legislature."[74] This was a curious choice. The new national government placed on the states the authority to define who "the people" were. And just as curiously, convention delegates never proffered an argument in favor of uniform national suffrage, or at the very least, an argument for a new constitutional right to vote more expansive and inclusive than what the states were presently doing. This choice also meant that national citizenship in the new nation would be divorced from the right to vote.

This was a crucial choice. In the parlance of modern voting rights law, this was the classic choice between rights and structure. The framers placed structure – federalism – over rights, and in so doing, they made a clear judgment about the value and meaning of the franchise in the new nation. To be sure, it is true that this was a decision driven less by ideology than practical considerations. As Alexander Keyssar explained in his magisterial history of the right to vote, "[a]ny national suffrage requirement was likely to generate opposition in one state or another, and a narrow national suffrage, such as a freehold qualification, seemed capable of derailing the Constitution altogether."[75] But as we move forward in this history of race and voting, it bears asking, what values are expressed by placing federalism at the heart of American Democracy? More importantly, is federalism a part of our constitutional DNA forever? Or can these values and meanings subsequently change at some point in history?

II. THE SECOND MOMENT: OF FREEDOM AND RECONSTRUCTION

In the summer of 1862, President Lincoln took the first step towards the emancipation of the slave population across the Confederate states. This is when he penned the draft of what ultimately

71. *Id.*
72. *Id.*
73. FARRAND, *supra* note 37, at 202.
74. U.S. CONST. art. I, § 2.
75. KEYSSAR, *supra* note 24, at 19.

became the Emancipation Proclamation.[76] Under the Proclamation, signed on January 1, 1863, President Lincoln freed the slave population across the United States, save for slaves who resided in Union-controlled areas (such as New Orleans) or in the Border States who remained in the Union (Delaware, Kentucky, Maryland, and Missouri). Within three years, the Thirteenth Amendment extinguished slavery across the nation.[77]

The end of slavery raised important questions about the meaning of freedom. What does it mean to be free? Is freedom simply the absence of chains? This was President Johnson's position, which led him, time and again, to clash with Congressional Republicans. To the President, the Thirteenth Amendment was the climax of Reconstruction, the end of the national government's duties towards the freedmen. To Congressional Republicans, however, freedom required much more. They could point to the immediate rise of the Black Codes and peonage as proof that the resettlement of the freed population required more than President Johnson allowed. Freedom required the enforcement of rights and a state apparatus committed to that enforcement.

Within a year, congressional Republicans gave us their answer. Soon, before adjourning in March of 1865, the 38th Congress adopted the Freedmen's Bureau bill, to which "more than any other institution, fell the task of assisting at the birth of a free labor society."[78] The Bureau was established in order to aid former slaves in matters of food, housing, education, health care and land ownership.[79] The Bureau would exist for only a year, a time after which the freedmen would no longer need its assistance to join American society.[80] Naturally, President Johnson vetoed the original bill, and Congressional Republicans failed to override it.[81] Congress enacted a revised version four months later and overrode the expected presidential veto.[82]

The following year, Republicans enacted the Civil Rights Act of 1866, a measure designed "to protect all Persons in the United States

76. *See* DAVID HERBERT DONALD, LINCOLN 362–65 (1995).

77. U.S. CONST. amend. XIII.

78. ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 142 (2005).

79. *Id.* at 243.

80. *Id.*

81. CONG. GLOBE, 39th Cong., 1st Sess. 421, 915–17 (1866).

82. Act of July 16, 1866, ch. 200, 14 Stat. 173; CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866).

in their Civil Rights and furnish the Means of their Vindication."[83] This was the Republicans' first attempt to provide substantive meaning to the Thirteenth Amendment. To be free meant to be equal before the law and to possess civil rights. This was a crucial point. Republicans agreed that the Act protected the "fundamental rights" of American citizenship. They were less certain about what these rights specifically entailed. On its terms, the Act protected the right

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizensÉ[84]

To be free, in other words, meant to be a free agent in the economic sphere. This definition lay at the heart of the free labor ideology central to the ethos of the Republican Party. President Johnson disagreed with this definition and vetoed the bill.[85] Republicans overrode his veto.[86]

Notable for our purposes is the fact that the Civil Rights Bill did not explicitly include political rights among its protections. In fact, Republicans assured their colleagues that they would not extend the right to vote to the freedmen. But this would not do. Republicans well understood that the settlement of the war question demanded political agency to the freedmen as a corollary to readmission of the Confederate states to the Union. Under terms of Presidential Reconstruction, the Southern states need only repeal their secession ordinances, repudiate all confederate debts, and adopt the 13th Amendment.[87] Were the Southern states to return to the Union on these terms, however, Republicans and Northern interests would be in a worse place than prior to the war. This is because of the three-fifths compromise, which gave slave states political power in reference to the number of slaves that resided within their borders. The 13th Amendment nullified the three-fifths compromise and would thus enhance the representation of the Confederate states in the House of Representatives and the Electoral College.[88] To allow the Southern states to return to the Union without guaranteeing political rights to

83. Act of May 31, 1870, § 18, 16 Stat. 144.
84. 14 Stat. 173 (1865).
85. FONER, *supra* note 78 at 115.
86. *Id*. at 117.
87. *Id*.
88. U.S. CONST. amend. XIII.

the freedmen would essentially expand the political power of these states in national politics. The war would have been fought for nothing.

Republicans were aware of this conundrum. They were also aware, however, that Northern states refused to extend voting rights to the freedmen, and proposals to do so in a number of these states had been recently defeated.[89] One possible answer was to grant the ballot to Southern Blacks alone, but only the radical Republicans in Congress supported this solution. The Republicans were in a bind. The Joint Committee on Reconstruction found a way out of this puzzle by "an ingenious contrivance worthy of a better cause."[90] Under the Amendment, the states remained free to disenfranchise its Black population at will. Under section 2 of the Amendment, however, their representation in Congress and the Electoral College would be reduced in proportion to the number of disenfranchised male citizens of the state over 21 years of age.[91] This solution would essentially penalize the Southern states for disenfranchising its population but not the North, whose Black population was too small for this penalty to matter. Frederick Douglass referred to this strategy as "compromising and worthless."[92]

The following year, Congress took a path to Black enfranchisement far more direct than believed possible in 1866. This was the Reconstruction Act of 1867.[93] The Act is best known for establishing military rule across the Confederate states.[94] More important for us is Section 5 of the Act, its suffrage provision.[95] Under this section, readmission to the Union required the Confederate states to enfranchise all its male citizens over 21-years-old, irrespective of race, color, or previous condition of servitude, and who have resided in the states for one year prior to the election.[96] This was a conservative pragmatic approach to the problem at hand; the Act extended black suffrage

89. WANG XI, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910, at 45–46 (1997).

90. JAMES B. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 514 (2nd ed. 1992).

91. U.S. CONST. amend. XIV § 2.

92. Frederick Douglass, *At Last, At Last, the Black Man has a Future: An Address Delivered in Albany, New York, on 22 April 1870*, ALB. EVENING J., Apr. 23, 1870 [hereinafter "*At Last*"].

93. 14 Stat. 428 (1867).

94. *Id*.

95. *Id*.

96. *Id*.

only to the Southern states, not to the nation as a whole.[97] And yet, the turnaround from the prior year is nothing short of remarkable. Foner explains it as follows:

> The astonishingly rapid evolution of Congressional attitudes that culminated in Black suffrage arose both from the crisis created by the obstinacy of Johnson and the white South, and the determination of Radicals, blacks, and eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand.[98]

Black suffrage, in other words, was both a response to the exigencies created by the politics of the day and a paean to racial equality. These two arguments happily converged in 1867 and into the future. But only to a point. Would Congress extend the tenets of the '67 Act and the implied promise of Section 2 of the 14th Amendment across the nation? More importantly, would Congress secure the rights afforded by the '67 Act through a constitutional amendment that would apply to the nation as a whole? These were not idle questions. Without an amendment to the constitution, future majorities may wrest away the hard-fought gains for Black rights. A new Amendment, enshrining Black suffrage, was needed.

Republicans recognized the difficulties ahead. They may well have sought to enfranchise the Black population in the North in order to strengthen its power, particularly in areas where political power was evenly divided.[99] Doing so, however, threatened to alienate core Republican constituencies who opposed Black enfranchisement.[100] As a result, the draft of the Amendment passed by Congress on February 26, 1869 and sent to the states for ratification reflected the most conservative proposal debated by the body.[101] One proposal affirmed the right by all male citizens over 21 years of age to vote.[102] A second proposal forbids states to deny its citizens the right to vote on account of race, color, or previous condition of servitude, and it further forbid the use of literacy tests, property or nativity qualifications for voting. A final proposal was the now-familiar ban on race, color and previous

97. *Id*.

98. FONER, RECONSTRUCTION, *supra* note 78, at 277.

99. *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1969).

100. *See* LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303 (1967).

101. WANG XI, *supra* note 89.

102. *Id*.

condition of servitude as a voting prerequisite.[103] This was the proposal sent to the states for ratification, and ratified to the states on March 30th.[104]

Passage of the 15th Amendment led supporters of Black suffrage to hail its promise. In a special message to Congress, President Grant remarked that "the adoption of the fifteenth amendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."[105] Passage of the Amendment was seen as the nation's second founding. Wendell Phillips, the Massachusetts abolitionist, argued that the Amendment marked the real birthday of the nation because the Declaration of Independence finally applied to all.[106] And to the question, "what does this Fifteenth Amendment mean to us?" Frederick Douglass answered:

> I will tell you. It means that the colored people are now and will be held to be, by the whole nation, responsible for their own existence and their well or ill being. It means that we are placed upon an equal footing with all other men, and that the glory or shame of our future is to be wholly our own.[107]

This was a common refrain. Passage of the Fifteenth Amendment commonly meant that Black Americans were finally in charge of their own destinies. They were finally free. The Amendment, declared James Garfield, "confers upon the African race the care of its own destiny. It places their fortunes in their own hands."[108] Only now could Reconstruction finally be over. Or in the words of the New York Tribune, "Let us have done with Reconstruction. . . . The country is tired and sick of it. . . . LET US HAVE PEACE."[109]

The achievement of Reconstruction in this context could not be understated. Only a generation ago, in *Dred Scott*, the U.S. Supreme Court had declared that Black Americans could not be United States citizens.[110] In a scant five years after the war, the country had not

103. *Id*.
104. *Id*.
105. UVA: Miller Center, *March 30, 1870: Announcement of Fifteenth Amendment Ratification*, inhttps://millercenter.org/the-presidency/presidential-speeches/march-30-1870-announcement-fifteenth-amendment-ratification.
106. William Gillette, Retreat from Reconstruction 1869–1879, at 23 (1979).
107. *At Last*, *supra* note 92.
108. Eric Foner, Forever Free: The Story of Emancipation and Reconstruction 149 (2005).
109. David Blight, Professor, Yale Univ., Lecture on The Civil War and Reconstruction Era, 1845-1877.
110. Scott v. Sandford, 60 U.S. 393 (1857).

only rejected *Dred Scott*'s central holding, but it had also placed Black Americans on a plane of equality that few could imagine a few years earlier. The numbers tell a poignant story. At the height of Reconstruction, two-thirds of all eligible Black voters cast ballots for presidential and gubernatorial elections.[111] More importantly, these new voters helped elect record numbers of candidates to public office – 324 members of Congress and state legislatures in 1872 alone.[112] This figure amounted to 15% of all Southern officeholders.[113]

The Fifteenth Amendment is generally understood as responsible for this remarkable feat. This is clearly wrong, however, or at best incomplete. The freedmen registered and came to the polls in historic numbers, so much is true. But the leading reason for this was the Reconstruction Act of 1867 and its demand of Black enfranchisement as a pre-condition for readmission to the Union.[114] This was key. Blacks joined the American political community in the South because the North so demanded it. In other words, mass enfranchisement was a question of political will enforced through military rule. The Fifteenth Amendment sought to extend the promise of the '67 Act, but it did so in a very different way. The Reconstruction Act essentially forced the Southern states to enfranchise all eligible male Black voters. The Fifteenth Amendment established instead a negative right: race may not be the basis for regulating the franchise. The need for a stronger enforcement arm became clear almost immediately. Congress responded with a series of enforcement acts.[115]

As the Reconstruction Era came to a close and military rule across the South ended, it became an open question whether the fragile commitment to Black voting would last. Frederick Douglass put it best, in a speech he gave in 1875 on "the color question."[116] He asked, "when this great white race has renewed its vows of patriotism and flowed back into its accustomed channels . . . in what position will this stupendous reconciliation leave the colored people?"[117] He asked, "when this great white race has renewed its vows of patriotism

111. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions* 135, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman and Chandler Davidson eds. 1992).
112. *Id*. at 140 (table 1).
113. *Id*.
114. 14 Stat. 428 (1867).
115. *Id.*
116. FREDERICK DOUGLASS, *The Color Question, July 5, 1875*, *in* FREDERICK DOUGLASS PAPERS.
117. *Id.*

and flowed back into its accustomed channels . . . in what position will this stupendous reconciliation leave the colored people?"[118] Douglass then asked the question at the heart of the Reconstruction project, a question that remains with us to this day: "If war among the whites brought peace and liberty to the blacks, what will peace among the whites bring?"[119] He was not optimistic. "The signs of the times are not all in our favor."[120] His words proved prescient.

III. THE UNWINDING OF RECONSTRUCTION

The Reconstruction settlement was deeply intertwined with the electoral fortunes of the Republican Party. Passage of the Fourteenth Amendment in Congress and the various Reconstruction Acts made sense in reference to the outcome of the election of 1866. However, by the fall of 1867, signs of trouble surfaced, specifically in Ohio, where Republicans proffered a referendum to amend their state constitution in support of Black suffrage, hoping to begin a domino effect for Black suffrage across the North. Instead, Ohio voters rejected the amendment.[121] Black equality remained a mirage in Republican minds.

By 1874, Democrats had reversed Republican majorities in what may be described as "an electoral tidal wave."[122] Democrats turned a 110-seat deficit in the House into a 6-seat majority.[123] They also won many gubernatorial races across the North and the Midwest, from New Hampshire and Massachusetts to Indiana and Illinois.[124] Republicans still held on to the White House and the US Senate, but Democratic victories across the states ensured that Republicans would lose seats in the Senate. To be sure, the Depression of 1873 explains these changed political fortunes. But whatever the reason, it remained to be seen how the new political landscape would affect the Reconstruction agenda.

The winds of public opinion were shifting, and the U.S. Supreme Court took notice. From the moment the Court got a chance to render its verdict on the nascent Reconstruction policy, it offered a narrow and almost unrecognizable account of Republican policymak-

118. *Id.* at 117.
119. *Id.*
120. *Id.*
121. GILLETTE, *supra* note 106.
122. FONER, *supra* note 11, at 523.
123. GILLETTE, *supra* note 106, at 246 (1979).
124. *See id.*

ing. These were *the Slaughterhouse Cases*.[125] In *Slaughterhouse*, the Court agreed that the 14th Amendment had been enacted as a way to protect Black rights.[126] Yet the Court further concluded that the Amendment only protected the rights of national, not state, citizenship.[127] These were a very limited set of rights. This meant that the Amendment did not alter the calculus of our traditional federalism; that is, the states remained in charge of protecting their citizens and their rights. This is a curious reading of the Amendment, for as Justice Field noted in dissent, if this were its proper meaning, "it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage."[128] This cannot possibly be the extent of the jewel of Reconstruction. The Court, which was staffed by Lincoln and Grant nominees and confirmed by Republican majorities, had essentially narrowed the Amendment into something that few Republicans could recognize. The tide of public opinion was clearly shifting.

Three years later, the Court went further. In *U.S. v. Cruikshank*,[129] the justices overturned three convictions that resulted from the Colfax massacre, in which a white mob killed and wounded around 100 Blacks residents of Colfax, Louisiana.[130] The federal government brought indictments under the Enforcement Act of 1870.[131] And once again, federalism ruled the day. Technically, the Court based its holding partly on the fact that the government failed to single out race as the motivation behind the rioters' conduct.[132] But far more important was the Court's view that the postwar Amendments were subject to a state action requirement; that is, the Amendments may only be deployed against the actions of states, not private actors.[133] This meant that the responsibility for protecting citizens from crimes perpetrated by individuals remained with the states and local governments. In postwar America, as the Court must have known,

125. Slaughter-House Cases, 83 U.S. 36 (1873).

126. *Id.* at 62.

127. *Id.* at 73–74.

128. *Id.* at 96.

129. U.S. v. Cruikshank, 92 U.S. 542 (1876).

130. LeeAnna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction (2009); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction (2009).

131. *Cruikshank*, 92 U.S. at 548.

132. *Id.* at 556.

133. *Id.* at 552.

this meant that crimes against the Black community would go unpunished. The justices noted that the national government retained the authority to protect national rights, but as the *Slaughterhouse Cases* held, this subset of rights was narrow in nature and almost inconsequential.[134] They were meaningless. In the meantime, private acts of terror, the issue of the day, remained unpunished.

The same day the Court decided *Cruikshank*, it also decided *U.S. v. Reese*, a case that bears directly on our story.[135] *Reese* involved a constitutional challenge to a Kentucky law that required, among other things, the payment of a poll tax, which the city of Lexington had set at $1.50.[136] Many Black residents could not pay the tax, and those who tried to pay it were often refused.[137] Plaintiffs brought a challenge under the prohibitions with the interference of the right to vote under sections 3 and 4 of the Enforcement Act of 1870.[138] The Supreme Court brushed this challenge aside.[139] As with *Slaughterhouse* and *Cruikshank*, our federalism carried the day. According to the Court, the Fifteenth Amendment did not give Congress plenary power over elections; such powers remained with the states.[140] Rather, the Amendment gave Congress the power to prohibit racial discrimination in voting.[141] As such, the Court struck down sections 3 and 4 of the Act as beyond the power of Congress. These sections had been drafted so broadly as to cover any imaginable instance where Blacks had been denied the right to vote, for whatever reason. This was precisely what Congress could not do.

Taken together, these cases paved the way for the betrayal of Reconstruction and the abandonment of Blacks by the national government. They paved the way, in other words, for the rise of Jim Crow. This is how Charles Warren put it, in his influential history of the Court:

> Viewed in historical perspective now, there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the negro question which had so long embittered congressional debates; they relegated the burden and

134. *Slaughter-House Cases*, 83 U.S. at 82.
135. United States v. Reese, 92 U.S. 214 (1876).
136. *Id.* at 215.
137. ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE LOSING THE VOTE IN REESE AND CRUIKSHANK (2001).
138. *Reese*, 92 U.S. at 215.
139. *Id.* at 222.
140. *Id.* at 220.
141. *Id.*

> the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.[142]

The Court had placed the states once again in charge of protecting the rights of its colored citizenry. It was as if Reconstruction never happened. This was the moment Frederick Douglass had feared.

A roadblock remained. The Court recognized that the design of the Reconstruction Amendments was "to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it."[143] This was the clear lesson of Reconstruction. The states must stay away from explicit racial classifications that discriminate against the Black population as a class. The Court made this point clearly. In *Strauder v. West Virginia*[144], a case decided on the heels of the *Slaughterhouse Cases* and soon before the *Civil Rights Cases*[145], the Court struck down a state law that explicitly barred Blacks from participating in juries. In so doing, the Court pointed the way to the future. States shall not use race as the basis to form their jury pools, so much was clear. However, the Court continued, this was not to say that the Court may not "make discriminations."[146] For example, states "may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this."[147] In other words, states may not explicitly bar blacks from voting, or from juries, or from the exercise of civil rights more generally. But proxies would work just as well, and the U.S. Constitution and federal law would not stand in their way.

IV. THE THIRD MOMENT: VOTE SUPPRESSION IN THE SHADOW OF THE 15TH AMENDMENT

"The government, which made the black man a citizen of the United States," Senator Lodge told his colleagues, "is bound to protect him in his rights as a citizen of the United States and it is a cowardly government if it does not do it. No people can afford to write

142. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, vol. 3, 330 (1923).
143. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).
144. *Id.* at 303
145. The Civil Rights Cases, 109 US 3 (1883).
146. *Strauder*, 100 U.S. at 310.
147. *Id.*

anything into their constitution and not sustain it."[148] He was speaking in direct reference to the Lodge Election Bill of 1890, a measure intended to protect black voters in their exercise of rights seemingly protected by the 15th Amendment.[149] For almost as soon as the Northern commitment to Reconstruction ended, the presence of Black voters in Southern registration lists dropped dramatically. White-only governments across the South accomplished this retrenchment through fraud and violence. The Lodge Bill was an effort to enforce an explicit constitutional command.

Supported by President Harrison and Republican majorities in Congress, the bill authorized the national supervision of federal elections. Upon petition by 100 or more voters within a congressional district, the bill authorized a circuit court judge to appoint federal supervisors on a bipartisan basis, whose duty was to watch and report on election procedures.[150] The Circuit Court was further authorized to decide disputes over the election, as well as begin investigations of persons charged with electoral fraud, bribery or intimidation.[151] The bill applied to all congressional districts across the country.[152] Its purpose, according to Senator Lodge, was to "[m]ake public all the facts relating to elections, to protect the voters and to render easy the punishment of fraud."[153]

The critics were unconvinced. They labeled the legislation a "force bill" and traced it back to measures from the Reconstruction era. The arguments were familiar: the bill was a sectional measure, intended to target the South; it would be costly; it would impose severe penalties; and, above all else, it would threaten state sovereignty. To be sure, racism and the explicit threat to white supremacy motivated some critics of the bill, particularly in the South. But it is also true that partisan motives played a role as well. Fair and honest elections would threaten up to 30 congressional seats then in Democratic hands.[154]

148. 21 Cong. Rec. 6543 (1890).

149. Lodge, The Federal Election Bill, 151 North American Review 257, 259 (1890).

150. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 267 (1890).

151. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257 (1890).

152. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 272 (1890).

153. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 259 (1890).

154. *Id.*

The bill succumbed to a filibuster.[155] Its defeat sent a clear signal that the national government would no longer protect the voting rights of Black Americans. In the wake of the bill's defeat, the promise of Reconstruction ended tragically. Black voters were removed from the voting rolls almost as quickly as they had joined them. This disenfranchisement happened all across the South, between the years 1890 and 1910, in a world where the Fifteenth Amendment was good law.[156] The political strategies varied across the states.

The leading practice, though by no means the most effective, was the poll tax and its requirement that eligible voters pay a capitation tax as a pre-condition to voting.[157] States also began to experiment with periodic voting registration requirements.[158] Even if applied neutrally, these requirements significantly suppress voter turnout. But these were not neutral requirements. The states required very specific levels of information, and any mistake—no matter how insignificant—would invalidate the application.[159] They also set specific days and times for registration. And once registered, a prospective voter must bring his registration certificate to the polling place.[160] Above all these changes and requirements, these new Southern registration laws granted great amounts of discretion to local registrars. This was key. The requisite neutrality in election administration gave way to the whims and biases of local registrars across the region.

States also made a concerted effort to disenfranchise illiterate persons. This strategy had the dual effect of removing both Black and poor voters from the rolls. Most obviously, some states required applicants to read a section of the state or federal Constitution and to occasionally explain to the registrar what they had read. Some states also maintained separate boxes for each seat up for election and required voters to place his particular choice in the right box. Ballots placed in the wrong box were not counted. This created an obvious problem for illiterate voters, who could not read the boxes and thus risked placing their ballots in the wrong box. The boxes were periodically rearranged in order to ensure that illiterate voters could not be

155. Jeffery A. Jenkins & Justin Peck, Legal History and Legislature: *Building Toward Major Policy Change: Congressional Action on Civil Rights*, 1941-1950, 31 LAW & HIST. REV. 139, 143 (2012).

156. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 305 (1998).

157. *Id.* at 309.

158. *Id.* at 352.

159. *Id.* at 352–54.

160. *Id*.

assisted by friends prior to entering the voting place. Finally, states also began to adopt the secret ballot. Prior to this time, political parties printed and distributed ballots.[161] This practice allowed illiterate voters to receive assistance prior to Election Day. The advent of the secret ballot in the late 19th Century meant that voters must look up and down the list printed by the government in order to find their preferred candidate. This made the task of voting much more difficult on illiterates, if not downright impossible. It also made the task far more difficult on anyone who did not speak English fluently.

This era is commonly known as the first voter suppression period. Most voter suppression practices date back to this period. These are not only the aforementioned literacy tests and poll taxes, but also residency requirements, felon disenfranchisement laws, good character clauses and, in due course, the white primary.[162] As a safety valve to ameliorate the over-inclusiveness of these practices, which swept many whites as well, the states implemented the grandfather clause. Though these exemptions varied, they generally allowed otherwise ineligible voters to vote if they were lineal descendants of a veteran of war or anyone who voted prior to 1867.[163] The wide discretion afforded local registrars also ensured that the burden of these new electoral restrictions fell hardest on the Black community.

Taken together, these various electoral changes had the desired effect. The numbers tell a poignant picture. Reconstruction policies had a salutary effect on Black political participation. Black voters came to the polls and gained political office in numbers not seen again until the 1990's. For example, Blacks gained an electoral majority in many states across the South and held elected office in record numbers – around 2,000 – at every level of government, from the U.S. Senate to state Supreme Courts and local government.[164] But the electoral retrenchment took its toll. In Louisiana, for example, there were 130,334 registered Black voters in 1896.[165] After the new state constitution took effect in 1898, the number of registered Black voters dropped to 5,320.[166] There were only 730 registered Black voters in

161. *Id.*

162. *Id.*

163. *Id.* at 353.

164. Richard H. Pildes, *The Canon(s) Of Constitutional Law: Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENTARY 295, 300 (2000).

165. United States v. Louisiana, 225 F. Supp. 353, 374 (E.D. La. 1963).

166. *Id*.

1910, or 0.5% of the eligible population.[167] A similar disenfranchisement occurred across the Southern states. Alabama dropped from 181,315 registered Black voters to just 2,980 in 1903.[168] Both Virginia and North Carolina saw their estimated black voter turnout drop by virtually 100%.[169] These drops were consistent across the South.[170]

Advocates of Black political rights knew that they could not fight back this suppression wave through the political branches. The defeat of the Lodge Bill made clear that voting rights enforcement must happen outside of Congress. The only institution that offered any hope was the federal judiciary. And that's precisely where they went. The case was *Giles v. Harris*.[171]

Jackson Giles was a literate, Republican Party activist, who held a patronage job as janitor in the Montgomery, Alabama federal courthouse.[172] Mr. Giles had been a registered voter from 1871 to 1901.[173] He also happened to be Black.[174] Ratification of the 1901 Alabama state Constitution – "the most elaborate suffrage requirements that have ever been in force in the United States"[175] – thus ensured that Mr. Giles would be removed from the registration lists.[176] But Mr. Giles was asking the Court to add his name and the names of 5,000 similarly situated black voters to the voting rolls.[177] The Court refused, reasoning that if the plaintiff was in fact correct, "how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"[178] The Court offered a second reason. The litigation was essentially a frontal attack on Jim Crow and the mass disenfranchisement begun in 1890. In the Court's words, the complaint alleged "that the great mass of the white popula-

167. *Id.*

168. PEYTON MCCRARY ET AL., ALABAMA, IN QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 38, 38–52 (Chandler Davidson & Bernard Grofman eds., 1994).

169. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE, RESTRICTION, AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 at 241 (1974).

170. Pildes, *supra* note 164, at 303 ("The effect of these disenfranchising constitutions throughout the South, combined with statutory suffrage restrictions, was immediate and devastating.").

171. Giles v. Harris, 189 U.S. 475 (1903).

172. Pildes, *supra* note 164, at 299.

173. *Id.*

174. *Id.*

175. *Id.* at 302.

176. *Id.* at 302–03.

177. *Id.* at 305.

178. Pildes, *supra* note 170, at 306.

tion intends to keep the blacks from voting."[179] So much was clear. The question for the Court was whether, if "the conspiracy and the intent exist, a name on a piece of paper will . . . defeat them."[180] The answer was just as clear, at least to a majority of the Court. An effective ruling for Mr. Giles, and black rights in general, required a commitment by the Court to "supervise" local elections. This was not a role that the justices could see for themselves and the institution of the Court in 1903. So, they punted.

Giles closed the last available door available for enforcing the 15th Amendment. The promise of black political rights died in its wake. Looking to the future, it remained to be seen whether, and how, the promises made in 1870 would ever become a reality.

V. THE FOURTH MOMENT: THE SECOND RECONSTRUCTION

Registering to vote in 1960 Louisiana was no easy task. First came the technicalities of the process. A prospective voter must fill out an application form.[181] She would state her age in years, months, and days; she would also state her gender and her race; her address; her occupation; and her previous place of registration.[182] The applicant must fill out this form very carefully, for any mistake might lead the registrar to reject the application. Further, under the state Constitution, an applicant must "establish that she is the identical person whom [s]he represents [her]self to be when applying for registration."[183] If the registrar had "good reason to believe" that she was not the same person, "he may require the applicant to produce two credible registered voters of his precinct to make oath to that effect."[184]

Second came the literacy threshold. Under the Louisiana Constitution, a prospective voter must "be able to read any clause in this Constitution, or the Constitution of the United States, and give a reasonable interpretation thereof."[185] The interpretation must be satis-

179. *Giles*, 189 U.S. at 488.

180. *Id.*

181. COMM'N ON CIV. RIGHTS, VOTING: 1961 COMMISSION ON CIVIL RIGHTS REPORT 49 (1961).

182. *Id.*

183. Byrd v. Brice, 104 F. Supp. 442, 443 (W.D. La. 1952).

184. *Id.*

185. *Louisiana*, 225 F. Supp. at 358.

factory to the registrar in her parish.[186] Until 1960, Louisiana applicants could demonstrate their literacy by filling out the application, and illiterate applicants could dictate the information to the registrar (though they must still pass the interpretation portion of the registration).[187] Beginning in 1960, under a law approved by state voters, illiterate persons could no longer register.[188] Two years later, the Louisiana State Board of Registration adopted a voter qualification test.[189] Under this test, an applicant must draw one of ten cards.[190] Each card had six multiple choice questions, and the applicant must answer four questions correctly in order to pass the test.[191] Questions included the name of the first U.S. President or the number of justices on the U.S. Supreme Court.[192]

Finally, and also beginning in 1960, the registrant must show that she was not a person of "bad character."[193] The law defined "bad character" as, among other things, "living in a common law marriage within 5 years prior to applying to vote;" giving birth to an illegitimate child within 5 years immediately prior applying for registration, unless the child was conceived "as a consequence of rape or forced carnal knowledge;" or fathering an illegitimate child within 5 years immediately prior to applying for registration.[194] The statutory definitions of "bad character" were not all inclusive. The law further provided that registrars may establish any of these definitions with "competent evidence," a term that the law did not define.[195]

The registration process was further complicated by the many techniques designed to keep voters from registering. For example, the state would periodically purge voters from the voting rolls and then ask them to re-register, at which point the state may retroactively challenge any registrant it so chose.[196] The state may also slow down its registration process.[197] Registration offices may only open once a

186. Baton Rouge Comm. on Registration Educ., Negro Voting in Louisiana 9, 1st ed. (1963).
187. Louisiana v. United States, 380 U.S. 145, 149–50 (1965).
188. *Voting Rights: A Case Study of Madison Parish, Louisiana*, 38 U. Chi. L. Rev. 726, 744 (1971).
189. *Louisiana*, 380 U.S. at 154.
190. *Louisiana*, 225 F. Supp. at 393.
191. *Voting Rights*, *supra* note 188, at 743.
192. *Id.*
193. *Id.* at 737 n.54.
194. *Id.*
195. *Id.*
196. *Id.* at 775–76.
197. Voting Rights, *supra* note 188, at 775–76.

week, or once a month, or over the lunch hour, or at the discretion of the local registrars.[198] Voters may be threatened with violence or economic repercussions if they insisted on registering to vote.[199] Voters may also be explicitly denied the right to register to vote.[200]

The root of the problem was the tremendous amount of discretion placed on registrars throughout the process. This was how racial bias creeped into the system. Consider how registrars administered and evaluated the interpretation test. Registrars could choose the level of difficulty for the question that any given applicant must answer. Registrars may also show applicants sample answers, or may assist applicants in answering questions. In practice, white applicants were generally asked to answer easier questions, saw sample answers, and received assistance from the registrars. Black applicants did not. Registrars also had ample discretion in evaluating the answers. A particularly egregious example saw a registrar ask a black applicant for an interpretation of the Article X, § 16 of the Louisiana Constitution, which states: "Rolling stock operated in this State, the owners of which have no domicile therein, shall be assessed by the Louisiana Tax Commission, and shall be taxed for State purposes only, at a rate not to exceed forty mills on the dollar assessed value."[201] The applicant answered that "it means if the owner of which does not have residence within the State, his rolling stock shall be taxed not to exceed forty mills on the dollar."[202] This answer was rejected.[203] In contrast, a registrar asked a white applicant to interpret Article 1, § 3 of the Louisiana Constitution.[204] The applicant answered: "FRDUM FOOF SPETGH."[205] The registrar accepted this interpretation.[206]

The raw data shows that these various strategies and provisions worked as intended. In 1960, whites in Louisiana 21 years old and older were 71.5% of the population, and non-whites were 28.5%.[207] Yet whites accounted for 86.2% of registered voters, while non-whites accounted for only 13.8%.[208] The data at the parish level raised more

198. *Id.*
199. *Id.* at 739–40.
200. *Id.* at 775 n.261.
201. LA. CONST. art. X, § 16.
202. *Louisiana*, 225 F. Supp. at 384.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. COMM'N ON CIV. RIGHTS, *supra* note 181, at 107.
208. *Id.*

questions. Four parishes with black populations between 61% and 66% had no black registered to vote at all.[209] Fifteen parishes had black voter registration under 10% of the voting age population.[210] Seven parishes had between 10% and 24% of the black voting age population registered.[211] And thirteen parishes had between 25% and 49% of the black voting age population registered.[212]

These figures were consistent across the Deep South. In its 1961 report, the U.S. Commission on Civil Rights concluded that "in about 100 counties in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee, there has been evidence, of varying degree, of discriminatory disenfranchisement."[213] More specifically, according to the commission, in 129 counties across ten Southern states where blacks are more than 5% of the voting age population, less than 10% of eligible black voters were registered to vote.[214] And in 23 counties in 5 of these states, no eligible Black voters were registered.[215] The commission concluded: "So in 1961 the franchise is denied entirely to some because of race and diluted for many others. The promise of the Constitution is not yet fulfilled."[216]

In his address at the Prayer Pilgrimage for Freedom on May 17, 1957, Dr. King was aware of this history.[217] He told his audience that "all types of conniving methods are still being used to prevent Negroes from becoming registered voters."[218] The speech came in the midst of debates in Congress over the right to vote, debates that culminated in the Civil Rights Act of 1957. Dr. King explained to his audience that nothing had changed. He then urged President Eisenhower and members of Congress "to give us the right to vote."[219] This is a remarkable address, not the least of which because Dr. King asked the nation to give people of color the very thing that had been granted

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. COMM'N ON CIV. RIGHTS, *supra* note 181, at 133.
214. *Id.* at 111.
215. *Id.*
216. *Id.* at 135.
217. Amy Rogers Nazarov, *In the Footsteps of Martin Luther King Jr. in Washington*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/lifestyle/magazine/in-the-footsteps-of-martin-luther-king-jr-in-washington/2017/01/11/0e340cc4-c3d2-11e6-9578-0054287507db_story.html?utm_term=.a3aa82b108ce.
218. Barbara Arnwine & John Nichols, *Martin Luther King's Call to 'Give Us the Ballot' is as Relevant Today as it was in 1957*, THE NATION (Jan. 15, 2018), https://www.thenation.com/article/martin-luther-kings-call-to-give-us-the-ballot-is-as-relevant-today-as-it-was-in-1957/.
219. *Id.*

to them through the 15th Amendment. This is an arresting point. Reconstruction meant nothing. The settlement of Reconstruction and its many promises to the freedmen, came to naught. The larger lesson is clear: The Constitution is but a parchment promise absent the political will to enforce its mandates. And just as importantly, Dr. King was giving the nation a way to rid itself of its "people of color" problem. If given the ballot, people of color would then take their political fortunes in their own hands. The careful reader will note that this was not a new argument. This was the same argument made in 1870 by leading political figures, from Frederick Douglass to James Garfield and many others.[220] Dr. King joined very distinguished company.

Progress had come slowly since the national government had abdicated its enforcement responsibility in the early Twentieth Century. Most of the gains came through the courts. In 1915, the U.S. Supreme Court struck down the grandfather clause in *Guinn v. United States*.[221] And in 1927, the Court also truck down the Texas white primary in *Nixon v. Herndon*.[222] At first glance, these cases appear to contradict the Court's posture in *Giles* and its hesitation to take on the political elites of its day. But this was not new terrain for the Court. These cases were transparent attempts by the state to circumvent constitutional norms. The justices almost had no other choice. More crucially, the reach of the cases was small, almost trivial.[223] *Giles* asked the Court to overturn the entire voting registration regime in Alabama.[224] In contrast, Oklahoma was the only state at the time with a grandfather clause, and the white primary law at issue in *Nixon* was the only one of its kind in the nation; all other states banned blacks through party rule.[225] These cases also failed to reach other disenfranchising practices; they were *sui generis*. And, just as importantly, the cases did not question the legislative motives behind the challenged statutes, the kind of inquiries that would be needed in the future in order to address the voting suppression practices across the South.

220. *See* discussion *infra*.

221. *See generally* Guinn v. United States, 238 U.S. 347, 356–67 (1915).

222. Nixon v. Herndon, 273 U.S. 536, 541 (1927).

223. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 919–21 (1998).

224. Giles v. Harris, 189 U.S. 475, 486 (1903).

225. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58 (2001).

Guinn and *Nixon* are important for a different reason. Almost as soon as the Court issued its rulings, state actors responded in ways that undermined the rulings. In Oklahoma, the legislature responded by "grandfathering" the grandfather clause; that is, the new law provided for the automatic registration of anyone who voted in 1914, while requiring all other eligible voters to register within a 12-day window or be forever disenfranchised.[226] And the Texas legislature immediately passed a law that attempted to remove all traces of state action from the white primaries.[227] Rather than triumphs of judicial review, they instead epitomize the ease by which judicial rulings could be circumvented.[228] The cases offered a blueprint for the future. The Court could not do this important work alone.[229]

President Truman joined the fight for voting rights in 1946. In a wire to the NAACP convention, Truman expressed his view that "the ballot is both a right and a privilege."[230] More importantly, he told the convention that the "right to use it must be protected and its use by everyone must be encouraged."[231] The following year, and speaking from the steps of the Lincoln Memorial, President Truman argued that "[t]he National government must take the lead in safeguarding civil rights. We cannot afford to delay action until the most backward community has learned to prize civil liberty and has taken adequate steps to protect the rights of all its citizens."[232] This was no idle talk. In December 1947, the President's Committee on Civil Rights issued its report, *To Secure These Rights*, which highlighted the state of civil rights violations in the country and the need for further action.[233] Among its many recommendations, the report called for federal legislation to protect the right of eligible persons to participate in federal elections, and for authorizing the Department of Justice to use civil

226. *See* Lane v. Wilson, 307 U.S. 268, 276 (1939).

227. *See* Nixon v. Condon, 286 U.S. 73, 82–83 (1932); Grovey v. Townsend, 295 U.S. 45, 46–47 (1935).

228. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 86 (2004).

229. For the view that the understanding of the Court as a countermajoritarian hero is a myth, and that "the Court's capacity to protect minority rights is more limited than most justices or scholars allow," see Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–7 (1996).

230. STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 119 (1999).

231. *Id.* 119–20.

232. *Id.* 123.

233. See generally THE PRESIDENT'S COMMITTEE, TO SECURE THESE RIGHTS (1947).

and criminal sanctions in the protection of that right.[234] This recommendation formed the basis, 10 years later, of the Civil Rights Act of 1957.

The '57 Act was the first national civil rights law since Reconstruction. The legislation vested authority on the executive branch, through the newly established civil rights division, to seek injunctive relief "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage" in acts that would deprive the right to vote based on race.[235] But the legislation fell short of expectations. For one, officials within the Department of Justice viewed their roles under the legislation very narrowly. They wished for Southern acquiescence to the law and viewed prosecution only as a last resort.[236] Also, federal judges throughout the South were recalcitrant to side with the federal government in these suits.[237] Further, registration officials would resign before the lawsuit commenced, forcing the federal government to sue the state.[238] But as the lower courts concluded, the law authorized the Department of Justice to bring suits against "persons," not states.[239] And just as importantly, subpoenas for the voting records at the center of these suits were either ignored or blatantly defied.[240] Files were destroyed or mysteriously disappeared.[241] As a result, the '57 Act was not nearly enough. Even as the NAACP conducted many registration drives, the number of eligible black voters rose a meager three percent, or just under 200,000.[242] More work remained to be done.

Three years later, Congress corrected many of the deficiencies of the '57 Act. Specifically, the 1960 Act authorized lawsuits directly against the states.[243] Also, the Act required state voting officials to preserve their voting record for twenty-two months and to allow the

234. *Id.* 107, 128.

235. The Civil Rights Act, Pub. L. No. 85-315, § 131 (c), 71 Stat. 637 (1957) (current version at 52 U.S.C. § 10101 (2019)).

236. U.S. Comm'n On Civil Rights, Report Of The U.S. Commission On Civil Rights, 1959, at 131 (1959); *see* Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 at 333 (1976).

237. *See* United States v. Mississippi, 380 U.S. 128 (1965).

238. *Id.* at 130.

239. *Id.* at 137.

240. *See* U.S. Comm'n On Civil Rights, Report Of The U.S. Commission On Civil Rights 1959, at 70-71, 81 (1959).

241. *Id.* at 134.

242. Lawson, *supra* note 236.

243. The Civil Rights Act, Pub. L. No. 86-450, § 601 (b), 74 Stat. 92 (1960) (current version at 52 U.S.C. § 10101 (2019)).

Attorney General and her representatives to inspect and photograph them.[244] The Act also permitted federal judges to appoint voting referees to register voters whenever the finding of racial discrimination in voting is pursuant to a "pattern or practice."[245] As before, however, these amendments depended both on the good will of federal judges across the South to enforce the law as well as the federal government's view of its own power and responsibilities, especially the lawyers within the Department of Justice. The federal government appeared ready to do its part. In the five months after passage of the '60 Act, the Civil Rights Division began four voting cases, which were one more than they had begun in the preceding two and a half years.[246] Private groups were also ready to do their part. Dr. King, Roy Wilkins, and Philip Randolph agreed to jointly sponsor a "nonpartisan crusade to register one million new Negro voters."[247] It was not clear, however, how Southern federal judges would react to the new law.

In November 1961, President Kennedy met with the U.S. Commission on Civil Rights in order to receive a statutory report from the commission. The commission took this opportunity to place the recent statutory achievements in historical context. The resulting report, *Freedom to be Free*, initially drafted by John Hope Franklin in consultation with Rayford Logan, Allan Nevins, and C. Vann Woodward, came out two years later.[248] The historians' influence on the report is unmistakable. The first line of the report points to the Emancipation Proclamation as the starting point, as any text that examines the march from bondage to freedom in the United States must.[249] But almost as soon as 1863 is barely mentioned, the report takes us back to 1619 and offers a "brief review of the slave's struggle for equality prior to emancipation."[250] The report then offers a brief history of race and freedom, through Reconstruction and Redemption, to Jim Crow and the march in the Twentieth Century towards equality.[251] The end of this discussion details the many gains in racial representation in government thanks to the Black community's "new

244. *Id.* § 301.
245. *Id.* § 601(A).
246. *See* Brian K. Landsberg, Sumter County, *Alabama and the Origins of the Voting Rights Act*, 54 Ala. L. Rev. 877 (2003); *see* Lawson, *supra* note 236 at 140–249.
247. David J. Garrow, Bearing the Cross 142 (1986).
248. U.S. Comm'n on Civil Rights, Freedom to the Free (1963).
249. *Id.* at 1.
250. *Id.* at 7.
251. *Id.* at 30.

political strength."[252] At the time of publication, the report noted that Blacks "now held more *elective* offices than at any time since 1877."[253] Despite this achievement, the report concluded, more work remained to be done.[254] The problem of racial disenfranchisement continued. At the heart of the problem, particularly in the South, was "resistance to the established law of the land and to social change."[255]

While the political branches and the bureaucracy continued to debate their duties and responsibilities under the Reconstruction power, the grassroots did not let on. The Voter Education Project, under the direction of the Southern Regional Council, formed in 1962 and lasted for two and a half years.[256] It raised and administered monies raised towards registering eligible voters in the South, funds that it then provided to the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, and the National Urban League.[257] More directly, VEP also coordinated registration drives and activities.[258] In 1964, civil rights groups, including CORE and SNCC, organized Freedom Summer, a voter registration drive aimed at increasing the number of Black registered voters in Mississippi.[259] The gains from these efforts were noticeable.

But these gains were not enough, nor were they a signal that the problem of racial discrimination in voting had been solved. Congress certainly did not think so, and so in 1964, they came back to the issue as part of the omnibus Civil Rights Act. This new bill continued to improve the traditional litigation avenues begun in 1957 while recognizing that local registrars had too much discretion to discriminate against voters of color at will.[260] In response, the '64 Act made it unlawful to apply different standards, practices, and procedures from those applied to successful applicants; it banned the use of immaterial

252. *Id.* at 189.

253. *Id.* (emphasis added).

254. *Id.* at 207.

255. *Id.*

256. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1953, at 578 (1988)

257. Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade*, 1962-1965, 57 S.C. L. REV. 889 (2006).

258. *Id*.

259. *Id.*; Lawson, *supra* note 236.

260. The Civil Rights Act, Pub. L. No. 88-352, § 101 (a), 78 Stat. 241 (1964) (current version at 52 U.S.C. § 10101 (2019)).

mistakes in the application form as a reason to deny registration; and it required that registration tests be administered in writing.[261] The Act also established the completion of sixth grade as a rebuttable standard of literacy.[262] The Act provided for three-judge courts with direct appeal to the U.S. Supreme Court.[263]

During his State of the Union address on January 4, 1965, President Johnson recognized that the fight against racial discrimination in voting was not over.[264] As he detailed the many challenges facing the nation, from education and clean water and air to crime and "crippling disease," President Johnson proposed as part of his national agenda that "we eliminate every remaining obstacle to the right to vote."[265] Later in the address, he asked that "a just nation throw open . . . the city of promise" to those Americans "still trapped in poverty and idleness and fear."[266] This promise included, for African Americans, the "enforcement of the civil rights law and elimination of barriers to the right to vote."[267] More work remained.

Two months later, on March 7, a group of marchers began a pilgrimage from Selma to Montgomery. They left Brown Chapel AME Church and marched silently through downtown Selma. But they did not make it past the Edmund Pettus Bridge. State and local officials awaited them.[268] And from the ashes of this tragic and unforgettable moment arose the most important and effective civil rights statute in our nation's history, the Voting Rights Act.[269]

VI. THE VOTING RIGHTS ACT

The Voting Rights Act reflected President Johnson's directive to the Department of Justice to "prepare the 'goddamnedest toughest' voting-rights bill possible."[270] Prior efforts to enforce the 15th Amendment failed because they pursued a court-centric, individual

261. *Id.* § 101 (a).
262. *Id.* § 101 (b).
263. *Id.* § 101 (d).
264. *See* Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 87 (Mar. 15, 1965).
265. The Civil Rights Act, § 101 (d).
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. Howell Raines, My Soul Is Rested: Movement Days in the Deep South Remembered 337 (1977) (interview with Nicholas Katzenbach, Attorney General during the Johnson Administration).

rights approach to what was clearly a structural problem. These prior efforts fell short, in the words of Attorney General Katzenbach, "tarnished by evasion, obstruction, delay, and disrespect."[271] This is how Katzenbach explained the problem to a House subcommittee:

> Our experience in the voting area has been that, no matter what is decided by courts, no matter what is passed by Congress in this respect, every single place in some States, the only way you can get compliance is to litigate and then that is defended, it is defended up through every court procedure to the Supreme Court, no matter how clear and obvious the points, no matter how many times those same points have been decided, until you eventually get a decree. Then the decree is examined carefully to see whether there is any way in which a certain practice not explicitly prohibited by the decree can be engaged in for the same discriminatory purposes. When this is done, and you go back to court to get the judge to broaden the decree, his capacity and jurisdiction to do that is litigated, then that is taken on appeal and that is taken to the Supreme Court. When you run out of these things, the legislature enacts a new test and that has to be litigated and appealed and go to the Supreme Court.[272]

"What is required," Katzenbach argued, "is a systematic, automatic method to deal with discriminatory tests, with discriminatory testers, and with discriminatory threats."[273]

The Act confronted the problem of racial discrimination in voting in new and aggressive ways. The most powerful provisions of the Act were Sections 4 and 5, the coverage formula and the preclearance provision. Under section 4(b), states who used literacy tests and had voter registration or voter turnout rates below 50% would become covered jurisdictions.[274] And any such jurisdiction was subject to section 5 of the Act, its preclearance provision.[275] This meant that any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within these jurisdictions must be approved by the federal government prior to implementation.[276] The Act also banned literacy tests from covered jurisdictions and provided

271. Voting Rights: Hearings on H.R. 6400 before the Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. 1, 5 (1965).

272. *Id*. at 41–42.

273. *Id*.

274. The Voting Rights Act, Pub. L. No. 89-110, § 4 (b), 79 Stat. 438 (1965) (current version at 52 U.S.C. § 10101 (2019)).

275. Voting Rights Act of 1965, Pub. L. 89-110, §§ 4-5, 79 Stat. 437, 437 (1965).

276. *Id.*

for poll watchers and registrars.[277] No longer could local registrars stay ahead of the law and keep voters of color from joining the voting rolls. Notably, these special provisions of the Act would last 5 years; once voters of color were registered and able to vote, the need for the law would wane.[278]

Central to the history of the Voting Rights Act is the fact that the Court has generally treated the Act like a superstatute from the moment it first addressed the constitutionality of the Act in *South Carolina v. Katzenbach*.[279] For Chief Justice Warren, the constitutionality of the Act was not to be decided on the basis of a formalistic and rigid understanding of both the statute and the Constitution, but "with reference to the historical experience which it reflects."[280] The Court clearly viewed Congress as a partner in resolving the problem of racial discrimination in voting that had plagued (and notice the personalization of the problem) "our country for nearly a century."[281]

Undeniably, this was aggressive enforcement of the 15th Amendment. In *South Carolina v. Katzenbach*,[282] the Supreme Court upheld the Act under a deferential standard of review.[283] But in his opinion for the Court, Chief Justice Warren made a strategic mistake. In attempting to quell criticism that the Act targeted Southern jurisdictions as "conquered provinces," Warren justified the aggressive nature of the Act by pointing both to history and the legislative record.[284] He referred to the number of hearings in each congressional committee, the total number of witnesses, the length of the debates in each chamber, and final vote tallies.[285] From this "voluminous legislative history," Warren reached two conclusions.[286] First, he concluded that the country faced "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[287] And second, that "Congress concluded" that past attempts to enforce the 15th Amendment had

277. *Id.*
278. *Id.*
279. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 Iowa L. Rev. 1389 (2015).
280. *Id.* at 1406.
281. *Id.*
282. 383 U.S. 301 (1966).
283. Charles & Fuentes-Rowher, *supra* note 279, at 1406–07.
284. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324.
285. *See id*. at 308–09.
286. *Id.* at 309.
287. *Id.*

fallen woefully short and must be replaced by "sterner and more elaborate measures."[288] Warren then "paused" in order to "summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress."[289]

Justice Brennan saw the problem immediately. In comments he sent to the Chief Justice on the first circulated draft of the opinion, Brennan questioned the need to justify the Act by pointing to the legislative record.[290] Justifying the Act in 1965 was quite easy; one need only open a newspaper or watch the news.[291] Brennan knew that as time passed, the evidence to justify the Act would not be as evident. To be sure, the coverage formula was a temporary measure, on the belief that the need for the Act would lessen and eventually end. And therein lied the rub. This was a question of epistemic authority. Who was in charge of deciding when the need for the VRA would no longer exist? More generally, who would be in charge of determining the proper scope of congressional powers under the Reconstruction Amendments? Who would be in charge, in other words, of determining whether legislation was "appropriate" to enforce the 13th, 14th and/or 15th Amendments? To Brennan, the Court need only point, as it did, to rational basis review and defer to the congressional judgment.[292] The nod to legislative findings was surplusage, and strategically mistaken.

Months later, Justice Brennan's fears came to pass. In *Katzenbach v. Morgan*, the Court confronted the constitutionality of section 4(e) of the Act, which barred the use of literacy tests for persons who had completed a sixth grade education in Puerto Rico.[293] This section was in direct tension with a recent case, *Lassiter v. Northampton*, which upheld the use of literacy tests as legitimate exercises of state power absent a finding that the tests were used as discriminatory tools.[294] Unfortunately for the Court, the voluminous congressional record in support of the special provisions of the Act did not encompass section 4(e). Writing for the Court, Justice Brennan deferred to

288. *Id.*
289. *Id.*
290. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 505-06 (2014).
291. *Id.* at 492–93.
292. *Id.* at 506–07.
293. *Id.* at 500.
294. *Id.* at 500–01.

the congressional vision of constitutional equality, notwithstanding the fact that that vision contradicted and displaced the Court's previously articulated understanding of constitutional equality.[295] This is what Justice Brennan had argued in *South Carolina*, but *Morgan* came one case too late and soon became a historical footnote, a blip in the Court's march towards a muscular version of judicial review.

Buried within *Morgan*'s apparent irrelevance lies an important lesson. The problem of racial discrimination in voting was too difficult for any one institution to handle alone. The problem required multiple institutions working in concert towards the same goal. Congress made the first move, in enacting an aggressive and inventive statute. It was then up to the justices and the executive to interpret and enforce the statute as needed. And this is precisely what *Morgan* offered, a clear signal to the political branches that the justices would do their part to further the promise of constitutional equality.

The effect of the Act was undeniable. Gains in registration and voting turnout were immediate.[296] These gains were made possible in spite of significant non-compliance on the part of state officials with some of the demands of the Act.[297] This led to an important crossroad for the Act. The special provisions were intended to last for five years. Should Congress extend them any further? The facts in the next landmark case, *Allen v. State Board of Elections*,[298] pointed towards an answer. In *Allen*, the Court examined the scope of the preclearance provision, and whether specific changes in state law were subject to preclearance.[299] The case put the Court in a bind. The Act as originally enacted focused on the act of registering and voting. Some of the changes at issue in *Allen* and its companion cases, however, were dilutive in nature; that is, eligible voters were able to register and vote, but the state was undervaluing the weight of their vote.[300]

Writing for the Court, and turning to the reapportionment cases for support, Chief Justice Warren argued that the Voting Rights Act was "aimed at the subtle, as well as the obvious, state regulations

295. *Id.* at 501.

296. UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION (1968) at vii.

297. Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827 (2006).

298. 393 U.S. 544 (1969).

299. *Id.* at 563–64.

300. *See Allen*, 393 U.S. at 550–53.

which have the effect of denying citizens their right to vote because of their race."[301] Consequently, Warren concluded that Congress *intended* that "all changes, no matter how small, be subjected to § 5 scrutiny."[302] Had the Court decided otherwise, the Voting Rights Act would have succumbed, as prior attempts before it, to the ingenuity and ill will of local officials' intent on denying voters of color the right to a meaningful vote. *Allen* was thus crucial in the life of the Act, perhaps its most important moment. After *Allen*, Congress extended the special provisions of the Act for another five years and cited this ruling as a leading reason for doing so.[303]

The Court continued its expansive and flexible approach to in its interpretations of the language of the Act for the next decade. The Court meant what it wrote: every change, no matter how small, must be precleared under § 5. Though the statutory language specifically covered changes with which votes "could comply," the Court expanded the reach of § 5 to annexations and redistricting plans, changes with which voters need not comply.[304] The Court also demanded preclearance of a state rule demanding unpaid leave of employees seeking elective office, due to its "potential for discrimination."[305] Similarly, the Court also expanded the reach of jurisdictions covered by the law. Though the Act explicitly applied only to states or jurisdictions that registered voters, the Court expanded its reach to include political units that did not have registration responsibilities.[306] For the first decade of the Act, though there were certainly blips,[307] the Court was a willing partner in the project begun by Congress in 1965.

By 1980, only three justices remained from the Court that first upheld the constitutionality of the Act in *South Carolina*.[308] Under-

301. *Id*. at 565.

302. *Id.* at 568.

303. *See* Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 4 (1969). ("Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of Allen v. State Board of Elections, decided by the Supreme Court on March 3, 1969, is the portent of change.").

304. Perkins v. Matthews, 400 U.S. 379, 390–91 (1971); Georgia v. United States, 411 U.S. 526, 536 (1973).

305. *See* Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32 (1978).

306. *See* United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110 (1978); Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32 (1978).

307. *See* Beer v. United States, 425 U.S. 130 (1976).

308. These were Justices Brennan, Stewart, and White.

standably, the Court's posture began to change. In *City of Mobile v. Bolden*,[309] the Court held that § 2 of the Act inflexibly tracked the constitutional standard under the 15th Amendment. This was not an irrational or even illogical position. There was much evidence from the legislative record, as well as the language of § 2, to support such a conclusion.[310] But importantly, that decision signaled that the era of partnership and cooperation was coming to an end. It is true that the partnership continued, to a point. Two years later, Congress extended the special provisions of the Act and took the chance to overturn *City of Mobile*, offering its own interpretation.[311] The Court subsequently upheld this new standard, even though it was in direct conflict with the constitutional standard. This was a question the Court must face sometime in the future: could Congress, under its power to enforce the 15th Amendment's intent standard, implement an effect standard? Though many justices have raised the question in concurring and dissenting opinions through the years[312], the Court itself is yet to take up the question squarely.

Through the 1990's and into the new century, cracks in the voting rights edifice continued to show. In *Presley v. Etowah County*,[313] for example, the Court declined to extend preclearance coverage to changes in the distribution of authority of an elected body after an election had taken place.[314] Writing for the Court, Justice Kennedy reminded his audience that only changes with respect to voting were covered by § 5.[315] Consequently, governance changes, or what Justice Kennedy labeled the "internal operation of an elected body," did fall under § 5 coverage.[316] This case is exemplary of Court's change in posture. Had it been willing to do so, the Court could have nestled the changes in *Presley* within prior precedents. What happened in Etowah County, after all, fit perfectly within the historical record. And as in *Allen*, the Court in *Presley* could have interpreted the act of voting as protected by the Act through its prior voting rights prece-

309. City of Mobile v. Bolden, 446 U.S. 55 (1980).

310. *See, e.g.*, Voting Rights: Hearings before the S. Comm. on the Judiciary on S. 1564, 89th Cong. 171 (1965) (statement of Sen. Dirksen) (arguing that section 2 "is a restatement, in effect, of the 15th Amendment").

311. 42 U.S.C. § 1973.

312. *See* Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 142-43 (2010)

313. 502 U.S. 491 (1992).

314. *Id.* at 510.

315. *Id.* at 500.

316. *Id.* at 503.

dents. Had it done so, governance questions could have easily come under the purview of the Act.[317] But this was a different Court.

This was a Court that swung the voting rights pendulum hard in the opposite direction from the Warren Court. These were the *Shaw* cases, where the Court invented a new cause of action in the name of its colorblind vision.[318] These were also the *Bossier Parrish* cases, where the Court offered narrow interpretations of § 5 of the Act, and which Congress saw fit to partially reverse when it extended the special provisions of the Act for another twenty-five years.[319] Thus, in 2008, when plaintiffs challenged the constitutionality of the Voting Rights Act, in *Northwest Austin v. Holder*,[320] the stage was set. Would the Act survive its latest constitutional challenge?

It did, but only for a time.

VII. THE FIFTH MOMENT: UNWINDING THE SECOND RECONSTRUCTION AND THE FUTURE OF VOTING RIGHTS LAW

"Things have changed in the South," Chief Justice Roberts unanimously declared in *Northwest Austin*, and he had the evidence to prove it.[321] "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[322] On this evidence, the Chief Justice implicitly asked, what else was left for the "temporary" VRA to do? Moreover, the Chief continued, the "statute's coverage formula is based on data that is now more than thirty-five years old, and there is considerable evidence that it fails to account for current political conditions."[323] One can almost hear the Chief Justice explicitly asking the question that is implicit in his *Northwest Austin* discourse—whether there is any useful purpose to maintaining an outmoded regulatory regime that has already achieved its

317. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1716–19 (1993); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 520 (2015).

318. Karlan, *supra* note 317, at 1736–37.

319. *See, e.g.*, Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000).

320. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

321. *Id*. at 202.

322. *Id*.

323. *Id.* at 203.

public policy aims, especially in light of the purported "federalism costs" imposed by the statute.[324]

But the Court didn't go where its own words appeared to take it. Like Courts before it, the Roberts Court could also interpret the clear language of the law creatively, in furtherance of its own institutional goals. Specifically, in *Northwest Austin*, the Court interpreted the Act's bail out provision—which allowed covered jurisdictions to apply for exit from coverage—to include the plaintiffs, a local utility district in Texas.[325] The Court so concluded in the face of statutory language that only applied to states or political subdivisions that registered voters.[326] The utility district in *Northwest Austin* was neither, yet the Court argued that to hold otherwise and keep the utility district under coverage would raise a serious constitutional question.[327] And rather than face *that* serious question, the Court expanded the language of the Act.

Northwest Austin raised a puzzle for students of the Court. Why lecture the legal public about the improved state of race relations only to then avoid the obvious constitutional question through a creative, if unpersuasive, reading of the statutory language? The Court made its intentions clear in the next case, *Shelby County v. Holder*.[328] *Shelby County* marks the death of the Voting Rights Act as a superstatute.[329] Specifically, the Court struck down the Act's coverage formula, which identified the states that were subject to the Act's special provisions, and it effectively neutered the existing preclearance regime.[330] This is significant; it signals that the partnership between Congress and the Executive, on one side, and the Court, on the other side, has disintegrated. With *Shelby County* and its herald, *Northwest Austin*, the Court is cautiously dismantling the most important civil rights statute in our nation's history. The strong message of *Shelby County* is that the voting rights era—and maybe much more broadly, the civil rights era—as we have known it, is over.

Thus, the question with which we close this Essay: where does voting rights policy go from here? Not surprisingly, voting rights activ-

324. We examine the question of the Act's federalism costs in Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 127 (2015).
325. *Nw. Austin*, 557 U.S. at 210–11.
326. *Id.* at 205–06.
327. *Id.* at 211.
328. 570 U.S. 529 (2013).
329. *See* Charles & Fuentes-Rowher, *supra* note 279, at 1391.
330. *Id.*

ists called on President Barack Obama and Congress to enact a new coverage formula.[331] Indeed, a few weeks after the *Shelby County* decision, President Obama convened civil rights leaders to the White House to reassure them that his Administration is committed to a bipartisan fix for the Act.[332] Attorney General Eric Holder, for his part, promised to use the remaining sections of the VRA to vigorously enforce voting rights policy.[333] And as evidence of his commitment, Attorney General Holder filed suit in Texas and asked a lower court to use section 3(c) of the VRA to once again require the state to preclear some voting changes.[334]

As these early responses to *Shelby County* reveal, many of the proposed fixes and reactions to the decision reflect an attempt to restore the status quo ante. These early efforts have been aimed at promoting aggressive § 2 litigation, using section 3's bail-in provision, and using § 2 cases to craft a new coverage provision. Importantly, these strategies critically depend upon the continued persistence of racial discrimination in voting by state actors as the central problem of voting rights policy. This is because the most critical justification for the VRA has long been the presence, profundity, and persistence of intentional racial discrimination in voting by state actors. More importantly, modern voting rights law and policy is held together by a consensus that clearly understood the reality, pervasiveness, and extent of racial discrimination by state actors in democratic politics. This anti-discrimination consensus is the foundation upon which modern voting rights law is built.

However, rightly or wrongly, the Court no longer believes that intentional racial discrimination by state actors remains the dominant problem of democratic politics.[335] The decision in *Shelby County* is clear evidence that the Court's current conservative majority believes that the regulatory model that has undergirded modern voting rights policy and has been in place for almost fifty years is no longer tenable because of what it views as the backward-looking nature of the VRA's statutory scheme. A statutory scheme that, in its view, is focused on rooting out intentional discrimination by state actors as that discrimination manifested itself in the middle of the twentieth century. *Shelby*

331. *Id.*
332. *Id.* at 1391–92.
333. *Id.* at 1392.
334. *Id.*
335. *Id.*

County is the expression of the Court's dissent from the current voting rights model; *Shelby County* announces the dissolution of the framework that has guided voting rights law and policy of the past half-century.

CONCLUSION – SLOUCHING TOWARD UNIVERSALITY

In the wake of *Shelby County*, voting rights scholars and activists are searching for a way forward. This brief jaunt through our history can provide us some lessons for the future. First, *Shelby County* must be viewed as part of our ongoing dialectic on the scope and importance of voting and political participation. Though the history of franchise in American law and politics is generally one of expansion, it is also one of entrenchment. Progress is sometimes followed by backlash. From the founding and through the 21st Century, the history of the right to vote is a history of ebbs and flows, successes and failures; of voter expansion yet voter suppression; of racial empowerment yet racial retrenchment. This is a history of continuous political struggle.

Second, progress is a function of legal and social consensus, which is itself is the product of social movements. The VRA came about because of the civil rights movement. Though as lawyers, we often focus on the role of the Court and litigation, we should pay attention as much attention to social movements and the political process as providing the framework for exploring the scope and content of political participation. Thus, we ought to be looking to the political process and to a political movement to build a new way forward.

Third, the history of the voting in the United States is one that has been fought on a largely racialized battlefield. Additionally, since at the least the advent of the VRA, we have filtered most of our disputes with respect to political participation through a racial prism. One, as of yet unexplored or underexplored, benefit of this racial prism is that it has led us as a society to view restrictions on voting and political participation as unusual and less acceptable both on normative and instrumental grounds. On normative grounds, it is becoming increasingly difficult to justify barriers to voting and political participation. On instrumental grounds, as we search for a path forward from the voting rights, racialized model, we might find the only available path is one in which we view voting and political participation as a positive and universal right.

Putin's Revenge: The Foreign Threat to American Campaign Finance Law

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INTRODUCTION

When Congress established federal contribution limits in 1974, it also instituted a complete ban on foreign campaign contributions. In adopting the post-Watergate reforms, Congress acted on the presump-

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tion that it could create a closed campaign finance system limited exclusively to Americans.[1]

It was a reasonable conclusion to draw at the time. After all, the means of global communication in the mid-1970s were quite limited. There was no internet, no email, no cellphones, and no 24/7 news channels. Mail from Europe or Asia took a week to arrive and newspapers and magazines took even longer. Accordingly, as long as Congress prohibited Americans from accepting direct financial contributions from foreign sources, it could effectively limit campaign activity to Americans in the 1970s.

But as the 2016 election demonstrated, the days of a closed system of campaign finance—one in which campaign-related speech and expenditures come exclusively from American sources—are long over. The internet empowered the Russian government to intervene in the American presidential election on an unprecedented scale. Russian President Vladimir Putin directed his intelligence services to use computer hacking and social media to promote Donald Trump and undermine Hillary Clinton. The success of the Russian influence campaign demonstrated in stunning fashion the extent to which foreign governments can use the internet to shape public opinion in the United States.

The thesis of this article is that modern technology has created a global electronic village that empowers foreign actors to intervene in American elections like never before. In the internet age, the most significant form of foreign influence comes not in the shape of a direct cash payment to candidate campaigns, but rather in the form of less tangible but far more potent "in kind" contributions and expenditures. Computer hacking, political propaganda, staged photo opportunities, and the instantaneous global dissemination of opposition research and fake news offer foreign governments a way to advance their national interests by shaping public opinion in the United States during election campaigns. The upshot is our 1970s-era campaign finance laws have become woefully antiquated in the internet age.

1. 52 U.S.C. § 30121 (2012); FED. ELECTION COMM'N, FOREIGN NATIONALS (2017), http://www.fec.gov/pages/brochures/foreign.shtml#search=foreign; U.S. DEP'T OF JUSTICE, FOREIGN AGENTS REGISTRATION ACT, https://www.fara.gov/; *see* Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CALIF. INTERDISC. J. 79, 100 (2017); Bluman v. FEC, 800 F. Supp. 2d 281, 283 (D.D.C. 2011*)*, *aff'd*, 565 U.S. 1104 (2012).

The growing threat of foreign interference is compounded by the fact that legislative solutions are much more elusive than is commonly understood. Laws that purport to ban foreign influence on our elections will not stop governments from posting on the internet information that advances their strategic interests. The federal "ban" on foreign campaign activity thus promises more than Congress can actually deliver.

Accordingly, this article proposes a modest but significant reform to current law by focusing on one area where legislation can be effective: the regulation of communications between American candidates and foreign governments. Congress should require candidates to inform the Federal Election Commission ("FEC") of all foreign government contacts that their campaigns have within 48 hours of the communications. Such reports should be made immediately available to the public and posted on the FEC website. In addition, Congress should empower the FEC to alert the public to foreign efforts to influence American elections. Although we cannot prevent foreign governments from seeking to influence our election campaigns, we can ensure that the public is made aware of those efforts. In the internet age, a fully informed public is the best defense against foreign meddling.

I. FOREIGN INTERFERENCE AS A CAMPAIGN FINANCE ISSUE

A. The Foreign Hacking Threat

The concept of foreign election interference naturally engenders fears of hacked voting machines and corrupted election outcomes. That nightmarish scenario is not as outlandish as it might seem. Recent studies have demonstrated that foreign actors pose a serious threat to election administration.[2] For example, if foreign govern-

2. Casey Leins, *State Voting Systems Remain Vulnerable to Hackers*, U.S. NEWS (Feb. 12, 2018), https://www.usnews.com/news/best-states/articles/2018-02-12/state-voting-systems-remain-vulnerable-to-hackers-ahead-of-midterm-elections-report-reveals ("With less than nine months until midterm elections, states still have a long way to go to protect their voting systems from security threats, according to a new report released Monday by the Center for American Progress."); Danielle Root, Liz Kennedy, Michael Sozan & Jerry Parshall, *Election Security in All 50 States*, CTR. FOR AM. PROGRESS (Feb. 12, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/ ("No state received a perfect score in this report. With few exceptions, most states fell in the middle of the spectrum: No state received an A; 11 states received a B; 23 states received a C; 12 states received a D; and five states received an F. The main takeaway from the Center for American Progress' research and analysis is that all states have room for improvement. . . .").

ments gained access to state registration databases, they could create chaos by changing or deleting voter information.[3] Only 16 states permit Election Day registration, which means that if the hack was not detected until Election Day, voters with deleted or altered registration files would not be permitted to vote in most states.[4]

Evidence already exists of foreign interest in targeting registration databases. In 2016, hackers attempted to gain access to the voter registration systems in 21 states.[5] Jeh Johnson, the Secretary of the Department of Homeland Security, later confirmed that the Russian government was behind the attack on the state voter registration databases.[6] Although the Russians did not change votes or alter registration records in 2016, the fact that they probed registration databases raised concern that in the future foreign governments might attempt to sabotage American voting and registration systems.[7]

In response to the rising threat from hackers, election authorities have begun to implement significant reforms. There are many sensible steps the states can take to protect election infrastructure, including the adoption of paper ballots, post-election paper audits, voting machine modernization, and paper backups of election pollbooks.[8]

3. Clare Malone, *The Moscow Midterms: How Russia could steal our next election*, FIVETHIRTYEIGHT (Apr. 9, 2018), https://fivethirtyeight.com/features/how-russia-could-steal-the-midterms/.

4. NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME DAY VOTER REGISTRATION (2019), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx; Douglas W. Jones, *4 ways to defend democracy and protect every voter's ballot*, THE CONVERSATION (Sept. 6, 2018), https://theconversation.com/4-ways-to-defend-democracy-and-protect-every-voters-ballot-101765; Richard Forno, *How vulnerable to hacking is the US election cyber infrastructure?*, THE CONVERSATION (July 29, 2016), https://theconversation.com/how-vulnerable-to-hacking-is-the-us-election-cyber-infrastructure-63241.

5. Callum Borchers, *What we know about the 21 states targeted by Russian hackers*, WASH. POST (Sept. 23, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/23/what-we-know-about-the-21-states-targeted-by-russian-hackers/?utm_term=.80ec8eeb7885; Cynthia McFadden, William M. Arkin & Kevin Monahan, *Russians penetrated U.S. voter systems, top U.S. official says*, NBC NEWS (Feb. 7, 2018), https://www.nbcnews.com/politics/elections/russians-penetrated-u-s-voter-systems-says-top-u-s-n845721; Likhitha Butchireddygari, *Many County Election Officials Still Lack Cybersecurity Training*, NBC NEWS (Aug. 23, 2017), https://www.nbcnews.com/politics/national-security/voting-prep-n790256.

6. McFadden, Arkin & Monahan, *supra* note 5.

7. Cynthia McFadden, William M. Arkin & Kevin Monahan, *U.S. intel: Russia compromised seven states prior to 2016 election*, NBC NEWS (Feb. 28, 2018), https://www.nbcnews.com/politics/elections/u-s-intel-russia-compromised-seven-states-prior-2016-election-n850296 ("All state and federal officials who spoke to NBC News agree that no votes were changed and no voters were taken off the rolls."); U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE 4 (2018), https://www.justice.gov/ag/page/file/1076696/download ("To our knowledge, no foreign government has succeeded in perpetrating ballot fraud, but the risk is real").

8. Michael Wines, *6 Ways to Fight Election Hacking and Voter Fraud, According to an Expert Panel*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/election-secur-

For example, in 2016 a majority of Pennsylvania counties relied on electronic voting machines without paper backup.[9] In 2018, the state's governor committed to funding statewide paper backups, a change that will go into effect in 2020.[10] Pennsylvania is not alone in improving its election security. Many states have moved away from electronic voting systems and over a dozen states have either established or expanded post-election audits.[11] Improving cybersecurity has also become a priority in jurisdictions across the country.[12] Although the effort to secure America's election infrastructure remains a work in progress, there is for the first time in years cautious optimism about the future of election security.

But the challenge posed by malign foreign actors is not limited to election administration. Foreign influence campaigns represent a clear and rising threat to the American campaign finance system, as the 2016 election demonstrated in dramatic fashion.

B. The Foreign Interference Threat

In 1966, Congress banned foreign nationals from using an agent to make financial contributions during American election campaigns.[13] When Congress amended the Federal Election Campaign

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ity-expert-panel.html; Lawrence Norden & Ian Vandewalker, *Securing Elections From Foreign Interference*, BRENNAN CTR. FOR JUST. 10–12, 17–22 (June 29, 2017), https://www.brennancenter.org/sites/default/files/publications/Securing_Elections_From_Foreign_Interference.pdf.

9. Cynthia McFadden, Kevin Monahan & Tracy Connor, *Paperless in Pennsylvania: Can Swing State Verify the 2016 Vote?*, NBC NEWS (Oct. 13, 2016), https://www.nbcnews.com/news/us-news/paperless-pennsylvania-can-swing-state-verify-2016-vote-n660266.

10. Marc Levy, *Pennsylvania commits to new voting machines, election audits*, ASSOCIATED PRESS (Nov. 29, 2018), https://www.apnews.com/da88a6bf0fd1489abfb72b967bfd6fa4.

11. Cory Bennett, *States ditch electronic voting machines*, THE HILL (Nov. 2, 2014) ("Roughly half of the states that significantly adopted electronic voting following the cash influx have started to move back toward paper."), https://thehill.com/policy/cybersecurity/222470-states-ditch-electronic-voting-machines; NATIONAL CONFERENCE OF STATE LEGISLATURES, POST-ELECTION AUDITS (2019), http://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx.

12. Jacqueline Thomsen, *Report finds states have improved cybersecurity for voter registration data*, THE HILL (Sept. 20, 2018), https://thehill.com/policy/cybersecurity/407581-report-finds-states-have-improved-cybersecurity-for-voter-registration; Jacqueline Thomsen, *Experts point to states improving election security ahead of midterms*, THE HILL (Oct. 30, 2018), https://thehill.com/policy/cybersecurity/413876-experts-point-to-states-improving-election-security-ahead-of-midterms.

13. Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 970 (2011) ("In 1966, Congress strengthened its restrictions on foreign controlled political activities by amending FARA to make it a felony for a foreign principal to use an agent to make campaign contributions or for a candidate to solicit such contributions."); Daniel S. Savrin, Note, *Curtailing Foreign Financial Participation in Domestic Elections: A Proposal to Reform the Federal Election Campaign Act*, 28 VA. J. INT'L L. 783, 791 (1988).

Act ("FECA") in 1974, it imposed a comprehensive prohibition on foreign campaign activity and tasked the Federal Election Commission with enforcing the ban.[14] Today, federal law prohibits foreign nationals from "directly or indirectly" making "a contribution or donation of money or *other thing of value*" to a candidate and it also prohibits foreign nationals from making independent or coordinated expenditures "in connection with a Federal, State, or local election."[15] FECA thus bans "in kind" contributions and independent expenditures as well as direct contributions to candidates. To further limit foreign influence on American election campaigns, federal election regulations bar foreign nationals from participating "directly or indirectly" in election-related decision-making.[16] Perhaps most important of all, FECA prohibits Americans from soliciting, accepting, or receiving a campaign contribution or donation from a foreign national.[17]

FEC rules provide guidance for determining when an American has violated the ban on soliciting foreign donations or expenditures. Section 110.20 of the Code of Federal Regulations ("CFR") directs that "[n]o person shall knowingly provide substantial assistance in the solicitation, making, acceptance, or receipt of a contribution or donation" by a foreign national.[18] The CFR defines the term "solicit" as "an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value."[19] Federal regulations define the term "knowingly" as having "actual knowledge that the source of the funds solicited, accepted or received is a foreign national" or awareness "of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of the funds solicited, accepted or received is a foreign national."[20] Furthermore, FEC rules require recipients to

14. Jeffrey K. Powell, *Prohibitions On Campaign Contributions From Foreign Sources: Questioning Their Justification In A Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 961 (1996); Savrin, *supra* note 13, at 793-95.

15. 52 U.S.C. § 30121(a)(1) (2018) (emphasis added).

16. 11 C.F.R. § 110.20 (i) (2019).

17. 52 U.S.C. § 30121(a)(2) (2018).

18. 11 C.F.R. § 110.20 (h) (2019).

19. *See* 11 C.F.R. § 110.20 (a)(6) (2019); 11 C.F.R. § 300.2 (m) (2019); *see also* Bob Bauer, *The Trump Campaign-Russia Alliance and Campaign Finance*, JUST SECURITY (Jan. 19, 2018), https://www.justsecurity.org/51216/trump-campaign-russia-alliance-campaign-finance/.

20. 11 C.F.R. § 110.20 (a)(4)(i)–(ii) (2019).

conduct a "reasonable inquiry" to determine whether campaign funds originated from a foreign source.[21]

FECA's prohibition on foreign involvement is not limited to foreign governments. It extends to all foreign nationals, including individual foreign citizens, corporations, political parties, and organizations.[22] The only exception is reserved for foreign nationals with permanent resident (i.e. green card) status.[23] But apart from green card holders, federal law does not permit foreign nationals to make contributions in connection with American elections.

The federal courts have consistently upheld the prohibition on foreign involvement in American election campaigns.[24] In *Bluman v. FEC*, the D.C. Circuit rejected a First Amendment challenge to the federal ban on foreign contributions and foreign-funded independent expenditures.[25] Although the D.C. Circuit held that the law permitted foreign nationals to engage in issue advocacy that did not refer to a candidate, the court concluded that the ban on foreign-funded express advocacy passed strict scrutiny review.[26] Writing for the 3-judge panel in *Bluman*, then-D.C. Circuit Court Judge Brett Kavanaugh concluded that the law prevents foreign nationals "only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate."[27] Judge Kavanaugh went on to explain the Constitutional foundations of the ban:

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21. 11 C.F.R. § 110.20 (a)(4)(iii) (2019).

22. 11 C.F.R. § 110.20 (a)(3) (2019); 22 U.S.C. § 611(b) (2018).

23. 11 C.F.R. § 110.20 (a)(3)(ii) (2018) ("Foreign national means . . . [a]n individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence"); *see also* FED. ELECTION COMM'N, INDIVIDUALS: THE "GREEN CARD" EXCEPTION, https://www.fec.gov/updates/foreign-nationals ("The Act does not prohibit individuals with permanent resident status (commonly referred to as 'green card holders') from making contributions or donations in connection with federal, state or local elections, as they are not considered foreign nationals.").

24. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). For an excellent analysis of *Bluman*, see RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 15–7, 113–20 (2016); *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 UNIV. OF CHI. L.R. DIALOGUE 77, esp. 82–6 (2014).

25. *Bluman*, 800 F. Supp. 2d at 283, 285, 292.

26. *Id*. at 284 ("This statute, as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."). For a critique of *Bluman*, see Richard L. Hasen, *Why Banning Russian Facebook Ads Might Be Impossible*, POLITICO (Sept. 26, 2017), https://www.politico.com/magazine/story/2017/09/26/russian-facebook-ads-regulation-215647.

27. *Bluman*, 800 F. Supp. 2d at 290.

> It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. . . . Political contributions and express-advocacy expenditures finance advertisements, get-out-the-vote drives, rallies, candidate speeches, and the myriad other activities by which candidates appeal to potential voters. . . . It follows that the government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.[28]

The Supreme Court summarily affirmed the *Bluman* decision.[29] Indeed, the *Bluman* decision did not break new ground, but rather simply restated the Court's long-standing support of Congress's constitutional authority to exclude foreign nationals from participating in the American election process. For example, in a 1978 case, the Supreme Court observed that "a State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community."[30] In a 1982 case, the Court went even further, holding that the:

> exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.[31]

The ban on foreign involvement in American election campaigns thus stands on firm constitutional ground.

However, as a practical matter, the statutory ban fails to deter foreign governments from seeking to influence elections in the United States. America's status as the leading global superpower makes the outcome of U.S. elections extremely important to governments around the world. And the internet makes it easier for foreign governments to exercise influence across international borders than ever before.[32] The combination of strategic incentives and technological

28. *Id.* at 288.

29. Bluman v. FEC, 565 U.S. 1104 (2012).

30. Foley v. Connelie, 435 U.S. 291, 295–96 (1978) (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

31. Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982).

32. Dep't of Justice, Report Of The Attorney General's Cyber Digital Task Force 1 (2018), https://www.justice.gov/ag/page/file/1076696/download.

capabilities has ushered in a new era of foreign involvement in American election campaigns. As the Justice Department warned in a recent report, modern communication technology permits "foreign actors to reach unprecedented numbers of Americans covertly and without setting foot on U.S. soil."[33] The Russian government's interference in the 2016 election provides the preeminent case in point.

II. RUSSIAN INTERFERENCE IN 2016

A. Putin's Preferred Candidate

When former Secretary of State Hillary Clinton announced her presidential candidacy in April 2015,[34] she had no inkling that one of her most formidable election opponents would be Russian President Vladimir Putin. As Clinton later explained, "I never imagined that he [Putin] would have the audacity to launch a massive covert attack against our own democracy, right under our noses—and that he'd get away with it."[35] But she certainly knew that he harbored intense personal animosity for her.[36] During her years as secretary of state, Clinton sensed from her personal interactions with Putin that he had contempt for her as a female officeholder.[37] In turn, she had a history of making disparaging remarks about him. For example, when she mounted her first campaign for the Democratic presidential nomination in 2008, Clinton quipped that the Russian leader "was a KGB agent. By definition he doesn't have a soul."[38]

But the origins of Putin's decision to intervene in the 2016 presidential election lay not in his hostile personal interactions with Clinton but rather in the controversy over Russia's 2011 parliamentary elections.[39] In December 2011, United Russia—a party founded by Putin—narrowly prevailed in the parliamentary elections, thus giving Putin momentum for his March 2012 campaign for a third term as

33. *Id.* at 2.

34. Amy Chozick, *Hillary Clinton Announces 2016 Presidential Bid*, N.Y. Times (Apr. 12, 2015), https://www.nytimes.com/2015/04/13/us/politics/hillary-clinton-2016-presidential-campaign.html.

35. Hillary Rodham Clinton, What Happened 333 (2017).

36. *Id.* ("I knew he had a personal vendetta against me and deep resentment toward the United States.").

37. *Id.* at 327–28.

38. Ben Smith, *Hillary: Putin 'doesn't have a soul'*, Politico (Jan. 6, 2008), https://www.politico.com/blogs/ben-smith/2008/01/hillary-putin-doesnt-have-a-soul-005126.

39. Simon Shuster, *All the Wrong Moves: Putin Plots His Strategy Against the Protesters*, Time (Dec. 9, 2011), http://content.time.com/time/world/article/0,8599,2101924,00.html.

Russia's president.[40] But widespread allegations of election fraud tainted United Russia's victory.[41] Opposition supporters took to the streets to protest what they viewed as a stolen election.[42] The rallies occurred in cities around the country and attracted the largest crowds since the collapse of the Soviet Union in 1991.[43] The protesters directly challenged Putin, chanting "Putin is a thief" and "Russia without Putin."[44] Despite the allegations of election fraud, Russia's Central Election Commission quickly certified the parliamentary results.[45]

The protesters were not alone in raising questions about the Russian election. The outcome first came under scrutiny when election monitors for the Organization for Security and Cooperation in Europe issued a highly critical public report.[46] The independent election monitors noted that they "had observed blatant fraud, including the brazen stuffing of ballot boxes."[47] The election observers clearly implied that the fraud benefited Putin's United Russia party, which sug-

40. Ellen Barry, *Rally Defying Putin's Party Draws Tens of Thousands*, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/world/europe/thousands-protest-in-moscow-russia-in-defiance-of-putin.html ("The ruling party, United Russia, lost ground in last Sunday's election, securing 238 seats in the next Duma, compared with the 315, or 70 percent, that it holds now. The Communist Party won 92 seats; Just Russia won 64 seats; and the nationalist Liberal Democratic Party won 56 seats."); Miriam Elder, *Russians come out in force to protest against alleged electoral fraud*, THE GUARDIAN (Dec. 10, 2011), https://www.theguardian.com/world/2011/dec/10/russia-protests-election-vladimir-putin [hereinafter Elder, *Russians protest*]; *see also* Shuster, *supra* note 39; Miriam Elder, *Vladimir Putin accuses Hillary Clinton of encouraging Russian protests*, THE GUARDIAN (Dec. 8, 2011), https://www.theguardian.com/world/2011/dec/08/vladimir-putin-hillary-clinton-russia ("United Russia was created in 2001 with the sole purpose of supporting Putin's agenda.") [hereinafter Elder, *Putin accuses Clinton*].

41. Barry, *supra* note 40; Shuster, *supra* note 39 ("Russia's parliamentary elections, held on Sunday, Dec. 4. The vote allowed Putin's United Russia party to hang on to a slim majority, but well-substantiated claims of voter fraud drove thousands of Russians to the streets of Moscow and other cities to protest on Monday and Tuesday.").

42. Shuster, *supra* note 39; Barry, *supra* note 40.

43. *Russian election: Biggest protests since fall of USSR*, BBC (Dec. 10, 2011), https://www.bbc.com/news/world-europe-16122524; Barry, *supra* note 40; Elder, *Russians protest*, *supra* note 40.

44. Barry, *supra* note 40; Elder, *Russians protest*, *supra* note 40; David M. Herszenhorn & Ellen Barry, *Putin Contends Clinton Incited Unrest Over Vote*, N.Y. TIMES (Dec. 8, 2011), https://www.nytimes.com/2011/12/09/world/europe/putin-accuses-clinton-of-instigating-russian-protests.html.

45. Barry, *supra* note 40 ("A deputy chairman of Russia's Central Election Commission told the Interfax news service that the final report on the election results was signed Friday, and that he saw no reason to annul them."); Elder, *Russians protest*, *supra* note 40.

46. Herszenhorn & Barry, *supra* note 44 ("Her first remarks were made on Monday, after a scathing preliminary report was released by monitors from the Organization for Security and Cooperation in Europe.").

47. Michael Schwirtz & David M. Herszenhorn, *Voters Watch Polls in Russia, and Fraud Is What They See*, N.Y. TIMES (Dec. 5, 2011), https://www.nytimes.com/2011/12/06/world/europe/russian-parliamentary-elections-criticized-by-west.html.

gested that the Russian government itself had rigged the election results.[48]

At the time of the parliamentary elections, Hillary Clinton served as Barack Obama's secretary of state. As nationwide protests rattled Putin's regime, Clinton publicly expressed her concern over the "troubling" reports of election fraud and announced that "[t]he Russian people, like people everywhere, deserve the right to have their voices heard and their votes counted."[49] When Moscow responded by asserting that the Obama Administration should stay out of Russia's internal affairs, Clinton explained that "we expressed concerns that we thought were well founded about the conduct of the [Russian] elections."[50] Tensions escalated still further when the secretary of state challenged the legitimacy of the election results. In unusually blunt language, she declared that Russia's parliamentary elections were "neither free nor fair."[51] Although the independent election report supported Clinton's assertions, even some of the secretary of state's colleagues in the Obama Administration worried that she had crossed a line in her criticism of Russia's election process.[52]

By questioning the integrity of the Russian elections, Clinton became a sworn enemy in Putin's eyes.[53] He interpreted her comments as a personal attack.[54] In an extraordinary public address, he accused Clinton of conspiring with his domestic political opponents to oust him from power, a sign of how seriously he took the secretary of

48. *Id.* ("While the monitors declined to draw firm conclusions, it was clear from their report that vote stealing and other alleged malfeasance might have spared the presumed beneficiary, Prime Minister Vladimir V. Putin's United Russia, an even worse blow than it officially received.").

49. *Id.*

50. Herszenhorn & Barry, *supra* note 44.

51. Kathy Lally, *Putin lashes back at Clinton criticism*, WASH. POST (Dec. 8, 2011), https://www.washingtonpost.com/world/putin-lashes-back-at-clinton-criticism/2011/12/08/gIQAQ5lYgO_story.html?utm_term=.55acf4d7e093.

52. Herszenhorn & Barry, *supra* note 44; Michael Crowley & Julia Ioffe, *Why Putin hates Hillary*, POLITICO (July 25, 2016), https://www.politico.com/story/2016/07/clinton-putin-226153 ("Some Obama officials felt the provocative statement went too far.").

53. Crowley & Ioffe, *supra* note 51 ("nothing angered Putin as much as Clinton's statement about Russia's December 2011 parliamentary elections, which produced widespread allegations of fraud and vote-rigging on behalf of Putin allies."); *see also* CLINTON, *supra* note 35, at 329 ("When he heard me and other Western leaders voice support for civil society in Russia, he saw it as a plot to undermine. For Putin, a pivotal moment came in 2011.").

54. Lally, *supra* note 51 ("The week before the parliamentary elections, Putin made dark references to Golos, an independent election monitor, accusing it of acting for U.S. interests. He attacked Golos, critics said, to discredit eventual reports of fraudulent elections and prevent questions about the legitimacy of his party, United Russia").

state's remarks.[55] Putin's concern was exacerbated by the popular uprisings of the "Arab Spring," which had toppled or destabilized regimes across the Middle East in the months before Russia's parliamentary elections.[56] Clinton's support for NATO airstrikes to topple Libyan dictator Muammar Gaddafi earlier that year also infuriated the Russian leader, who viewed the bombing campaign as a dangerous precedent in which western powers disregarded national sovereignty in the name of democracy.[57] The conflict between Clinton and Putin came to a head in 2014 when Russia invaded Ukraine and annexed Crimea.[58] In response to the Russian aggression, Clinton compared Putin's intervention in Ukraine "to what Hitler did back in the '30s."[59] The Hitler comparison, combined with the secretary of

55. Kathy Lally & Karen DeYoung, *Putin accuses Clinton, U.S. of fomenting election protests*, WASH. POST (Dec. 8, 2011), https://www.washingtonpost.com/world/europe/putin-accuses-clinton-us-of-stirring-election-protests/2011/12/08/gIQA0MUDfO_story.html?utm_term=.96c8d2370d20 ("Russian Prime Minister Vladimir Putin on Thursday accused the United States of supporting street protests against last Sunday's elections and blasted Secretary of State Hillary Rodham Clinton for suggesting that the voting was rigged."); Elder, *Putin accuses Clinton*, *supra* note 40 ("Vladimir Putin has accused Hillary Clinton, the US secretary of state, of fomenting an increasingly vociferous opposition movement in Russia, threatening to derail the two countries' fragile resetting of relations."); Simon Shuster, *Vladimir Putin's Bad Blood With Hillary Clinton*, TIME (July 25, 2016), http://time.com/4422723/putin-russia-hillary-clinton/; Elder, *Russians protest*, *supra* note 40 ("Putin has accused the US secretary of state Hillary Clinton of prompting the unrest"); Herszenhorn & Barry, *supra* note 44 ("In a rare personal accusation, Mr. Putin said Mrs. Clinton had sent 'a signal' to 'some actors in our country' after Sunday's parliamentary elections, which were condemned as fraudulent by both international and Russian observers.").

56. Mark N. Katz, *Russia and the Arab Spring*, MIDDLE EAST INST. (Apr. 3, 2012), https://www.mei.edu/publications/russia-and-arab-spring; Elder, *Putin accuses Clinton*, *supra* note 40 ("The accusation builds on months of Russian statements and media coverage blaming popular uprisings around the Arab world on western scheming."); Herszenhorn & Barry, *supra* note 44 ("Deeply wary of the forces of unrest that unleashed the Arab Spring, the Russian authorities have moved swiftly to contain the protests, deploying battalions of riot police officers and legions of pro-government young people to occupy public squares in Moscow and drown out the opposition.").

57. Will Englund, *The roots of the hostility between Putin and Clinton*, WASH. POST (July 28, 2016), https://www.washingtonpost.com/world/europe/the-roots-of-the-hostility-between-putin-and-clinton/2016/07/28/85ca74ca-5402-11e6-b652-315ae5d4d4dd_story.html?utm_term=.4ea4e086c2c5 ("Clinton had also pushed hard for the Libya intervention in the spring and summer of 2011, which Putin was appalled by, seeing it as unwarranted interference in another nation's sovereignty."); Thomas Harding, *Col Gaddafi killed: convoy bombed by drone flown by pilot in Las Vegas*, THE TELEGRAPH (Oct. 20, 2011), https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839964/Col-Gaddafi-killed-convoy-bombed-by-drone-flown-by-pilot-in-Las-Vegas.html.

58. Kathy Lally, *A readers' guide to the protests in Ukraine*, WASH. POST (Dec. 2, 2013), https://www.washingtonpost.com/world/europe/a-readers-guide-to-the-protests-in-ukraine/2013/12/02/2a589d1e-5b59-11e3-801f-1f90bf692c9b_story.html?utm_term=.37f0d516bd63 ("Hillary Rodham Clinton put it this way: A year ago, when she was still secretary of state, Clinton said Russia was trying to 're-Sovietize' the area once-occupied by the 15 republics that made up the Soviet Union.").

59. Crowley & Ioffe, *supra* note 52.

state's criticism of the 2011 election, convinced Putin that Clinton represented a threat to his own political survival.[60]

As early as December 2011, Putin hinted at an aggressive response to what he viewed as an unwarranted and dangerous American intervention into Russia's internal affairs. He warned that Russians must "protect our sovereignty" and not permit "a foreign government to influence internal political processes."[61] Years later, in an interview with Megyn Kelly of NBC News, Putin suggested that Clinton's 2011 critique of the Russian election motivated his intervention in the 2016 American election.[62] "Put your finger anywhere on a map of the world," he explained, "and everywhere you will hear complaints that American officials are interfering in internal election processes."[63] When Kelly asked whether American criticism of foreign elections justified Russian intervention in American elections, Putin answered: "It doesn't sound like a justification. It sounds like a statement of fact. Every action has an equal and opposite reaction."[64]

Putin's desire for revenge on Clinton is quite clear. But what is less clear is the nature of his support for Donald Trump. In January 2017, a joint report of the FBI, NSA, and CIA concluded that Putin had a "clear preference" for Trump in the 2016 election.[65] But why?

There is no question that Putin enjoyed far warmer relations with Trump than he did with Clinton. For years, Trump had lavished praise on the Russian leader.[66] For example, before traveling to Moscow for the Miss Universe pageant in 2013, Trump speculated whether Putin would become his "new best friend?"[67] In December 2015 Trump asserted that Putin was "a leader, unlike what we have in this coun-

60. Max Fisher, *Russia's Hacks Followed Years of Paranoia Toward Hillary Clinton*, N.Y. Times (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/world/europe/russia-hacks-putin-hillary-clinton.html; Englund, *supra* note 57; Crowley & Ioffe, *supra* note 52.

61. Elder, *Putin accuses Clinton*, *supra* note 40.

62. Kathleen Hall Jamieson, Cyberwar: How Russian Hackers And Trolls Helped Elect A President: What We Don't, Can't, And Do Know 22–23 (2018).

63. *Id.* at 22.

64. *Id.* at 23.

65. Director of National Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections*, Intelligence Community Assessment (Jan. 6, 2017), at 1, https://www.dni.gov/files/documents/ICA_2017_01.pdf.

66. Joe Sommerlad, *Donald Trump's gushing praise of Vladimir Putin under fresh scrutiny after Michael Cohen allegations*, The Independent (Jan. 18, 2019), https://www.independent.co.uk/news/world/americas/us-politics/trump-cohen-putin-russia-investigation-mueller-congress-fbi-a8734231.html.

67. Jeremy Diamond, *Timeline: Donald Trump's praise for Vladimir Putin*, CNN (July 29, 2016), https://www.cnn.com/2016/07/28/politics/donald-trump-vladimir-putin-quotes/index.html.

try."[68] In April 2016, Trump announced: "We're going to have a great relationship with Putin and Russia."[69] The Russian leader reciprocated Trump's praise, calling him "bright and talented."[70] The exchange of pleasantries seemed particularly strange in light of Trump's long history of vociferous attacks on many other global leaders, including even former President George Bush.[71]

A long history of business ties to Russia may have motivated Trump's admiration for Putin.[72] As far back as 1986 Trump had tried to build a luxury hotel near the Kremlin and his company continued to seek a deal to build a tower in Moscow during the 2016 election.[73] But his most important connection may have come in the form of Russian investments in his real estate holdings. In 2008, the president's son, Donald Trump Jr., told a New York real estate conference that "Russians make up a pretty disproportionate cross-section of a lot of our [Trump organization] assets. . . . We see a lot of money pouring in from Russia."[74] That same year Trump sold a $41 million Florida estate he owned to a Russian billionaire for $95 million.[75]

68. *Id.*

69. Amy Cheng & Humza Jilani, *Trump on Putin: The U.S. President's Views, In His Own Words*, FOREIGN POLICY (July 18, 2018), https://foreignpolicy.com/2018/07/18/trump-on-putin-the-u-s-president-in-his-own-words/.

70. Jeremy Diamond, *Donald Trump lavishes praise on 'leader' Putin*, CNN (Dec. 18, 2015), https://www.cnn.com/2015/12/18/politics/donald-trump-praises-defends-vladimir-putin/index.html.

71. Jasmine C. Lee & Kevin Quealy, *The 567 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html.

72. *See* Philip Bump, *The events that led to Trump's abandoned Moscow deal and Michael Cohen's latest plea agreement*, WASH. POST (Nov. 29, 2019), https://www.washingtonpost.com/politics/2018/11/29/events-that-lead-trumps-abandoned-moscow-deal-michael-cohens-latest-plea-agreement/?utm_term=.bd1d7db0d4a7.

73. David Ignatius, *A history of Donald Trump's business dealings in Russia*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/opinions/a-history-of-donald-trumps-business-dealings-in-russia/2017/11/02/fb8eed22-ba9e-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.846a152379a7; Carol D. Leonnig et al., *Trump's business sought deal on a Trump Tower in Moscow while he ran for president*, WASH. POST (Aug. 27, 2017), https://www.washingtonpost.com/politics/trumps-business-sought-deal-on-a-trump-tower-in-moscow-while-he-ran-for-president/2017/08/27/d6e95114-8b65-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.7dea8a64ea0e; *see also* Mark Mazzetti et al., *Moscow Skyscraper Talks Continued Through 'the Day I Won,' Trump Is Said to Acknowledge*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/us/politics/trump-tower-moscow-cohen-giuliani.html.

74. Brennan Weiss, *Trump's oldest son said a decade ago that a lot of the family's assets came from Russia*, BUSINESS INSIDER (Feb. 21, 2018), https://www.businessinsider.com/donald-trump-jr-said-money-pouring-in-from-russia-2018-2.

75. Tom Porter, *Trump Sold A $40 Million Estate To A Russian Oligarch For $100 Million—And A Democratic Senator Wants To Know Why*, NEWSWEEK (Feb. 10, 2018), https://www.newsweek.com/trump-sold-40-million-estate-russian-oligarch-100-million-and-democratic-802613.

During a 2013 interview on David Letterman's talk show, Trump boasted that he did "a lot of business with the Russians."[76] In a 2014 interview the president's son, Eric Trump, reportedly claimed that his family funded its golf courses with $100 million in Russian money and explained that "we don't rely on American banks. We have all the funding we need out of Russia."[77] Although Eric Trump later denied he made the statement about the Russian money, public records made clear the scale of Donald Trump's financial connections to Russia. A 2017 investigation by the Reuters news agency, for example, revealed that Russian billionaires had invested over $98 million in Trump luxury properties in Florida.[78]

The large nature of the financial transactions led some to suspect that Trump might have illegally laundered money for Russian oligarchs.[79] In February 2019, the House Intelligence Committee Chairman Adam Schiff announced that the committee would investigate "credible reports" that Trump had engaged in "money laundering" and thus was financially compromised by the Russians.[80]

In any case, what is clear is that the prospect of sanctions relief factored prominently in the Russian government's assessment of who it wanted to win the American election. Above all, Moscow sought an end to the economic sanctions that the Obama administration had imposed on Russia following the invasion of Ukraine and annexation of Crimea in 2014.[81] In supporting Trump, Putin's government clearly

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76. Sommerlad, *supra* note 66.

77. Tina Nguyen, *Eric Trump Reportedly Bragged About Access To $100 Million In Russian Money*, VANITY FAIR (May 8, 2017), https://www.vanityfair.com/news/2017/05/eric-trump-russia-investment-golf-course.

78. Nathan Layne et al., *Russian elite invested nearly $100 million in Trump buildings*, REUTERS (March 17, 2017), https://www.reuters.com/investigates/special-report/usa-trump-property/ ("A Reuters review has found that at least 63 individuals with Russian passports or addresses have bought at least $98.4 million worth of property in seven Trump-branded luxury towers in southern Florida, according to public documents, interviews and corporate records.").

79. Craig Unger, *Trump's Russian Laundromat*, THE NEW REPUBLIC (July 13, 2017), https://newrepublic.com/article/143586/trumps-russian-laundromat-trump-tower-luxury-high-rises-dirty-money-international-crime-syndicate; Adam Davidson, *Trump's Business of Corruption*, THE NEW YORKER (Aug. 21, 2017), https://www.newyorker.com/magazine/2017/08/21/trumps-business-of-corruption; *see also* Ryan Lucas, *Russian Lawyer At Trump Tower Meeting Charged In Connection To Money Laundering Case*, NPR (Jan. 8, 2019), https://www.npr.org/2019/01/08/683238650/russian-lawyer-at-trump-tower-meeting-charged-in-connection-to-money-laundering-.

80. Karoun Demirjian, *New Trump-Russia probe will focus on reports of money laundering, 'financial compromise,' Schiff says*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/powerpost/house-intel-panel-delays-cohen-interview-debates-russia-transcript-release/2019/02/06/42673254-2a24-11e9-b011-d8500644dc98_story.html?utm_term=.a958eca9b419.

81. *See* Mark Landler et al., *Obama Steps Up Russia Sanctions in Ukraine Crisis*, N.Y. TIMES (Mar. 20, 2014), https://www.nytimes.com/2014/03/21/us/politics/us-expanding-sanctions-

hoped that the Republican nominee would lift sanctions as president.[82] The Russians may have had sound reasons for that belief. During a July 2016 press conference, Trump announced that he would consider bringing the sanctions to an end.[83] Trump campaign chairman Paul Manafort's connections to Russian-linked figures also raised eyebrows.[84] During a private meeting in New York in August 2016, Manafort reportedly discussed the Ukraine-related sanctions with Konstantin Kilimnik, a Russian political operative with suspected ties to Russian military intelligence.[85] Moscow clearly seems to have expected that Trump's victory would lead to the termination of the Obama sanctions.[86]

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against-russia-over-ukraine.html; Karen DeYoung & Michael Birnbaum, *U.S. imposes new sanctions on Russia*, WASH. POST (Apr. 28, 2014), https://www.washingtonpost.com/world/national-security/us-imposes-new-sanctions-on-russia/2014/04/28/974c579e-ced6-11e3-b812-0c92213941f4_story.html?utm_term=.b03fdf0480cc.

82. Associated Press, *Russia sees Donald Trump as conduit for eased sanctions*, CBS NEWS (Dec. 3, 2016), https://www.cbsnews.com/news/russia-putin-donald-trump-conduit-eased-sanctions-election/.

83. Tyler Pager, *Trump to look at recognizing Crimea as Russian territory, lifting sanctions*, POLITICO (July 27, 2016), https://www.politico.eu/article/donald-trump-to-look-at-recognizing-crimea-as-russian-territory-lifting-sanctions-putin/ ("Donald Trump said Wednesday he would consider recognizing Crimea as Russian territory and lifting the sanctions against the country if he's elected president.").

84. Rachel Weiner, Spencer S. Hsu & Rosalind S. Helderman, *Paul Manafort shared 2016 polling data with Russian associate, according to court filing*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/local/legal-issues/paul-manafort-shared-2016-polling-data-with-russian-employee-according-to-court-filing/2019/01/08/3f562ad8-12b0-11e9-803c-4ef28312c8b9_story.html?utm_term=.a67b43f35d43.

85. Sharon LaFraniere, *Prosecutors Told Judge That Manafort Might Have Lied in Hopes of a Pardon*, N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/us/politics/manafort-pardon-russia-inquiry.html?module=inline; Sharon LaFraniere et al., *In Closed Hearing, a Clue About 'the Heart' of Mueller's Russia Inquiry*, N.Y. TIMES (Feb. 10, 2019), https://www.nytimes.com/2019/02/10/us/politics/manafort-mueller-russia-inquiry.html?action=click&module=Top%20Stories&pgtype=Homepage ("while Russia was taking steps to bolster Mr. Trump's candidacy, people in his orbit were discussing deals to end a dispute over Russia's incursions into Ukraine and possibly give Moscow relief from economic sanctions imposed by the United States and its allies."); Rosalind S. Helderman & Tom Hamburger, *How Manafort's 2016 meeting with a Russian employee at New York cigar club goes to 'the heart' of Mueller's probe*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/politics/how-manaforts-2016-meeting-with-a-russian-employee-at-new-york-cigar-club-goes-to-the-heart-of-muellers-probe/2019/02/12/655f84dc-2d67-11e9-8ad3-9a5b113ecd3c_story.html?utm_term=.e58c1039c931; Kenneth P. Vogel and Andrew E. Kramer, *Russian Spy or Hustling Political Operative? The Enigmatic Figure at the Heart of Mueller's Inquiry*, N.Y. TIMES (Feb. 23, 2019), https://www.nytimes.com/2019/02/23/us/politics/konstantin-kilimnik-russia.html ("But for the politicians and oligarchs who were Mr. Manafort's clients, Mr. Kilimnik's suspected intelligence connections suggested a seal of approval from Moscow. That was an important selling point, especially when combined with Mr. Manafort's connections.").

86. Andrew Osborn & Christian Lowe, *Russia revels in Trump victory, looks to sanctions relief*, REUTERS (Nov. 9, 2016), https://www.reuters.com/article/us-usa-election-reaction-russia/urope-revels-in-trump-victory-looks-to-sanctions-relief-idUSKBN1342FJ; Tom Hamburger & Rosalind Helderman, *Trump administration 'had a secret plan to lift Russian sanctions' and cede*

Whatever the true nature of Trump's relationship with Moscow, the bottom line was Putin's government wanted to see Clinton defeated and Trump elected. But Russia did far more than simply root for Trump from the sidelines.

B. The Russian Interference Campaign

Having decided to place his bets on Trump, Putin ordered his intelligence services to conduct a covert influence campaign designed to affect the outcome of the presidential election.[87] The Russian government engaged in two distinct campaigns to help Trump and hurt Clinton.[88] First, Russia conducted an email hacking operation designed to

Ukraine territory to Moscow, THE INDEPENDENT (Feb. 20, 2017), https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-russia-sanctions-secret-plan-ukraine-michael-cohen-a7590441.html. However, to Russia's disappointment, bipartisan opposition in Congress blocked most of Trump's efforts to lift sanctions. Ironically, as conclusive evidence of Putin's election meddling came to light, congressional pressure forced the administration to add even more sanctions on Russia in 2018. Cristina Maza, *Trump White House Is A 'Disappointment,' Russia Says*, NEWSWEEK (Dec. 29, 2017), https://www.newsweek.com/russias-relationship-trump-america-2017s-biggest-disappointment-kremlin-763988; *see also* Seung Min Kim et al., *McConnell to Trump: Do not lift sanctions on Russia*, POLITICO (Jan. 27, 2017), https://www.politico.com/story/2017/01/mitch-mcconnell-trump-russia-sanctions-234281; Ilya Arkhipov & Henry Meyer, *Kremlin Sours on Trump After His Repeated Putin Snubs*, BLOOMBERG (Dec. 6, 2018), https://www.bloomberg.com/news/articles/2018-12-06/kremlin-said-to-sour-on-trump-as-putin-snubs-feed-disappointment; Ellen Nakashima, *Trump administration hits Russian spies, trolls with sanctions over U.S. election interference, cyberattacks*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-sanctions-russian-spies-trolls-over-us-election-interference-cyber-attacks/2018/03/15/3eaae186-284c-11e8-b79d-f3d931db7f68_story.html?utm_term=.25dde340ba30; Peter Baker, *White House Penalizes Russians Over Election Meddling and Cyberattacks*, N.Y. TIMES (Mar. 15, 2018), https://www.nytimes.com/2018/03/15/us/politics/trump-russia-sanctions.html?rref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics&region=rank&module=package&version=highlights&contentPlacement=1&pgtype=sectionfront ("The sanctions targeted the same three Russian organizations and 13 individuals indicted by Mr. Mueller for an audacious operation spreading disinformation and propaganda to disrupt American democracy and, eventually, promote Mr. Trump."). *But cf.* Jeanne Whelan, *Treasury lifts sanctions on companies tied to Putin ally*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/business/2019/01/28/treasury-lifts-sanctions-companies-tied-putin-ally/?utm_term=.d8dacf71cfdb.

87. Director of National Intelligence, *supra* note 65, at 1–2. A bipartisan report of the Senate Intelligence Committee reaffirmed the intelligence community's conclusions. *See* Karoun Demirjian, *Russia favored Trump in 2016, Senate panel says, breaking with House GOP*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/powerpost/russia-favored-trump-in-2016-senate-panel-says-breaking-with-house-gop/2018/05/16/6cf95a6a-58f6-11e8-8836-a4a123c359ab_story.html?utm_term=.9431e6837bcd&wpisrc=nl_politics-pm&wpmm=1.

88. Ashley Parker & John Wagner, *'Go Donald!': Inside the Russian shadow campaign to elect Trump*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/politics/go-donald-inside-the-russian-shadow-campaign-to-elect-trump/2018/02/16/dea562c2-134a-11e8-9065-e55346f6de81_story.html?utm_term=.10fdcc1a0d20 ("From staging events on the ground in political battlegrounds to spreading misinformation across social media, the operation functioned in effect as a third party injecting itself into the hotly contested 2016 presidential race — exploiting the vulnerabilities of Democratic nominee Hillary Clinton and stoking ethnic tensions to help Trump become president.").

embarrass the Clinton campaign and divide the Democratic Party.[89] The operation began in March 2016 when intelligence officers from the GRU—a Russian military intelligence agency[90]—hacked into the email accounts of Hillary Clinton's campaign staff and DNC officials.[91] The GRU stole 50,000 emails from Clinton campaign chairman John Podesta's email account and also placed malware on DNC computers.[92] The hacked emails revealed private and often stinging criticism of Democratic presidential candidate Bernie Sanders by senior DNC officials.[93] The Russians realized that the emails would alienate many Sanders voters, potentially turning some of them against Clinton in the general election.[94] The GRU then apparently forwarded the emails to Wikileaks for public release during the Democratic National Convention in July 2016, when the disclosures would do maximum political damage to the Clinton campaign.[95]

89. *See* Devlin Barrett & Matt Zapotosky, *Mueller probe indicts 12 Russians with hacking of Democrats in 2016*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/world/national-security/rod-rosenstein-expected-to-announce-new-indictment-by-mueller/2018/07/13/bc565582-86a9-11e8-8553-a3ce89036c78_story.html?utm_term=.b7e27e7cf619&wpisrc=al_news__alert-politics—alert-national&wpmk=1; Director of National Intelligence, *supra* note 65, at ii-iii ("We assess with high confidence that Russian military intelligence (General Staff Main Intelligence Directorate or GRU) used the Guccifer 2.0 persona and DCLeaks.com to release US victim data obtained in cyber operations publicly and in exclusives to media outlets and relayed material to WikiLeaks.").

90. Andrew Kramer, *G.R.U., Russian Spy Agency Cited by Mueller, Casts a Long Shadow*, N.Y. TIMES (July 13, 2018), https://www.nytimes.com/2018/07/13/world/europe/what-is-russian-gru.html.

91. Indictment, United States v. Viktor Borisovich Netyksho et al., Case 1:18-cr-00215-ABJ (D.D.C. July 13, 2018), ¶¶ 1–3; Mark Mazzetti & Katie Benner, *12 Russian Intelligence Officers Indicted in Hacking Tied to the Clinton Campaign*, N.Y. TIMES (July 13, 2018), https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=Top-news&WT.nav=Top-news; Barrett & Zapotosky, *supra* note 89.

92. Philip Bump, *Timeline: How Russian agents allegedly hacked the DNC and Clinton's campaign*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/news/politics/wp/2018/07/13/timeline-how-russian-agents-allegedly-hacked-the-dnc-and-clintons-campaign/?utm_term=.b8aada0800c6&wpisrc=nl_politics-pm&wpmm=1.

93. Michael D. Shear & Matthew Rosenberg, *Released Emails Suggest the D.N.C. Derided the Sanders Campaign*, N.Y. TIMES (July 22, 2016), https://www.nytimes.com/2016/07/23/us/politics/dnc-emails-sanders-clinton.html.

94. Alan Yuhas, *Hillary Clinton campaign blames leaked DNC emails about Sanders on Russia*, THE GUARDIAN (July 24, 2016), https://www.theguardian.com/us-news/2016/jul/24/clinton-campaign-blames-russia-wikileaks-sanders-dnc-emails ("Hillary Clinton's campaign has accused Russia of meddling in the 2016 presidential election, saying its hackers stole Democratic National Committee (DNC) emails and released them to foment disunity in the party and aid Donald Trump.").

95. Barrett & Zapotosky, *supra* note 89.

The GRU's efforts paid immediate dividends as the Wikileaks email postings caused a national uproar in the United States.[96] The controversy divided Democrats just as the GRU had hoped, leading Sanders delegates to boo Clinton at the party's national convention and forcing DNC Chairwoman Debbie Wasserman Schultz to announce her resignation.[97] During the presidential convention, Sanders supporters even chanted "lock her [Clinton] up" while carrying anti-Clinton banners.[98] The "lock her up" chant echoed a Trump attack line on Clinton that Republican delegates had chanted during the Republican presidential convention.[99] The Democratic Party's problems were compounded in October 2016, when Wikileaks released a second batch of GRU-hacked emails that once again put Clinton in an unfavorable light by showing infighting among her aides.[100] Ultimately, as many as 12 percent of Sanders voters cast their ballots for Trump, thus providing the Republican nominee with a crucial boost in the exceedingly close November election.[101]

Despite the ban on foreign campaign expenditures, Trump publicly encouraged the Russians to continue their efforts to hack the Clinton campaign. In a televised press conference on the morning of July 27, 2016, he announced: "Russia, if you're listening, I hope you're able to find the 30,000 [Clinton] emails that are missing. I think you

96. Abby Phillip & Katie Zezima, *Top Democratic National Committee officials resign in wake of email breach*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/08/02/democratic-national-committee-ceo-amy-dacey-resigns-in-wake-of-email-breach/?utm_term=.6ff5ff78f33e.

97. Dan Roberts et al., *Debbie Wasserman Schultz to resign as DNC chair as email scandal rocks Democrats*, THE GUARDIAN (July 25, 2016), https://www.theguardian.com/us-news/2016/jul/24/debbie-wasserman-schultz-resigns-dnc-chair-emails-sanders; Adam Gabbatt & Dan Roberts, *'Lock her up': Sanders supporters adopt Trump's attack line on Clinton*, THE GUARDIAN (July 25, 2016), https://www.theguardian.com/us-news/2016/jul/25/lock-her-up-sanders-trump-clinton-chant; Anne Gearan et al., *DNC chairwoman will resign in aftermath of committee email controversy*, WASH. POST (July 24, 2016), https://www.washingtonpost.com/politics/hacked-emails-cast-doubt-on-hopes-for-party-unity-at-democratic-convention/2016/07/24/a446c260-51a9-11e6-b7de-dfe509430c39_story.html?utm_term=.9e6f367822a2.

98. Gabbatt & Roberts, *supra* note 97.

99. Ben Kamisar, *Sanders Supporters Chant 'Lock Her Up' at Philadelphia Rally: Report*, THE HILL (July 25, 2016), https://thehill.com/blogs/ballot-box/presidential-races/289078-sanders-supporters-chant-lock-her-up-at-philadelphia.

100. Eliza Collins, *Four of the Juiciest Leaked Podesta Emails*, USA TODAY (Oct. 13, 2016), https://www.usatoday.com/story/news/politics/onpolitics/2016/10/13/four-juiciest-leaked-podesta-emails/92014368/; *18 revelations from Wikileaks' hacked Clinton emails*, BBC (Oct. 27, 2016), https://www.bbc.com/news/world-us-canada-37639370.

101. Danielle Kurtzleben, *Here's How Many Bernie Sanders Supporters Ultimately Voted for Trump*, NPR (Aug. 24, 2017), https://www.npr.org/2017/08/24/545812242/1-in-10-sanders-primary-voters-ended-up-supporting-trump-survey-finds; Jason Le Miere, *Bernie Sanders Voters Helped Trump Win and Here's Proof*, NEWSWEEK (Aug. 23, 2017), https://www.newsweek.com/bernie-sanders-trump-2016-election-654320.

will probably be rewarded mightily by our press."[102] Perhaps not coincidentally, Russian military intelligence officers attempted to hack into Clinton's personal email servers on that very same day.[103]

The second stage of the Russian political influence campaign consisted of using social media to post false and inflammatory material designed to increase Republican turnout for Trump and decrease Democratic turnout for Clinton, especially among African American voters.[104] According to federal investigators, Yevgeny Prigozhin, a key Putin ally, supervised the political influence campaign.[105] The operation began when two Prigozhin-controlled companies—Concord Management & Consulting and Concord Catering—established the Internet Research Agency ("IRA") in St. Petersburg, Russia to wage "information warfare against the United States of America."[106] Working around the clock, the IRA acted as a troll factory, attacking

102. Ashley Parker & David E. Sanger, *Donald Trump Calls on Russia to Find Hillary Clinton's Missing Emails*, N.Y. TIMES (July 27, 2016), https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html.

103. 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 ("As it turns out, that same day, the Russians — whether they had tuned in or not — made their first effort to break into the servers used by Mrs. Clinton's personal office, according to a sweeping 29-page indictment unsealed Friday by the special counsel's office that charged 12 Russians with election hacking."); Amber Phillips, *6 questions from the indictment of 12 Russians for hacking*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/13/6-questions-from-the-indictment-of-12-russians-for-hacking/?utm_term=.b453baf5428d&wpisrc=nl_politics-pm&wpmm=1.

104. United States v. Internet Research Agency et al., Case No. 1:18-cr-00032 (D.D.C. Feb. 16, 2018), at ¶ 34; April Glaser, *Russian Trolls Were Obsessed With Black Lives Matter*, SLATE (May 11, 2018), https://slate.com/technology/2018/05/russian-trolls-are-obsessed-with-black-lives-matter.html; Philip Ewing, *Russians Targeted U.S. Racial Divisions Long Before 2016 And Black Lives Matter*, NPR (Oct. 30, 2017), https://www.npr.org/2017/10/30/560042987/russians-targeted-u-s-racial-divisions-long-before-2016-and-black-lives-matter.

105. Marwa Eltagouri, *The rise of 'Putin's chef,' the Russian oligarch accused of manipulating the U.S. election*, WASH. POST (Feb. 17, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/02/16/the-rise-of-putins-chef-yevgeniy-prigozhin-the-russian-accused-of-manipulating-the-u-s-election/?hpidHP_hp-top-table-main_putin-chef-1045pm%3Ahomepage%2Fstory&utm_term=.784935e98dde; Neil MacFarquhar, *Yevgeny Prigozhin, Russian Oligarch Indicted by U.S., Is Known as 'Putin's Cook'*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/world/europe/prigozhin-russia-indictment-mueller.html?emc=edit_mbe_20180219&nl=morning-briefing-europe&nlid=69180613&te=1.

106. Eltagouri, *supra* note 105; MacFarquhar, *supra* note 105; Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html?emc=edit_th_180217&nl=todaysheadlines&nlid=691806130217; David A. Graham, *What Mueller's Indictment Reveals*, THE ATLANTIC (Feb. 16, 2018), https://www.theatlantic.com/politics/archive/2018/02/mueller-roadmap/553604/; Parker & Wagner, *supra* note 88 ("While Clinton and Trump battled one another, Russian saboteurs and propagandists working for the St. Petersburg-based Internet Research Agency were waging a secret political crusade to benefit Trump.").

Clinton and promoting Trump on social media and other internet outlets.[107]

The political influence campaign targeted American voters with surgical precision.[108] Cognizant of the fact that African American voters constituted a critical Democratic constituency, the Russian's social media campaign relentlessly attempted to discourage African Americans from voting.[109] For example, posing as African American voters, Russian operatives claimed on social media that "Hillary Clinton Doesn't Deserve the Black Vote."[110] The Russians also set up a fake Instagram account under the account name "Woke Blacks" that urged African American voters not to participate in the election.[111] Using Facebook's targeting tools, the Russians covertly purchased 3,500 advertisements designed to turn voters away from Clinton, inflame racial divisions, and undermine confidence in America's democratic system of government.[112] The Russian posts referred to Clinton as "Pure Evil" and included doctored photos, including a fake picture

107. Neil MacFarquhar, *Inside the Russian Troll Factory: Zombies and a Breakneck Pace*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/18/world/europe/russia-troll-factory.html?emc=edit_nn_20180219&nl=morning-briefing&nlid=69180613&te=1; Apuzzo & LaFraniere, *supra* note 106.

108. Oliver Roeder, *Why We're Sharing 3 Million Russian Troll Tweets*, FIVETHIRTYEIGHT (July 31, 2018), https://fivethirtyeight.com/features/why-were-sharing-3-million-russian-troll-tweets/.

109. Nate Silver, *How Much Did Russian Interference Affect The 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018), https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election/; Glaser, *supra* note 104; Donie O'Sullivan, *Her Son Was Killed — Then Came the Russian Trolls*, CNN (June 29, 2018), https://www.cnn.com/2018/06/26/us/russian-trolls-exploit-philando-castiles-death/index.html.

110. Parker & Wagner, *supra* note 88.

111. *Internet Research Agency et al.*, 1:18-cr-00032-DLF at ¶¶ 46, 46b, 28; Apuzzo & LaFraniere, *supra* note 106.

112. Derek Hawkins, *The Facebook Ad Dump Shows the True Sophistication of Russia's Influence Operation*, WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/05/11/the-cybersecurity-202-the-facebook-ad-dump-shows-the-true-sophistication-of-russia-s-influence-operation/5af4733a30fb04258879944e/?utm_term=.9410e29dfc87; Nick Penzenstadler, et al., *We read every one of the 3,517 Facebook ads bought by Russians. Here's what we found*, USA TODAY (May 11, 2018), https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002/?utm_source=newsletter&utm_medium=email&utm_campaign=sendto_newslettertest&stream=Top-stories; Alicia Parlapiano & Jasmine C. Lee, *The Propaganda Tools Used by Russians to Influence the 2016 Election*, N.Y. TIMES (Feb. 16, 2018) https://www.nytimes.com/interactive/2018/02/16/us/politics/russia-propaganda-election-2016.html?em_pos=small&emc=edit_up_20180219&nl=upshot&nl_art=2&nlid=69180613&ref=headline&te=1 ("The indictment says that from April to November 2016, the group paid for advertisements on social media and elsewhere that expressly advocated for Mr. Trump or opposed Mrs. Clinton.").

of her shaking Osama bin Laden's hand.[113] Another posting declared: "Hillary is a Satan, and her crimes and lies . . . proved just how evil she is."[114] The Russian trolls operated at a frenetic pace, "applauding Donald Trump's candidacy while trying to undermine Hillary Clinton's."[115]

By any measure, the Russian intervention violated American campaign finance law.[116] The Internet Research Agency operated like a political campaign with a staff of 80, a huge budget, and a sophisticated understanding of American politics.[117] On Facebook alone, over 126 million Americans viewed Russian-controlled fake accounts.[118] In addition the Russians published over 131,000 messages on Twitter.[119] The scale of the Russian social media campaign was thus considerable.[120] Equally important, the GRU's hacking of the DNC emails generated weeks of unfavorable news coverage for Clin-

113. Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html?emc=edit_nn_20180219&nl=morning-briefing&nlid=69180613&te=1.

114. Apuzzo & LaFraniere, *supra* note 106.

115. MacFarquhar, *supra* note 107.

116. Philip Bump, *The Three Illegal Acts That May Have Helped Trump Win the Presidency*, WASH. POST (Aug. 24, 2018), https://www.washingtonpost.com/news/politics/wp/2018/08/24/the-three-illegal-acts-that-may-have-helped-trump-win-the-presidency/?utm_term=.63450c399592&wpisrc=nl_most&wpmm=1; Parker & Wagner, *supra* note 88; Darren Samuelsohn, *Mueller shifts focus back to Russian 'information warfare'*, POLITICO (Feb. 16, 2018), https://www.politico.com/story/2018/02/16/mueller-indictment-russia-information-warfare-416378.

117. Parker & Wagner, *supra* note 88 ("The group, which included 80 people, fashioned itself similarly to an actual political campaign, complete with departments for things such as search-engine optimization, data analysis, technology support and budgeting, according to prosecutors."); Parlapiano & Lee, *supra* note 112 ("The Russians in the indictment acted as an organization, and employees who ran the accounts were directed to create 'political intensity through supporting radical groups' and to criticize Hillary Clinton, but not Donald J. Trump or Bernie Sanders.").

118. Shane, *supra* note 113; Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html ("Russian agents intending to sow discord among American citizens disseminated inflammatory posts that reached 126 million users on Facebook, published more than 131,000 messages on Twitter and uploaded over 1,000 videos to Google's YouTube service").

119. Shane, *supra* note 113; Isaac & Wakabayashi, *supra* note 118.

120. Phillip Rucker, *Trump's Russia 'Hoax' Turns Out To Be Real*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/politics/trumps-russia-hoax-turns-out-to-be-real/2018/02/16/be3d174a-1346-11e8-9065-e55346f6de81_story.html?utm_term=.5400929f1215 ("The indictment — signed by special counsel Robert S. Mueller III and announced by Deputy Attorney General Rod J. Rosenstein, both of whom Trump has at times mused about wanting to fire — reveals that the scope of Russia's alleged efforts to help Trump defeat Democratic nominee Hillary Clinton was extraordinary."); Anton Troianovski, *Mueller Indictment is Vindication for Russia's Troll-Factory Critics*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/02/16/mueller-indictment-is-vindication-for-russias-troll-factory-critics/?utm_term=.b7fde2273301.

ton. The Russian influence campaign thus constituted an independent expenditure of millions of dollars and thousands of work hours on behalf of Trump.[121] The Republican nominee further capitalized on the hacked emails by constantly referring to them in his Tweets and on the campaign trail.[122]

It will never be known with certainty whether the Russian intervention changed the election outcome.[123] But what is clear is that the 2016 election was decided by a razor-thin margin. Trump carried an Electoral College majority thanks to a total of 79,646 votes in Michigan, Pennsylvania, and Wisconsin, a margin of less than 1% in those three states.[124] A study by Kathleen Hall Jamieson pointed out that the Russian hacking and cyber manipulation may have played a decisive role in Trump's election victory,[125] a view shared by former DNI Director James Clapper.[126] On the other hand, the statistician Nate Silver emphasized that the direct political effects of the Russian interference cannot be conclusively determined from the available election data.[127] In any case, there is no doubt that the election outcome pleased Moscow.[128] In the hours after the election results were announced, American intelligence agencies intercepted communications in which senior Russian officials celebrated Trump's victory and con-

121. Shane, *supra* note 113; Graham, *supra* note 106; Emily Cochrane & Alicia Parlapiano, *Over 100 Charges, 20 People and 3 Companies: The Mueller Inquiry, Explained*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/us/politics/mueller-investigation-charges.html.

122. Duncan J. Watts & David M. Rothschild, *Don't blame the election on fake news. Blame it on the media*., COLUM. JOURNALISM REV. (Dec. 5, 2017), https://www.cjr.org/analysis/fake-news-media-election-trump.php.

123. Silver, *supra* note 109; Watts & Rothschild, *supra* note 122.

124. Philip Bump, *Donald Trump Will Be President Thanks to 80,000 People in Three States*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/donald-trump-will-be-president-thanks-to-80000-people-in-three-states/?noredirect=on&utm_term=.369da0fbb9c7.

125. Jamieson, *supra* note 62, ("If Russian intrigue led to the nine days of publicized suspicion that eroded Clinton's support in the election's final week and a half, the case that Russian activities swung the election to Trump becomes even more conclusive."); Jane Mayer, *How Russia Helped Swing the Election for Trump*, THE NEW YORKER (Oct. 1, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump.

126. Greg Sargent, *James Clapper's bombshell: Russia swung the election. What if he's right?*, WASH. POST (May 24, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/05/24/james-clappers-bombshell-russia-swung-the-election-what-if-hes-right/?utm_term=.1496e7de75b0&wpisrc=nl_most&wpmm=1.

127. Silver, *supra* note 109 ("Russian interference is hard to measure because it wasn't a discrete event.").

128. Adam Entous & Greg Miller, *U.S. Intercepts Capture Senior Russian Officials Celebrating Trump Win*, WASH. POST (Jan. 5, 2017), https://www.washingtonpost.com/world/national-security/us-intercepts-capture-senior-russian-officials-celebrating-trump-win/2017/01/05/d7099406-d355-11e6-9cb0-54ab630851e8_story.html?utm_term=.f4bad4594bcc.

gratulated themselves for their role in the election.[129] As one U.S. intelligence official told the *Washington Post*, "The Russians felt pretty good about what happened on Nov. 8 [Election Day] and they also felt pretty good about what they did."[130]

Whatever the true impact of the Russian influence campaign, it is undeniable that the 2016 election offered a blueprint for future foreign actors to build upon. As former FBI director James Comey warned during his May 2017 testimony before the Senate Intelligence Committee, the Russians "will be back."[131]

III. THE BROADER ROLE OF FOREIGN GOVERNMENTS ON AMERICAN ELECTION CAMPAIGNS

A. The Recent History of Foreign Involvement in American Presidential Campaigns

The Russian intervention in 2016 was unprecedented in its scope and intensity, but not in its nature.[132] Friendly and hostile governments alike have sought to influence American elections. Although no previous case of foreign intervention involved anything remotely approaching the scale of the Russian effort in 2016, history makes clear that foreign governments—including even close allies like Britain, Israel, and Germany—have always had a strong interest in American election campaigns. That interest is likely to grow, not diminish, with the passage of time, especially since the internet empowers governments to communicate across international borders more easily than ever before.

Ironically, one of the most controversial foreign interventions in recent election history also involved a Clinton. In the 1992 presiden-

129. *Id.*

130. *Id.*

131. Peter Baker & David Sanger, *Trump-Comey Feud Eclipses a Warning on Russia: 'They Will Be Back'*, N.Y. TIMES (June, 2017), https://www.nytimes.com/2017/06/10/us/politics/trump-comey-russia-fbi.html. *See also* Mike Calia, *Secretary Of State Rex Tillerson: Russia Is Already Trying to Interfere in US Midterm Congressional Elections*, CNBC (Feb. 7, 2018), https://www.cnbc.com/2018/02/07/tillerson-russia-already-interfering-in-midterm-elections.html.

132. Bradley W. Hart, *Nazis And Communists Tried It Too: Foreign Interference in US Elections Dates Back Decades*, THE CONVERSATION (Jan. 22, 2019), https://theconversation.com/nazis-and-communists-tried-it-too-foreign-interference-in-us-elections-dates-back-decades-109934?utm_medium=email&utm_campaign=latest%20from%20The%20Conversation%20for%20January%2028%202019%20-%201222011235&utm_content=latest%20from%20The%20Conversation%20for%20January%2028%202019%20-%201222011235+Version+A+CID_ac7d91afbc90b4b4cf5a8833ed2ab5be&utm_source=campaign_monitor_us&utm_term=nazis%20and%20communists%20tried%20it%20too%20Foreign%20interference%20in%20US%20elections%20dates%20back%20decades.

tial election, British Prime Minister John Major privately supported the incumbent American president, George H.W. Bush, while Major's fellow Conservative Party members made no secret of "their preference for a Bush victory."[133] During the campaign, the British government searched its records for evidence that the Democratic nominee, Bill Clinton, had applied for British citizenship to avoid the draft during the Vietnam War.[134] The discovery of such records would have boosted Bush's reelection chances by raising questions about Clinton's patriotism.[135] In conducting the records review, the British may not have acted spontaneously. The Home Office search occurred at the same time as the Bush State Department searched Clinton's passport records, which suggested the two governments might have coordinated the hunt for damaging information.[136] In any case, neither the British government nor the Bush administration found records of interest regarding Clinton.[137]

But the British government did not stop there in its efforts to assist the Bush campaign. In the fall of 1992, Conservative Party strategists traveled to Washington to provide political advice to the Republicans.[138] In April 1992, Prime Minister Major had won a tough

133. Eugene Robinson, *Critics Blast Major On File Search*, WASH. POST (Dec. 7, 1992), https://www.washingtonpost.com/archive/politics/1992/12/07/critics-blast-major-on-file-search/54fb7d37-1eed-4ffa-a9fd-f62ddc831bd2/?utm_term=.376eec866c64 ("Major and Bush have enjoyed a warm friendship, and Conservative officials here were candid about their preference for a Bush victory."); Martin Rosenbaum, *Revealed: The Bush-Major Conversations*, BBC (June 1, 2016), https://www.bbc.com/news/uk-politics-36216768 ("Sir John Major and George Bush senior overlapped in power between late 1990 and early 1993, and their close relationship is illustrated by transcripts of conversations obtained by the BBC.").

134. Caroline Davies & Owen Bowcott, *Major Apologised to Bill Clinton over Draft-Dodging Suspicions*, THE GUARDIAN (Dec. 27, 2018, 7:01 PM), https://www.theguardian.com/uk-news/2018/dec/28/john-major-apologised-bill-clinton-vietnam-war-draft-dodging-suspicions-national-archives; Robinson, *supra* note 133 ("[g]overnment critics suggested that the search, which a Home Office spokesman said sought to establish whether Clinton had applied for British citizenship in order to avoid serving in the Vietnam War, might have been part of a campaign by the governing Conservative Party to help President Bush's reelection effort.").

135. *See also* Rosenbaum, *supra* note 133 ("Sir John Major and George Bush senior overlapped in power between late 1990 and early 1993, and their close relationship is illustrated by transcripts of conversations obtained by the BBC.").

136. Robinson, *supra* note 133 ("[t]he search of Home Office files occurred around the same time that U.S. State Department officials were looking through Clinton's passport files for information that might have some impact on the election."); Clinton himself believed that the Bush campaign requested that the British government conduct the records search. *See* BILL CLINTON, MY LIFE 433 (2004) ("[l]ater, it came out that the Bush people had also asked John Major's government to look into my activities in England.").

137. Robinson, *supra* note 133 ("[n]o such records were found, a Home Office spokesman said Friday.").

138. DENNIS W. JOHNSON, DEMOCRACY FOR HIRE: A HISTORY OF AMERICAN POLITICAL CONSULTING 389 (2017); MARY MATALIN & JAMES CARVILLE WITH PETER KNOBLER, ALL'S FAIR: LOVE, WAR, AND RUNNING FOR PRESIDENT 374 (1994); Jonathan Freedland, *Bush and the*

reelection battle and the Bush campaign hoped that Major's advisers could help President Bush achieve the same feat in the American election.[139] To that end, the British political strategists advised the Bush team on designing campaign commercials to attack Clinton's character and to depict him as a tax-and-spend liberal.[140] Top Bush adviser Mary Matalin later admitted that the Bush team "quite consciously copied the British approach" on economic issues.[141] *Newsweek* even pointed out that "a couple of Bush's attack ads on Clinton as a binge taxer and spender were borrowed almost frame for frame from the Major campaign, and the overall design the [British] visitors had brought along from London bore a striking resemblance to the president's evolving [campaign] strategy."[142]

Clinton won the election despite Bush's British-influenced attack ads.[143] The subsequent revelation that the British government had attempted to help Bush defeat Clinton became a major embarrassment for the Major government.[144] Years later, Clinton pointedly noted that the Conservative Party had sent campaign strategists "to advise the Bush campaign on how they might destroy me."[145] Labor Party MP Tony Blair (a future prime minister) blasted the Major govern-

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Brits: A Major Misapprehension, WASH. POST (Oct. 9, 1992), https://www.washingtonpost.com/archive/opinions/1992/10/09/bush-and-the-brits-a-major-misapprehension/854f746d-b0a1-4b0d-9730-3af640415cbb/?noredirect=on&utm_term=.07d0cf01d7d8; Robinson, *supra* note 133 ("[t]wo Conservative Party strategists went to the United States weeks before the election to advise the Republicans on lessons learned from the Tories' upset victory over Labor last spring."); Mark Garnett, "Foreign and Defence Policy," in *John Major: An Unsuccessful Prime Minister?: Reappraising John Major* (eds. Kevin Hickson, Ben Williams 2017) (noting that the Conservative Party hoped "George Bush would be re-elected to serve a second term in the White House. Just to make sure, officials connected to the Conservative Party visited Washington to advise President Bush"); CLINTON, *supra* note 136, ("[t]wo Tory campaign strategists came to Washington to advise the Bush campaign on how they might destroy me the way the Conservative Party had undone Labour Party leader Neil Kinnock six months earlier").

139. JOHNSON, *supra* note 138; MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 374–5.

140. JOHNSON, *supra* note 138; MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 375–76; Donald Macintyre, *Aides Urge Clinton to Snub Major*, THE INDEP. (Dec. 6, 1992, 1:02 AM), https://www.independent.co.uk/news/aides-urge-clinton-to-snub-major-1561846.html.

141. JOHNSON, *supra* note 138; MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 376.

142. PETER GOLDMAN, ET AL., QUEST FOR THE PRESIDENCY 1992 518 (1994).

143. Dan Balz & Ann Devroy, *Clinton Sweeps in*; *Women, Minorities Gain in Congress; Bush Ousted; Perot Draws 19% of Vote*, WASH. POST (Nov. 4, 1992), https://www.washingtonpost.com/archive/politics/1992/11/04/clinton-sweeps-in/3dfc02e7-62a6-43e3-9b12-36de5101632e/?utm_term=.083a2fe69271.

144. Davies & Bowcott, *supra* note 134 ("But the fact it had checked and told the media about this, albeit on a background basis, without Clinton's knowledge or approval, proved deeply embarrassing for the then British prime minister.").

145. CLINTON, *supra* note 136.

ment's intervention in the 1992 presidential election, warning that it was "not just an error in judgment," but also threatened "our relations with one of our most powerful allies."[146] To restore trust between Washington and London, John Major personally apologized to Clinton in a confidential letter in December 1992.[147] Major blamed the matter on the media, claiming that "during the campaign our Home Office were asked a number of questions by journalists about whether you had applied for British citizenship while in this country."[148] Major expressed his hope that the story would not damage relations between the two countries, writing, "I am only sorry that it has been played up now in a mischievous way. I hope the mischief will be short-lived."[149]

Ironically, however, the Clinton campaign had also received assistance from British political strategists.[150] The idea seems to have come in part from Hillary Clinton, who urged her husband's campaign managers to "look into the British campaign."[151] As a result, a Labour Party consultant spent several weeks at the Clinton headquarters in Arkansas to advise on election strategy.[152] The Clinton campaign also sought counsel from Yvette Cooper, who was later elected to Parliament, and Geoff Mulligan, a top adviser to future Prime Minister Gordon Brown.[153] Clinton campaign manager James Carville reported that the main lesson the campaign learned from the British was to respond to Republican "tax-and-spend" attacks with counterattacks of their own.[154]

British involvement in the 1992 campaign did not give rise to any legal consequences, perhaps because both parties had sought British advice. But four years later a controversy over foreign campaign contributions would result in both criminal charges and a congressional

146. Robinson, *supra* note 133.
147. Davies & Bowcott, *supra* note 134.
148. *Id.*
149. *Id.*
150. MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 377; JOHNSON, *supra* note 138.
151. MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 377.
152. JOHNSON, *supra* note 138; MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 377.
153. *Who is Yvette Cooper? Labour Leadership Contender Guide*, BBC (Sept. 10, 2015), https://www.bbc.com/news/uk-politics-33692930 ("[s]he worked on Bill Clinton's presidential campaign in Arkansas in 1992, and also worked in the office of then Labour leader John Smith."); MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 377.
154. MATALIN & CARVILLE WITH KNOBLER, *supra* note 138, at 378 ("[b]ut the biggest difference between us and the Labour party was that we responded. They never did, and they got beat.").

investigation.[155] In the late 1990s Johnny Chung, a Taiwanese-born U.S. citizen, pleaded guilty to using straw donors to contribute thousands of dollars from Chinese sources to the Democratic National Committee and the 1996 Clinton reelection campaign.[156] Between 1994 and 1996, Chung visited the White House at least 49 times and met frequently with the DNC Chair Donald Fowler and the DNC finance chair, Richard Sullivan.[157] Chung later admitted to federal prosecutors that a Chinese military intelligence officer gave him $300,000 to contribute to the Democrats.[158] The DNC ultimately returned the money, but during Chung's sentencing hearing, U.S. District Judge Manuel Real expressed amazement that the Democrats could have failed to realize the illegal sources of the funds.[159] "If Mr. Fowler and Mr. Sullivan didn't know what was going on, they're two of the dumbest politicians I've ever seen," Judge Real declared from the bench.[160]

The Chung case was not the only controversy to emerge over the role of Chinese money in the Clinton campaign.[161] A federal investigation found evidence that Chinese government officials tried to secretly direct two million dollars in campaign contributions to the Democrats in the mid-1990s.[162] Furthermore, a U.S. Senate investigation concluded that a Chinese millionaire named Ng Lap Seng ille-

155. Sean J. Wright, *Reexamining Criminal Prosecutions Under The Foreign Nationals Ban*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 563, 579–81 (2018).

156. Don Terry, *Democratic Fund-Raiser Pleads Guilty to Fraud and Conspiracy*, N.Y. TIMES (Mar. 17, 1998), https://www.nytimes.com/1998/03/17/us/democratic-fund-raiser-pleads-guilty-to-fraud-and-conspiracy.html; *Democratic Fund-Raiser Chung Given 5 Years Probation*, CNN (Dec. 14, 1998), http://www.cnn.com/ALLPOLITICS/stories/1998/12/14/chung.sentence/.

157. Roberto Suro & Bob Woodward, *Chung Ties China Money To DNC; Documents Support Story, Officials Say*, WASH. POST (May 16, 1998), https://www.washingtonpost.com/archive/politics/1998/12/15/democratic-fund-raiser-chung-sentenced-to-five-years-of-probation/cd420ca9-9acd-4ad3-b719-2d9d63ee41e0/?utm_term=.7ebb78c12ac1; David Rosenzweig, *Reno, Democrats Criticized by Judge*, L.A. TIMES (Dec. 15, 1998), http://articles.latimes.com/1998/dec/15/local/me-54163; Roberto Suro, *Special Inquiry Rejected on Satellite Waiver Issue*, WASH. POST (May 21, 1998), https://www.washingtonpost.com/wp-srv/politics/special/campfin/players/chung.htm.

158. Suro & Woodward, *supra* note 157 ("[d]emocratic fund-raiser Johnny Chung has told Justice Department investigators that a Chinese military officer who is an executive with a state-owned aerospace company gave him $300,000 to donate to the Democrats' 1996 campaign"); Wolf Blitzer, *Johnny Chung Says Chinese Official Gave Him $300,000 for Clinton Campaign*, CNN (Apr. 4, 1999, 9:43 PM), http://edition.cnn.com/ALLPOLITICS/stories/1999/04/04/china.clinton.money/.

159. Rosenzweig, *supra* note 157; Suro & Woodward, *supra* note 157.

160. Rosenzweig, *supra* note 157.

161. CHARLES LEWIS & THE CTR. FOR PUB. INTEGRITY, THE BUYING OF THE PRESIDENT 2000 45–46 (2000).

162. Suro & Woodward, *supra* note 157 ("[s]ince 1996 federal law enforcement and intelligence agencies have been investigating intercepted communications and other indications that Chinese government officials conceived a plan to spend at least $2 million to influence U.S.

gally contributed hundreds of thousands to the DNC through Charlie Trie, a Taiwanese-born Arkansas restaurant owner.[163] Trie ultimately pleaded guilty to violating federal campaign finance laws.[164]

The illegal donations to the Democrats may have been motivated by a lucrative satellite contract between the Chinese government and two American corporations.[165] In 1998 the *New York Times* reported that American satellite manufacturers and Chinese state-owned companies had jointly lobbied the U.S. government to remove satellites from the list of America's most sensitive military technology, which cannot be exported.[166] Despite the lobbying efforts, Secretary of State Warren Christopher, the Defense Department, and the government's intelligence agencies steadfastly opposed removing satellites from the sensitive technology list.[167]

However, in a highly controversial decision, President Clinton ultimately took steps to permit the export of American satellite technology to China.[168] Perhaps not coincidentally, the head of one of the

elections, allegedly by channeling the money through foreign corporations into political campaigns.").

163. Brian Ross et al., *FBI Arrests Chinese Millionaire Once Tied to Clinton $$ Scandal*, ABC NEWS (Sept. 24, 2015, 10:25 AM), https://abcnews.go.com/International/fbi-arrests-chinese-millionaire-tied-clinton-scandal/story?id=33990683 ("Ng was identified in a 1998 Senate report as the source of hundreds of thousands of dollars illegally funneled through an Arkansas restaurant owner, Charlie Trie, to the Democratic National Committee during the Clinton administration."); Roberto Suro, *Clinton Fund-Raiser to Plead Guilty; Conduit for $600,000 in 1996, Trie Agrees to Tell all in Deal with Justice Dept.*, WASH. POST (May 22, 1999), https://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/trie052299.htm ("Yah Lin 'Charlie' Trie, the Little Rock restaurateur who became a controversial fund-raiser for President Clinton, entered into a plea agreement with the Justice Department yesterday, winning leniency in exchange for telling all in an investigation of improper campaign contributions originating in China."); Pierre Thomas, *Charlie Trie Indicted*, CNN (Jan. 28, 1998), http://www.cnn.com/ALLPOLITICS/1998/01/28/charlie.trie/; Nate Raymond, *Macau Billionaire in U.N. Bribe Case to Face January 2017 Trial*, REUTERS (July 11, 2016, 2:19 PM), https://www.reuters.com/article/us-un-corruption/macau-billionaire-in-u-n-bribe-case-to-face-january-2017-trial-idUSKCN0ZR27O.

164. Suro, *supra* note 163 ("Trie, 50, agreed to plead guilty to two counts of violating federal election laws—one felony and one misdemeanor—and will receive a maximum of three years' probation").

165. LEWIS & THE CTR. FOR PUB. INTEGRITY, *supra* note 161, at 43–47; John Mintz, *How Hughes Got What It Wanted on China*, WASH. POST (June 25, 1998), https://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/hughes062598.htm; SHIRLEY A. KAN, CONG. RESEARCH SERV., CHINA: POSSIBLE MISSILE TECHNOLOGY TRANSFERS FROM U.S. SATELLITE EXPORT POLICY – ACTIONS AND CHRONOLOGY 1, 5–8 (2001), https://fas.org/sgp/crs/nuke/98-485.pdf.

166. Jeff Gerth & David E. Sanger, *How Chinese Won Rights To Launch Satellites For U.S.*, N.Y. TIMES (May 17, 1998), https://www.nytimes.com/1998/05/17/us/how-chinese-won-rights-to-launch-satellites-for-us.html.

167. *Id*.

168. LEWIS & THE CTR. FOR PUB. INTEGRITY, *supra* note 161, at 45; Mintz, *supra* note 165 ("Hughes, the world's largest satellite builder and a favorite of U.S. trade officials, has gotten almost all it has sought from the Clinton administration on China deals, through in-your-face

American companies gave more money to the DNC than any other donor in the 1996 campaign.[169] As the *New York Times* noted, "Clinton's decision to change the export control rules . . . illustrates the intersection of the interests of both large American donors and surreptitious foreign donors to the 1996 campaign."[170]

Twelve years later a foreign government would play an even more overt—though far more benign—role in the election. In 2008 the mayor of Berlin and senior German government officials promoted Barack Obama's presidential campaign by inviting the Democratic nominee to give a speech before a cheering crowd of 200,000 people in the heart of Berlin.[171] The invitation created controversy at the highest levels of the German government. German Chancellor Angela Merkel feared that hosting Obama's speech would inappropriately inject Germany into the American election.[172]

But Germany's Foreign Minister as well as the German Ambassador to the United States—both of whom supported Obama's campaign—urged him to give a major speech in Germany.[173] The German people overwhelmingly supported Obama over his opponent, Arizona Sen. John McCain, in part because most Germans believed Obama would end the Iraq War whereas McCain threatened to esca-

lobbying tactics and a revolving-door hiring policy for officials departing key agencies"); Gerth & Sanger, *supra* note 166; KAN, *supra* note 165, at 1, 7.

169. James Bennet, *Clinton Says Chinese Money Did Not Influence U.S. Policy*, N.Y. TIMES (May 18, 1998), https://www.nytimes.com/1998/05/18/us/clinton-says-chinese-money-did-not-influence-us-policy.html ("Congressional Republican leaders have accused the Administration of being influenced by American aerospace manufacturers, citing Bernard L. Schwartz, chairman of Loral Space and Communications, who gave more than $600,000 to the Democratic Party, making him the single largest personal donor."); Gerth & Sanger, *supra* note 166 ("there is no doubt that American companies — partners and suppliers of China International Trade and China Aerospace — put enormous pressure on the White House. They were also important campaign contributors. For example, the chief executive of Loral Space and Communications gave $275,000 between November 1995 and June 1996 to the Democrats"); LEWIS & THE CTR. FOR PUB. INTEGRITY, *supra* note 161, at 44; KAN, *supra* note 165, at 1.

170. Gerth & Sanger, *supra* note 166.

171. Jeff Zeleny & Nicholas Kulish, *Obama Gets Pop Star Reception in Berlin*, N.Y. TIMES (July 24, 2008), https://www.nytimes.com/2008/07/24/world/americas/24iht-sub25obamacnd.14772845.html ("[t[he excitement in Germany over Obama has grown steadily through the Democratic primaries, reaching its peak with his address here Thursday in the Tiergarten, Berlin's equivalent of Central Park.").

172. Diana Magnay, *Germany's Merkel Skeptical About Obama Visit*, CNN (July 10, 2008, 12:17 PM), http://www.cnn.com/2008/POLITICS/07/10/obama.germany/ ("Chancellor Angela Merkel has voiced great skepticism about whether it's appropriate for Obama to speak at the Brandenburg Gate if he travels to Berlin.").

173. *A Major Speech in Berlin? Obama Refines Plans for Germany Trip*, SPIEGEL ONLINE (July 5, 2008, 4:11 PM), http://www.spiegel.de/international/world/a-major-speech-in-berlin-obama-refines-plans-for-germany-trip-a-564083.html.

late it.[174] A 2008 survey, for example, found that Germans preferred Obama to McCain by a margin of 72% to 11%.[175] Accordingly, Berlin's mayor saw an irresistible domestic political benefit in giving Obama a prominent German platform.[176]

During the speech, Obama received an extraordinarily warm and enthusiastic reception from the German people, who greeted him like a "pop star."[177] The Obama campaign paid a German company $700,000 to provide sound and lighting services,[178] but the city of Berlin bore the security costs,[179] which reportedly included a special police detail of some 700 officers.[180] In any case, the most important benefit the campaign derived from the Berlin speech did not come from sound, lighting or security services. Rather, it was the politically potent imagery. The massive German crowd treated Obama like a

174. Zeleny & Kulish, *supra* note 171 ("[f]irst and foremost, Obama is popular because he is not Bush, who is wildly unpopular in Germany. Asked why they support Obama, his opposition to the Iraq War usually comes up first.").

175. Craig Whitlock & Jonathan Weisman, *Germany Denies Being Pressured on Obama; Reports Say White House Objected to Speech Site*, WASH. POST (July 12, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/11/AR2008071102967_2.html ("[a] poll commissioned by Bild Am Sonntag, Bild's Sunday edition, found that 72 percent of Germans surveyed wanted Obama to win the U.S. presidency, compared with 11 percent who supported Sen. John McCain.").

176. Carsten Volkery, *Brandenburg Gate Speech: Chancellor, Berlin Mayor Bicker over Obama Visit*, SPIEGEL ONLINE (July 8, 2008, 6:20 PM), http://www.spiegel.de/international/germany/brandenburg-gate-speech-chancellor-berlin-mayor-bicker-over-obama-visit-a-564635.html; Gregor Peter Schmitz, *Brandenburg Gate Controversy: Obama Reacts to Debate in Berlin*, SPIEGEL ONLINE (July 10, 2008, 3:09 PM), http://www.spiegel.de/international/world/brandenburg-gate-controversy-obama-reacts-to-debate-in-berlin-a-565080.html ("[u]ltimately, the decision on whether Obama can speak at the Brandenburg Gate will be made by the government of the city of Berlin. According to report in the Friday edition of the Hannoverschen Neuen Presse newspaper, city officials in Berlin's Mitte district have reserved the Brandenburg Gate for the Democratic Party politician on July 24. Mayor Klaus Wowereit has also expressed his support for using the site for Obama's speech."); Whitlock & Weisman, *supra* note 175 ("[o]fficially, the final say on where Obama will be allowed to speak belongs to Berlin's mayor, Klaus Wowereit. A political rival of the chancellor's, Wowereit has said that Obama can campaign wherever he pleases, including the gate."); for the text of Obama's speech, see *Obama's Speech in Berlin*, N.Y. TIMES (July 24, 2008), https://www.nytimes.com/2008/07/24/us/politics/24text-obama.html.

177. Zeleny & Kulish, *supra* note 171.

178. Jerry Seper, *Obama Berlin Speech Cost $700K*, WASH. TIMES (Nov. 1, 2008), https://www.washingtontimes.com/news/2008/nov/01/citizen-of-the-world-speech-cost-obama-tour-700000/.

179. Gregor Peter Schmitz, *Brandenburg Gate Controversy: Obama Reacts to Debate in Berlin*, SPIEGEL (July 10, 2008, 3:09 PM), http://www.spiegel.de/international/world/brandenburg-gate-controversy-obama-reacts-to-debate-in-berlin-a-565080.html ("the city would provide security, though the event itself would have to be organized by the Americans.").

180. John Rosenthal, *Non-Interference, U.S. Election Law and Germany's Obama Contribution*, WORLD POLITICS REVIEW (Aug. 5, 2008), https://www.worldpoliticsreview.com/articles/2531/non-interference-u-s-election-law-and-germanys-obama-contribution ("We know, at any rate, who paid for security: namely, the city of Berlin and hence, ultimately, German taxpayers. A special police deployment, reported to number some 700 officers, was assigned to the task.").

global leader, which was precisely the message his campaign sought to project to voters back home in the United States.[181] As Britain's *Guardian* newspaper observed after the speech:

> By common consent, tonight and the entire Obama week has been a huge success, generating priceless images for TV consumption back home and helping Obama cross the credibility gap — *making it easier for Americans to imagine him as a player on the world stage*. The Obama camp is hoping the notion that the US will regain the respect of the world under a President Obama *will persuade many American voters to back him*. Tonight's pictures from Berlin will have further discomforted Obama's Republican opponent, John McCain, who has struggled for media oxygen during a week of near-constant coverage of the Democrat's grand tour [of Europe].[182]

The Germans also invited Senator McCain to give a speech in Berlin, but he declined the invitation, undoubtedly aware of the fact that the German people preferred Obama by a 7-to-1 margin.[183]

Ironically, Obama later found himself the subject of a foreign effort to influence the American electorate against him. During the 2012 presidential election, Israeli Prime Minister Benjamin Netanyahu made a series of public statements that many viewed as a thinly-veiled effort to assist the Republican nominee, former Massachusetts Governor Mitt Romney.[184] Netanyahu left little doubt which candidate he preferred. He bitterly opposed the Middle East policies of President Obama,[185] while in contrast the Israeli prime minister had a

181. Zeleny & Kulish, *supra* note 171.

182. Jonathan Freedland, *US Elections: Obama Wows Berlin Crowd with Historic Speech*, THE GUARDIAN (July 24, 2008, 4:16 PM), https://www.theguardian.com/global/2008/jul/24/barackobama.uselections2008 (emphasis added).

183. Gregor Peter Schmitz, *Speech at Brandenburg Gate? German Politicians Are in an Obama Tizzy*, SPIEGEL ONLINE (July 9, 2008), http://www.spiegel.de/international/world/speech-at-brandenburg-gate-german-politicians-are-in-an-obama-tizzy-a-564805.html ("An invitation would also be extended to John McCain."); Jeff Mason, *McCain takes swipe at Obama for Berlin speech*, REUTERS (July 24, 2008), https://www.reuters.com/article/us-usa-politics-mccain/mccain-takes-swipe-at-obama-for-berlin-speech-idUSN2450828920080724; Whitlock & Weisman, *supra* note 175.

184. Yossi Verter, *In Israel, We Speak Republican*, HAARETZ (Sept. 15, 2012), https://www.haaretz.com/in-israel-we-speak-republican-1.5162499; David Andrew Weinberg, *What Netanyahu's meddling in US election means for Obama, Romney, and diplomacy*, CHRISTIAN SCI. MONITOR (Sept. 27, 2012), https://www.csmonitor.com/Commentary/Opinion/2012/0927/What-Netanyahu-s-meddling-in-US-election-means-for-Obama-Romney-and-diplomacy; Joel Greenberg, *Israel's Netanyahu comes in for criticism in wake of U.S. presidential election*, WASH. POST (Nov. 8, 2012), https://www.washingtonpost.com/world/middle_east/after-backing-romney-netanyahu-faces-own-reelection-bid/2012/11/08/3c540bcc-29d5-11e2-bab2-eda299503684_story.html?utm_term=.e0ecc84401cb.

185. Scott Wilson, *In meeting, Obama to warn Netanyahu against military strikes on Iran*, WASH. POST (Mar. 2, 2012), https://www.washingtonpost.com/world/national-security/in-meet-

long-standing personal friendship with Gov. Romney that dated back to the 1970s.[186]

Prime Minister Netanyahu even appeared in a pro-Romney television advertisement that targeted swing state voters.[187] Produced by a politically-conservative American nonprofit group called Secure America Now, the ad consisted of a brief clip of Netanyahu warning of the threat posed by Iran's nuclear program.[188] The prime minister's remarks implicitly criticized Obama's refusal to threaten Iran with military force.[189] Although Netanyahu's spokesman insisted that his government had no involvement of any kind with the anti-Obama advertising campaign, many interpreted it as further evidence that the Israeli prime minister had taken sides in the American election.[190] Israeli opposition leader Shaul Mofaz described Netanyahu's support for Romney as "a rude, blunt, unprecedented, wanton and dangerous intervention in the United States election."[191] Many American observers also condemned Netanyahu's intervention in the 2012 campaign. David Remnick of the *New Yorker* magazine asserted that

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ing-obama-to-warn-netanyahu-against-military-strikes-on-iran/2012/03/02/gIQA5Wf0mR_story.html?utm_term=.216ea8bdd934; Peter Baker & Jodi Rudoren, *A Strained Alliance: Obama-Netanyahu Rift Grew Over Years*, N.Y. TIMES (Jan. 30, 2015), https://www.nytimes.com/2015/01/31/world/middleeast/a-strained-alliance-obama-netanyahu-rift-grew-over-years.html.

186. Michael Barbaro, *A Friendship Dating to 1976 Resonates in 2012*, N.Y. TIMES (Apr. 7, 2012), https://www.nytimes.com/2012/04/08/us/politics/mitt-romney-and-benjamin-netanyahu-are-old-friends.html.

187. Harriet Sherwood, *Binyamin Netanyahu gambles on Mitt Romney victory*, THE GUARDIAN (Sept. 20, 2012), https://www.theguardian.com/world/2012/sep/20/binyamin-netanyahu-gambles-on-mitt-romney; TOI Staff, *Netanyahu features in new pro-Romney ad for Florida*, THE TIMES OF ISRAEL (Sept. 20, 2012), https://www.timesofisrael.com/netanyahu-to-feature-in-pro-republican-ad/; Maggie Haberman, *Netanyahu ad to debut in Florida*, POLITICO (Sept. 19, 2012), https://www.politico.com/blogs/burns-haberman/2012/09/netanyahu-ad-to-debut-in-florida-136034; Maeve Reston & Paul Richter, *Romney camp hopes Israel trip secures evangelical, Jewish votes*, L.A. TIMES (July 29, 2012), http://articles.latimes.com/2012/jul/29/nation/la-na-romney-israel-20120729.

188. TOI Staff, *supra* note 187; Haberman, *supra* note 187.

189. Tom McCarthy, *Netanyahu appears in Obama attack ad warning of Iran nuclear plan*, THE GUARDIAN (Sept. 20, 2012), https://www.theguardian.com/world/2012/sep/20/netanyahu-us-political-ad-obama ("Netanyahu criticized the Obama administration's refusal to notify Iran of a 'red line' that would trigger an attack on its nuclear facilities."); TOI Staff, *supra* note 187 ("Netanyahu and Obama have been publicly at odds over the Israeli leader's call for US-set 'red lines' that, if crossed by Iran, would prompt American military intervention. The Obama administration has refused to tie itself to any such ultimatums, and Obama again reportedly rejected the idea of 'red lines' in a lengthy phone call with Netanyahu last week.").

190. Sherwood, *supra* note 187 ("Mark Regev, Netanyahu's spokesman, said the advertisement had 'not been co-ordinated with us, we were not consulted and no one asked us for our permission.'").

191. Matthew Kalman, *Reality bites for Benjamin Netanyahu after he threw his solid support behind Mitt Romney*, THE INDEPENDENT (Nov. 7, 2012), https://www.independent.co.uk/news/world/middle-east/reality-bites-for-benjamin-netanyahu-after-he-threw-his-solid-support-behind-mitt-romney-8294432.html; Greenberg, *supra* note 184.

"Netanyahu seems determined, more than ever, to alienate the President of the United States and, as an ally of Mitt Romney's campaign, to make himself a factor in the 2012 election—one no less pivotal than the most super Super PAC."[192] Joe Klein of *Time* magazine similarly warned that Netanyahu's actions came across as "an unprecedented attempt by a putative American ally to influence a U.S. presidential campaign."[193]

For his part, Romney welcomed Netanyahu's support, which he viewed as a way to appeal to Jewish voters in the United States.[194] Romney accused President Obama of abandoning Israel and of throwing it "under the bus"[195] by failing to stop the Iranian nuclear program. During the campaign, Romney took a heavily publicized trip to Israel, where he was received with "open arms" by the Israeli government.[196] Romney's trip likely required his Israeli hosts to bear heavy security costs, just as Obama's trip imposed similar costs on his German hosts four years before. Romney even held a campaign fundraiser in Israel, raising more than $1 million from American attendees.[197] After the Israel trip, Romney's campaign aired an advertisement that showed him giving a speech in Jerusalem and praying at the Western Wall.[198] The ad criticized Obama for not visiting Israel, and it promised that Romney "will be a different kind of president who stands by our allies. He knows America holds a deep and cher-

192. David Remnick, *Neocon Gambits,* THE NEW YORKER (Sept. 12, 2012), https://www.newyorker.com/news/news-desk/neocon-gambits.

193. Joe Klein, *Enter Bibi*, TIME (Sept. 12, 2012), http://swampland.time.com/2012/09/12/enter-bibi/.

194. Beth Reinhard, *Mitt Romney's Trip to Israel: Is the Jewish Vote up for Grabs?*, THE ATLANTIC (July 24, 2012), https://www.theatlantic.com/politics/archive/2012/07/mitt-romneys-trip-to-israel-is-the-jewish-vote-up-for-grabs/260276/.

195. Mackenzie Weinger, *Mitt: Dems threw Israel under bus*, POLITICO (Sept. 5, 2012), https://www.politico.com/story/2012/09/mitt-dems-threw-israel-under-bus-080794.

196. Sheera Frenkel, *Eyeing Jewish Vote In U.S., Romney Goes To Israel*, NPR (July 27, 2012), https://www.npr.org/2012/07/27/157495139/eyeing-jewish-vote-in-u-s-romney-goes-to-israel.

197. Steve Holland, *Romney Raises More Than $1 Million at End of Israel Trip*, REUTERS (July 30, 2012), https://www.reuters.com/article/us-usa-campaign-romney/romney-raises-more-than-1-million-at-end-of-israel-trip-idUSBRE86Q1DO20120730 ("U.S. Republican presidential candidate Mitt Romney on Monday tapped Jewish-American donors for more than $1 million, ending a trip to Israel that aimed to show he would be a better ally than President Barack Obama."); Philip Rucker, *Mitt Romney, at Fundraiser in Israel, Describes Spiritual Impact of Visit*, WASH. POST (July 30, 2012), https://www.washingtonpost.com/politics/at-fundraiser-in-israel-romney-describes-spiritual-impact-of-visit/2012/07/30/gJQAFXJpJX_story.html?utm_term=.6cde80bda725.

198. Molly Moorhead, *Mitt Romney says Barack Obama Has Not Visited Israel as president*, POLITIFACT (Aug. 7, 2012), https://www.politifact.com/truth-o-meter/statements/2012/aug/07/mitt-romney/romney-says-obama-has-not-visited-israel-president/.

ished relationship with Israel."[199] Obama ultimately won reelection, but he did not forget Netanyahu's role in the campaign. As the *New York Times* observed in 2015, Netanyahu's intervention caused lasting "resentment on the part of Mr. Obama, who watched Mr. Netanyahu seemingly root for his Republican opponent in the 2012 election."[200]

B. American Laws Will Not Prevent Future Foreign Interventions

The historical record of foreign involvement in American elections makes for a stark contrast with the black letter law of campaign finance. As explained in Section II above, federal law attempts to prevent foreign nationals from playing any role in assisting American candidates and parties. FECA expressly bans foreign nationals from making, directly or indirectly, "a contribution or donation of money or other thing of value" to a candidate or party committee "in connection with a Federal, State, or local election."[201] It also bars foreign nationals from engaging in election-related expenditures of their own and prohibits Americans from soliciting, accepting, or receiving election-related contributions or expenditures.[202]

But the history of the last quarter century demonstrates that foreign governments have intervened, directly or indirectly, in American elections despite federal laws to the contrary.[203] In 1992, FECA did not prevent Britain's Conservative Party from assisting Bush's reelection efforts, nor did it deter the Labour Party from assisting Clinton's challenge to Bush.[204] In 1996, federal campaign finance laws did not discourage the Chinese from covertly directing funds to the DNC.[205] In 2008, the purported ban on foreign campaign assistance did not stop the mayor of Berlin from giving an invaluable in-kind contribution to Barack Obama's presidential campaign.[206] In 2012, campaign finance laws did not prevent Prime Minister Netanyahu from signaling to American voters his support for Mitt Romney.[207] And in 2016, the prohibition on foreign influences did not prevent Donald Trump from publicly encouraging the Russian government to hack the Clinton

199. *Id.*
200. Baker & Rudoren, *supra* note 185.
201. 52 U.S.C. § 30121(a)(1)(A) and (B) (2017).
202. 52 U.S.C. § 30121(a)(1)(C) and (2) (2017).
203. Wright, *supra* note 155, at 565–66.
204. *See supra* section III(A).
205. *Id.*
206. *Id.*
207. *Id.*

campaign's email system. These examples, furthermore, only involve foreign interventions that ultimately came to public attention. It is quite likely that foreign governments have succeeded in covertly assisting American candidates without their support ever coming to the attention of election authorities or the media.

Campaign finance laws cannot change the fact that foreign governments have compelling reasons to try to shape American election outcomes. By any measure, U.S. foreign policy has an enormous impact on the entire world. For example, in the last 30 years, the United States has used its military superpower status to topple governments, including in Panama,[208] Afghanistan,[209] Iraq,[210] and Libya,[211] and to bomb terrorist groups and other adversaries, including in Bosnia, Kosovo, Pakistan, Yemen, Somalia, and Syria.[212] At the same time, America has employed its economic superpower status to sanction governments it opposes, such as Cuba, Russia, Iran, and Sudan,[213] and to establish international trade agreements and organizations, including the North American Free Trade Agreement in 1994,[214] the World Trade Organization in 1995,[215] and the United States-Mexico-Canada

208. Andrew Glass, *United States invades Panama, Dec. 20, 1989*, POLITICO (Dec. 20, 2018), https://www.politico.com/story/2018/12/20/united-states-invades-panama-1989-1067072.

209. Zachary Laub, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (July 4, 2014), https://www.cfr.org/backgrounder/taliban-afghanistan.

210. Kenneth T. Walsh, *10 Years Ago, the U.S. Invaded Iraq*, U.S. NEWS & WORLD REP. (Mar. 19, 2013), https://www.usnews.com/news/blogs/press-past/2013/03/19/10-years-ago-the-us-invaded-iraq.

211. Dominic Tierney, *The Legacy of Obama's 'Worst Mistake'*, THE ATLANTIC (Apr. 15, 2016), https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/.

212. Missy Ryan, *A reminder of the permanent wars: Dozens of U.S. airstrikes in six countries*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/world/national-security/a-reminder-of-the-permanent-wars-dozens-of-us-airstrikes-in-six-countries/2016/09/08/77cde914-7514-11e6-be4f-3f42f2e5a49e_story.html?utm_term=.870dd1dbf1ce; Daniel Williams, *NATO Continues Extensive Bombing Across Bosnia*, WASH. POST (Aug. 31, 1995), https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/nato.htm; Anthony Faiola, *Bombing of Yugoslavia Awakens Anti-U.S. Feeling Around World*, WASH. POST (May 18, 1999), https://www.washingtonpost.com/archive/politics/1999/05/18/bombing-of-yugoslavia-awakens-anti-us-feeling-around-world/d5149dc9-dd76-4e17-a699-8b06f8b12653/?utm_term=.588e0e4c0bfa.

213. *Sanctions Programs and Country Information*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/programs/pages/programs.aspx (last updated Feb. 25, 2019).

214. Chad P. Brown, *What is NAFTA, and what would happen to U.S. trade without it?*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/what-is-nafta-and-what-would-happen-to-u-s-trade-without-it/?utm_term=.82681cc226fd.

215. CONG. RESEARCH SERV., R45417, WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION (2019), https://fas.org/sgp/crs/row/R45417.pdf ("The United States was a major force behind the establishment of the WTO in 1995").

Agreement in 2018.[216] The United States has also imposed tariffs on foreign imports, such as the Trump tariffs that sparked the trade war with China in 2018-19.[217] The bottom line is that U.S. policy affects the whole world, which in turn means American election outcomes hold deep and abiding importance to nations across the globe.

Polarization further heightens the stakes of American elections for foreign governments. In the mid-twentieth century, a bipartisan foreign policy consensus largely prevailed in the United States.[218] But bitter divisions over the Vietnam War in the 1960s undermined that consensus, leading to increasingly sharp partisan differences over foreign as well as domestic policy.[219] In the twenty-first century, partisan polarization has reached the most extreme levels the United States has experienced since the 1800s.[220] Consequently, presidential and congressional election outcomes result in stark policy differences, a fact that incentivizes foreign governments to attempt to assist the candidates and parties most congenial to their interests.

Foreign governments in the twenty-first century also possess a sophisticated understanding of American politics which enables them to intervene in elections with precision. The global response to President Trump's trade policies provides a striking example. When the Trump administration raised tariffs on Chinese imports, Beijing responded by imposing retaliatory tariffs that specifically targeted Republican districts, thus pressuring pro-Trump incumbents on the eve

216. Peter Baker, *Trump Signs New Trade Deal With Canada and Mexico After Bitter Negotiations*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/world/americas/trump-trudeau-canada-mexico.html.

217. Phillip Inman & Lily Kuo, *As China feels US tariffs bite, a chill spreads around the world*, THE GUARDIAN (Jan. 5, 2019), https://www.theguardian.com/business/2019/jan/05/china-economy-slowdown-us-tariffs-trade-war.

218. WENDY L. WALL, INVENTING THE "AMERICAN WAY": THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT 8–9 (2008).

219. William A. Galston & Pietro S. Nivola, *Vote Like Thy Neighbor: Political Polarization and Sorting*, BROOKINGS (May 11, 2008) https://www.brookings.edu/articles/vote-like-thy-neighbor-political-polarization-and-sorting/ ("Large events made some increase in polarization inevitable. In the wake of the Vietnam War, the post-World War II foreign-policy consensus collapsed."); Eugene R. Wittkopf & James M. McCormick, *The Cold War Consensus: Did It Exist?* 22 POLITY 627 (1990); William A. Galston & Pietro S. Nivola, *Delineating the Problem*, *in* 1 RED AND BLUE NATION? 1, 20 (Pietro S. Nivola & David W. Brady, eds., 2006).

220. Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014); MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 2 (2009); Nathaniel Persily, *Introduction* to SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 13–14 (Nathaniel Persily, ed., 2015).

of the midterm elections.[221] As Bob Woodward has explained, "[t]he Chinese knew exactly how to inflict economic and political pain. . . . They knew which swing districts were going to be important to maintain control of the House. They could target tariffs at products from those districts, or at a state level. The Chinese would target bourbon from [Republican Senate Majority Leader] McConnell's Kentucky and dairy products from [Republican House Speaker] Paul Ryan's Wisconsin."[222]

It is not just the Chinese who take a politically-savvy approach to pressuring politicians in the United States. American allies—including Canada, Mexico, and the European Union—responded to Trump's tariffs in the same way, crafting retaliatory tariffs designed to have maximum political impact in Republican districts.[223] The foreign governments made no secret of their intentions. A top Mexican trade official explained that, in deciding which American products to target, "[w]e choose states where we can create the right political incentives to get this resolved soon."[224]

Although retaliatory tariffs do not represent a campaign finance issue, they illustrate two related and crucial points. First, the targeted tariffs show the extent to which foreign governments understand the intricacies of American political dynamics. They know precisely which districts and which members of Congress they need to influence in order to change American policy. Second, foreign governments also understand that applying pressure is most effective during election years, when incumbents are most vulnerable.

Foreign governments have other ways to reach into the United States. Chilling evidence exists that foreign intelligence services have begun to collect sensitive information on millions of Americans, presumably for the purpose of shaping United States policy in the future. One of the largest data breaches in history appears to be just such a case. In 2017, hackers breached the data files of Equifax, the consumer credit reporting agency.[225] The hackers gained access to the

221. Eduardo Porter & Karl Russell, *Firing Back at Trump in the Trade War With Tariffs Aimed at His Base*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/interactive/2018/10/03/business/economy/china-tariff-retaliation.html.

222. BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE 158–59 (2018).

223. Porter & Russell, *supra* note 221.

224. *Id.*

225. Brian Fung, *Equifax's massive 2017 data breach keeps getting worse*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/01/equifax-keeps-finding-millions-more-people-who-were-affected-by-its-massive-data-breach/?utm_term=.2ffba801d83d.

names, birthdates, Social Security numbers, and driver's license numbers of 147 million Americans, half the population of the United States.[226] Unlike previous data breaches, the hackers did not use the stolen data to engage in crime.[227] Instead, security experts suspect that a foreign government hacked into the Equifax data in order to get compromising information about current and future members of the federal government and business community.[228]

The Equifax breach followed on the heels of the Chinese government's 2015 hack of the Office of Personnel Management ("OPM"), which gave Beijing access to the security-clearance and personnel files of 22 million Americans, including 4 million federal employees.[229] Like the Equifax hack, the OPM hack gave the Chinese government potential leverage to use for blackmailing or coercing federal employees and policymakers. In the fall of 2018, China specialists from the Hoover Institution and the Asia Society's Center on U.S.-China Relations warned of the long-term threat posed by China's interference in American democracy.[230] Former U.S. Ambassador to China Winston Lord observed that China's capacity to interfere "across the board" in the United States was "even wider than the Russian threat."[231]

The 2015 Chinese hack of OPM, the 2016 Russian hack of the DNC, and the 2017 hack of Equifax demonstrate the extent to which the internet facilitates foreign intervention in American affairs on an unprecedented scale. Disturbing though it is to contemplate, the

226. Brian Fung, *145 million Social Security numbers, 99 million addresses and more: Every type of personal data Equifax lost to hackers, by the numbers*, WASH. POST (May 8, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/08/every-type-of-personal-data-equifax-lost-to-hackers-by-the-numbers/?utm_term=.761f4b94cb70 ("First it was 143 million consumers, then it was 145 million and finally 147 million.").

227. Kate Fazzini, *The great Equifax mystery: 17 months later, the stolen data has never been found, and experts are starting to suspect a spy scheme*, CNBC (Feb. 13, 2019), https://www.cnbc.com/2019/02/13/equifax-mystery-where-is-the-data.html.

228. *Id.*

229. Ellen Nakashima, *Hacks of OPM databases compromised 22.1 million people, federal authorities say*, WASH. POST (July 9, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/?utm_term=.69cd5c77fe8d; Ellen Nakashima, *Chinese breach data of 4 million federal workers*, WASH. POST (June 4, 2015), https://www.washingtonpost.com/world/national-security/chinese-hackers-breach-federal-governments-personnel-office/2015/06/04/889c0e52-0af7-11e5-95fd-d580f1c5d44e_story.html?utm_term=.1f3ad744914e.

230. Ellen Nakashima, *China specialists who long supported engagement are now warning of Beijing's efforts to influence American society*, WASH. POST (Nov. 28, 2018), https://www.washingtonpost.com/world/national-security/china-specialists-who-long-supported-engagement-are-now-warning-of-beijings-efforts-to-influence-american-society/2018/11/28/8a5a5570-f25f-11e8-80d0-f7e1948d55f4_story.html?utm_term=.aa2c2ae01469.

231. *Id.*

hacks also show that foreign governments already hold confidential and potentially embarrassing information about millions of Americans. One can easily imagine a future scenario in which a foreign government could release damaging information on the internet to sabotage the campaigns of American candidates that the foreign government opposes. Neither party is safe from foreign targeting. In 2016, the Russians targeted the Democrats, but in the future it could be a protectionist or hawkish Republican candidate who falls within the crosshairs of a foreign government. Consequently, the issue of foreign interference in American democracy should alarm Republicans as much as Democrats.

Technological advances will make the problem even worse over time. A bipartisan study by Democratic Senator Mark R. Warner and Republican Senator Marco Rubio concluded that doctored videos could be used in a foreign disinformation campaign designed to undermine American candidates.[232] As Washington Post cybersecurity reporter Derek Hawkins observed, "[r]ealistic-looking videos appearing to show politicians meeting taking bribes or uttering inflammatory statements could be used to try to sway an election. Or doctored footage purporting to show officials announcing military action could trigger a national security crisis."[233]

The unfortunate reality is the United States has little power to stop foreign governments from disseminating false or damaging information on foreign websites, foreign satellite news programs, and international social media sites to influence an American election campaign. The bottom line is foreign governments have both a growing incentive and an expanding capacity to reach into the United States for the purpose of shaping public policy. Passing new laws will not impact those incentives and, at best, will have only a modest impact on foreign governments' capacity to interfere in American elec-

232. Derek Hawkins, *The Cybersecurity 202: Doctored videos could send fake news crisis into overdrive, lawmakers warn*, WASH. POST (July 31, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/07/31/the-cybersecurity-202-doctored-videos-could-send-fake-news-crisis-into-overdrive-lawmakers-warn/5b5f39c91b326b0207955e39/?utm_term=.55cc7a034c45 [hereinafter Hawkins, *Doctored videos*]; Karoun Demirjian, *Top Senate intel Democrat proposes measures to counter influence campaigns on social media*, WASH. POST (July 30, 2018), https://www.washingtonpost.com/powerpost/top-senate-intel-democrat-proposes-measures-to-counter-influence-campaigns-on-social-media/2018/07/30/50de4786-9420-11e8-810c-5fa705927d54_story.html?utm_term=.1a1800e840f6.

233. Hawkins, *Doctored videos*, *supra* note 232.

tions.[234] Hence, the age of foreign targeting of American public officials is probably only in its early stages. The 2016 campaign will not be the last time foreign governments seek to influence American elections.

IV. A MODEST REFORM PROPOSAL

In response to the growing foreign threat to campaign finance law, Congress should require full transparency from American candidates, parties, and political committees. Any and all contacts campaigns have with foreign governments should be immediately reported to the FEC and disclosed to the public. Congress already requires campaigns to report within 48 hours contributions they receive in the final 20 days before an election.[235] The same policy should apply to foreign contacts. Equally important, Congress should empower the FEC to alert the electorate whenever foreign actors attempt, covertly or overtly, to influence American election outcomes.

One of the most disturbing features of the 2016 election was the Trump campaign's concealment of its repeated and sustained contacts with Russians and other foreign nationals.[236] Several Trump officials even hid their foreign connections from Congress, the FBI, and Special Counsel Robert Mueller. As of early February 2019, five members of the Trump campaign have been charged or found guilty of lying about their Russia contacts during the 2016 campaign.[237] For example, Trump foreign policy adviser George Papadopoulos pleaded guilty in October 2017 to lying to the FBI about his 2016 communications with a London-based professor who claimed the Russians had

234. Craig Timberg, *Indictment shows how Russians conspired to disrupt U.S. politics — but not how to stop them next time*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/business/technology/indictment-shows-how-russians-conspired-to-disrupt-us-politics—but-not-how-to-stop-them-next-time/2018/02/16/b56b08a2-1355-11e8-8ea1-c1d91fcec3fe_story.html?hpid=hp_hp-cards_hp-card-technology%3Ahomepage%2Fcard&utm_term=.59962f6aada7; Timothy Edgar, *Indicting Hackers Made China Behave, But Russia Will Be Harder*, LAWFARE (Feb. 18, 2018), https://www.lawfareblog.com/indicting-hackers-made-china-behave-russia-will-be-harder; Hawkins, Doctored Videos, *supra* note 232; Wright, *supra* note 155, at 565–66 ("foreign nationals and foreign governments have not been deterred from seeking to exert influence in U.S. elections at the federal, state, and local levels. In fact, they have become more creative in how they do so.").

235. Gaughan, *supra* note 1, at 126.

236. Larry Buchanan & Karen Yourish, *Trump and His Associates Had More Than 100 Contacts With Russians Before the Inauguration*, N.Y. TIMES (Jan. 26, 2019), https://www.nytimes.com/interactive/2019/01/26/us/politics/trump-contacts-russians-wikileaks.html.

237. Aaron Blake, *Mueller just caught a fourth Trump aide lying about contact with the Russians*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/politics/2019/02/14/mueller-just-caught-third-trump-aide-lying-about-contact-with-russians/?utm_term=.64eeeb47e412.

"dirt" on Hillary Clinton in the form of thousands of emails.[238] Two months later, former Trump National Security Adviser Michael Flynn pleaded guilty to lying to the FBI about the nature of his communications with Russian Ambassador Sergey I. Kislyak.[239] In November 2018, former Trump personal attorney Michael Cohen pleaded guilty to lying to Congress about the Trump Organization's secret negotiations during the election to build a Trump Tower in Moscow.[240] In early 2019, the special counsel's office indicted former Trump adviser Roger Stone for allegedly lying about his communications with Wikileaks during the 2016 campaign.[241] One month later, Judge Amy

238. Spencer S. Hsu & Rosalind S. Helderman, *Former Trump adviser George Papadopoulos sentenced to 14 days in plea deal with Mueller probe*, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/local/public-safety/former-trump-adviser-george-papadopoulos-sentenced-to-14-days-in-plea-deal-with-mueller-probe/2018/09/07/bef367a2-b210-11e8-aed9-001309990777_story.html?utm_term=.8dff2c6e4544; Matt Apuzzo & Michael S. Schmidt, *Trump Campaign Adviser Met With Russian to Discuss 'Dirt' on Clinton*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/us/politics/george-papadopoulos-russia.html; Tom Embury-Dennis, *Russia-linked professor who promised Trump campaign 'dirt' on Hillary Clinton 'may be deceased', court told*, THE INDEPENDENT (Sept. 10, 2018), https://www.independent.co.uk/news/world/americas/russia-investigation-trump-campaign-collusion-joseph-mifsud-dead-professor-a8531421.html; Tom McCarthy, *George Papadopoulos: ex-Trump adviser jailed for 14 days for lying to FBI*, THE GUARDIAN (Sept. 7, 2018), https://www.theguardian.com/us-news/2018/sep/07/george-papadopoulos-trump-adviser-sentenced-russia ("Papadopoulos had told investigators that the conversation happened before he became a Trump campaign adviser, when in fact he had worked for the campaign for more than a month at the time.").

239. Michael D. Shear & Adam Goldman, *Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate With Russia Inquiry*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html; Carol D. Leonnig, et al., *Michael Flynn pleads guilty to lying to FBI on contacts with Russian ambassador*, WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/politics/michael-flynn-charged-with-making-false-statement-to-the-fbi/2017/12/01/e03a6c48-d6a2-11e7-9461-ba77d604373d_story.html?utm_term=.40158acbdf38.

240. Devlin Barrett et al., *Michael Cohen, Trump's former lawyer, pleads guilty to lying to Congress about Moscow project*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/politics/michael-cohen-trumps-former-lawyer-pleads-guilty-to-lying-to-congress/2018/11/29/5fac986a-f3e0-11e8-bc79-68604ed88993_story.html?utm_term=.c917fb0ab8fd; Aaron Blake, *4 key takeaways from Michael Cohen's new plea deal*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/politics/2018/11/29/key-takeaways-michael-cohens-new-plea-deal/?utm_term=.97d0322c429d.

241. Devlin Barrett et al., *Longtime Trump adviser Roger Stone indicted by special counsel in Russia investigation*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/politics/longtime-trump-adviser-roger-stone-indicted-by-special-counsel-in-russia-investigation/2019/01/25/93a4d8fa-2093-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.3ad8869154f2 ("The indictment charges that Stone, a seasoned Republican political operative, sought to gather information about hacked Democratic Party emails at the direction of an unidentified senior Trump campaign official and engaged in extensive efforts to keep secret the details of those actions."); Philip Bump, *Timeline: The Roger Stone indictment fills in new details about WikiLeaks and the Trump campaign*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/politics/2019/01/25/indictment-roger-stone-fills-new-details-about-wikileaks-campaign/?utm_term=.ad569c24c595; Jon Swaine, *Trump adviser sought WikiLeaks emails via Farage ally, Mueller document alleges*, THE GUARDIAN (Nov. 28, 2018), https://www.theguardian.com/us-news/2018/nov/28/ted-malloch-wikileaks-information-trump-campaign-mueller-investigation ("Mueller's draft legal

Berman Jackson ruled that former Trump campaign chairman Paul Manafort lied to federal prosecutors about his communications with a Russian political operative during the election.[242]

The systematic effort to hide the truth from the American people extended beyond the Trump officials charged with federal crimes. Many individuals in the Trump campaign failed to disclose their Russia contacts. For example, on June 9, 2016 the president's son, Donald Trump, Jr., the president's son-in-law, Jared Kushner, and the president's campaign manager, Paul Manafort, met with a Kremlin-connected Russian lawyer and Russian intelligence operative who promised damaging information about Hillary Clinton.[243] When the Trump Tower meeting came to light on July 8, 2017, Donald Trump, Jr. falsely claimed the meeting was about Russian adoptions.[244] Only in August 2018—more than two years after the meeting—did President Trump fully concede that the purpose of the Trump Tower meet-

document said that on 25 July 2016, Malloch was forwarded an email from Roger Stone, a notorious 'dirty trickster' close to Trump. Stone wanted someone to make contact with Julian Assange, the WikiLeaks founder, who had just published the first tranche of emails stolen from the Democratic party and was promising more revelations.").

242. Spencer Tsu, *Federal judge finds Paul Manafort lied to Mueller probe about contacts with Russian aide*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/local/legal-issues/us-judge-finds-paul-manafort-lied-to-mueller-probe-about-contacts-with-russian-aide/2019/02/13/c5209f7a-2f2c-11e9-86ab-5d02109aeb01_story.html?utm_term=.5fa63ba5116d; Rosalind S. Helderman & Tom Hamburger, *How Manafort's 2016 meeting with a Russian employee at New York cigar club goes to 'the heart' of Mueller's probe*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/politics/how-manaforts-2016-meeting-with-a-russian-employee-at-new-york-cigar-club-goes-to-the-heart-of-muellers-probe/2019/02/12/655f84dc-2d67-11e9-8ad3-9a5b113ecd3c_story.html?utm_term=.c76a959e9297 ("When they saw each other days later at the Grand Havana Room, one topic the men discussed was a peace proposal for Ukraine, an agenda item Russia was seeking as a key step to lift punishing economic sanctions, according to court records."); *See also* Maggie Haberman & Jonathan Martin, *Paul Manafort Quits Donald Trump's Campaign After a Tumultuous Run*, N.Y. TIMES (Aug. 19, 2016), https://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html (discussing how the public revelation of Manafort's connections to pro-Russian politicians in Ukraine forced his resignation as campaign manager during the 2016 election).

243. Jo Becker et al., *Trump's Son Met With Russian Lawyer After Being Promised Damaging Information on Clinton*, N.Y. TIMES (July 9, 2017), https://www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html?hp=&action=click&pgtype=Homepage&clickSource=story-heading&module=inline&region=Top-news&WT.nav=Top-news; Benjamin Weiser & Sharon LaFraniere, *Veselnitskaya, Russian in Trump Tower Meeting, Is Charged in Case That Shows Kremlin Ties*, N.Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/nyregion/trump-tower-natalya-veselnitskaya-indictment.html.

244. Larry Buchanan & Karen Yourish, *The Russia Meeting at Trump Tower Was to Discuss Adoption. Then It Wasn't. How Accounts Have Shifted.*, N.Y. TIMES (Aug. 6, 2018), https://www.nytimes.com/interactive/2018/08/06/us/politics/trump-tower-russia-meeting.html ("When first asked about the meeting, Donald Trump Jr. issued a statement saying the meeting was primarily about the adoption of Russian children."); Becker et al., *supra* note 243 ("When he was first asked about the meeting on Saturday, Donald Trump Jr. said that it was primarily about adoptions and mentioned nothing about Mrs. Clinton.").

ing was to secure damaging information about Clinton from the Russians.[245]

The Trump campaign also concealed from public view an August 2016 Trump Tower meeting between Donald Trump, Jr., Joel Zamel, owner of an Israeli social media company called Psy-Group, and George Nader, an emissary representing princes from Saudi Arabia and the United Arab Emirates.[246] Nader and Zamel also reportedly had ties to Russia.[247] During the meeting, Zamel proposed a multi-million dollar "social media manipulation effort to help elect Mr. Trump."[248] Trump Jr.'s attorney later denied that Psy-Group ever worked for the campaign, but investigators subsequently discovered that Nader made a $2 million payment to Zamel after the election.[249] Nader also met frequently during the campaign with Jared Kushner, Trump campaign adviser Steve Bannon, and Trump foreign policy adviser Michael Flynn.[250]

Before and after the election, President Trump repeatedly denied the overwhelming evidence of Russian involvement in the campaign. For example, during the 2016 presidential debates, Trump declared that the hacking of the DNC and Clinton email systems might have

245. Michael D. Shear & Michael S. Schmidt, *President Admits Trump Tower Meeting Was Meant to Get Dirt on Clinton*, N.Y. TIMES (Aug. 5, 2018), https://www.nytimes.com/2018/08/05/us/politics/trump-tower-meeting-donald-jr.html.

246. Mark Mazzetti et al., *Trump Jr. and Other Aides Met With Gulf Emissary Offering Help to Win Election*, N.Y. TIMES (May 19, 2018), https://www.nytimes.com/2018/05/19/us/politics/trump-jr-saudi-uae-nader-prince-zamel.html [hereinafter, Mazzetti et al., *Gulf Emissary*]; Mark Mazzetti et al., *Rick Gates Sought Online Manipulation Plans From Israeli Intelligence Firm for Trump Campaign*, N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/us/politics/rick-gates-psy-group-trump.html [hereinafter, Mark Mazzetti et al., *Gates Online Manipulation*]; TOI Staff, *Multiple Trump campaign staffers 'reached out' to Israel firm under FBI scrutiny*, TIMES OF ISRAEL (Dec. 1, 2018), https://www.timesofisrael.com/multiple-trump-campaign-staffers-reached-out-to-israeli-firm-under-fbi-probe/.

247. Mazzetti et al., *Gulf Emissary*, *supra* note 246 ("Mr. Nader's visits to Russia and the work Mr. Zamel's companies did for the Russians have both been a subject of interest to the special counsel's investigators"); Mazzetti et al., *Gates Online Manipulation*, *supra* note 246 ("Mr. Nader and Mr. Zamel have given differing accounts over whether Mr. Zamel ultimately carried out the social media effort to help the Trump campaign and why Mr. Nader paid him $2 million after the election. . . .The reason for the payment has been of keen interest to Mr. Mueller, according to people familiar with the matter.").

248. Mazzetti et al., *Gulf Emissary*, *supra* note 246.

249. Mazzetti et al., *Gates Online Manipulation*, *supra* note 246 ("Mr. Nader and Mr. Zamel have given differing accounts over whether Mr. Zamel ultimately carried out the social media effort to help the Trump campaign and why Mr. Nader paid him $2 million after the election, according to people who have discussed the matter with the two men.").

250. Mazzetti et al., *Gulf Emissary*, *supra* note 246 ("In the hectic final weeks of the campaign and during the presidential transition, several of Mr. Trump's advisers drew Mr. Nader close. He met often with Mr. Kushner, Mr. Flynn and Stephen K. Bannon, who took over as campaign chairman after Mr. Manafort resigned amid revelations about his work in Ukraine.").

been done by "Russia, but it could also be China. It could also be lots of other people. . . . It also could be somebody sitting on their bed that weighs 400 pounds."[251] On October 24, 2016, Trump declared during a Florida campaign rally, "I have nothing to do with Russia, folks. OK? I'll give you a written statement."[252] Even after his own intelligence services confirmed that the Russians hacked the Democrats and conducted a political influence operation to assist his campaign, President Trump continued his denials.[253] From the White House, he repeatedly denied that Russia meddled in the election and described as a "hoax" the idea that his campaign had contacts or colluded in any way with the Russian government.[254] Most remarkable of all, during a July 2018 joint press conference with Vladimir Putin, President Trump openly broke with his intelligence services and declared that he saw no reason to question Putin's denials of Russian interference in the 2016 election.[255]

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251. Tal Kopan, *Is Trump right? Could a 400-pound couch potato have hacked the DNC?*, CNN (Sept. 27, 2016), https://www.cnn.com/2016/09/27/politics/dnc-cyberattack-400-pound-hackers/index.html. *See also* Krishnadev Calamur, *Some of the People Trump Has Blamed for Russia's 2016 Election Hack*, THE ATLANTIC (July 18, 2018), https://www.theatlantic.com/international/archive/2018/07/trump-russia-hack/565445/.

252. Kaitlan Collins, *The Trump officials who denied Russia contact*, CNN (July 12, 2017), https://www.cnn.com/2017/07/11/politics/trump-campaign-denials-russia-contact/index.html.

253. Angie Drobnic Holan, *2017 Lie of the Year: Russian election interference is a 'made-up story'*, POLITIFACT (Dec. 2017), https://www.politifact.com/truth-o-meter/article/2017/dec/12/2017-lie-year-russian-election-interference-made-s/; David A. Graham, *What Mueller's Indictment Reveals*, THE ATLANTIC (Feb. 16, 2018), https://www.theatlantic.com/politics/archive/2018/02/mueller-roadmap/553604/ ("The indictment also stands as an implicit rebuke to President Trump, who has repeatedly refused to acknowledge the Russian role in the election, saying many actors may have been involved. He has also rejected the idea that any interference might have aided him. His rejection puts him at odds with the entire American intelligence establishment, which has concluded that Russia interfered. On Tuesday, top officials, many of them Trump appointees, reaffirmed that stance and said Russia would also seek to meddle in the 2018 election.").

254. Jon Greenberg, *Donald Trump falsely says he never denied Russian meddling*, POLITIFACT (Feb. 19, 2018), https://www.politifact.com/truth-o-meter/statements/2018/feb/19/donald-trump/donald-trump-falsely-denies-he-denied-russian-medd/ ("there are any number of occasions when Trump has denied Russian meddling across the board."); Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html ("President Trump's Twitter outbursts that it is all a 'hoax' and a 'witch hunt,' in the face of a mountain of evidence to the contrary, have taken a toll on public comprehension.").

255. Philip Rucker et al., *Trump hands Putin a diplomatic triumph by casting doubt on U.S. intelligence agencies*, WASH. POST (July 16, 2018), https://www.washingtonpost.com/politics/ahead-of-putin-summit-trump-faults-us-stupidity-for-poor-relations-with-russia/2018/07/16/297f671c-88c0-11e8-a345-a1bf7847b375_story.html?utm_term=.da8c3f26ee3f.; *See also* Matthew Nussbaum, *A look back at Trump's statements on whether Russia meddled in the election*, POLITICO (July 13, 2018), https://www.politico.com/story/2018/07/13/trump-statements-russia-meddling-719281.

Ironically, Russian officials directly contradicted Trump's claims that his campaign had no contacts with Moscow. Two days after Trump's victory, Sergei Ryabkov, the Russian deputy foreign minister, announced that the Russian government had direct contact with members of Trump's "immediate entourage" throughout the election.[256] Similarly, Sergey Kislyak, Russia's Ambassador to the United States, revealed that he had frequent contacts with Trump foreign policy adviser Michael Flynn during the campaign.[257] Even more remarkably, during a 2017 Russian television interview, Kislyak disclosed that he met with so many Trump officials it would take "20 minutes" to list them all.[258]

The bottom line is the Trump campaign intentionally and inexcusably kept the American people in the dark. When voters cast their ballots in November 2016, they did not have all the relevant information in deciding who the next president should be.

Accordingly, the time has come for Congress to enact legislation requiring the mandatory reporting and public disclosure of all contacts between American campaigns and foreign nationals. The reports should include the identities of the American and foreign individuals involved as well as the content of the communications. In addition, just like campaign finance reports, federal law should require campaigns to report their foreign contacts to the FEC within 48 hours of the meeting or communication. The FEC should then post the details of the foreign contacts on its website along with all the other campaign finance information the agency collects and disseminates.

Congress already has a disclosure system in place that offers a model for implementing mandatory foreign disclosures. In 1995 Presi-

256. Ivan Nechepurenko, *Russian Officials Were in Contact With Trump Allies, Diplomat Says*, N.Y. TIMES (Nov. 10, 2016), https://www.nytimes.com/2016/11/11/world/europe/trump-campaign-russia.html?module=inline; Matthew Rosenberg, *Contradicting Trump on Russia: Russian Officials*, N.Y. TIMES (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/us/politics/donald-trump-russia.html.

257. Greg Miller et al., *National security adviser Flynn discussed sanctions with Russian ambassador, despite denials, officials say*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.0af4154a76d4 ("Kislyak said that he had been in contact with Flynn since before the election, but declined to answer questions about the subjects they discussed."); Rosenberg, *supra* note 256 ("Sergey I. Kislyak, told The Washington Post that he had communicated frequently during the campaign with Michael T. Flynn, a close campaign adviser to Mr. Trump").

258. Tucker Higgins, *Russian ambassador says he won't name all the Trump officials he's met with because 'the list is so long'*, CNBC (Nov. 16, 2017), https://www.cnbc.com/2017/11/16/kislyak-wont-name-trump-officials-hes-met-because-list-is-so-long.html.

dent Clinton signed into law the Lobbying Disclosure Act ("LDA"), which requires lobbyists to register with the House and the Senate.[259] The reports describe the lobbying activity details, including the lobbyists' names, the discussion topics, the relevant bill numbers, and the government agency involved.[260] The LDA thus provides an example of how Congress can keep the public fully informed of each campaign's foreign contacts.

When Congress adopted the LDA, it emphasized the critical importance of transparency in government communications with lobbyists. Congress noted that "responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision making process in both the legislative and executive branches of the Federal Government."[261] Secret communications between government officials and interested parties undermine public confidence in America's democratic system of government. Accordingly, in enacting the LDA, Congress recognized that "the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government."[262]

The same reasoning applies with equal force to foreign contacts. Secret communications between American campaigns and foreign governments corrode public confidence in the integrity of the nation's democratic process. Covert relationships between candidates and foreign interests also create an environment conducive to blackmail and corruption. Consequently, if American candidates or their staffs communicate with foreign nationals, the American people should be privy to the conversation.

The public disclosure of a candidate's foreign contacts and support provides insight into the policies the candidate will likely implement if elected. For example, when the mayor of Berlin welcomed Barack Obama in 2008, and when the prime minister of Israel embraced Mitt Romney in the 2012 election, American voters received

259. JACOB R. STRAUS, CONG. RESEARCH SERV., R44292, THE LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS 1 (2017), https://lobbyingdisclosure.house.gov/index.html.

260. *See*, *e.g.*, *Lobbying Disclosure Act Guidance*, OFFICE OF THE CLERK OF THE HOUSE OF REPRESENTATIVES (JAN. 31, 2017), https://lobbyingdisclosure.house.gov/amended_lda_guide.html#section4; STRAUS, *supra* note 259, at 10–12, 14.

261. 2 U.S.C. § 1601(1) (1995).

262. 2 U.S.C. § 1601(3) (1995).

valuable information about the likely foreign policies Obama and Romney would pursue in office. The enthusiastic German response to Obama made clear that Europeans expected him to take a more multilateral approach to international relations than his opponent John McCain. Similarly, Israeli Prime Minister Benjamin Netanyahu's support for Romney indicated that the Israeli government expected him to take a much harder line on Iran's nuclear program than President Obama. Foreign nations thus have a unique perspective on American politics and their open support for candidates assists American voters in evaluating the choices the electorate faces on Election Day.

The 2016 election presented a stark contrast to the transparency of Obama's trip to Germany and Romney's trip to Israel. By its very nature, the Russian intelligence services' intervention in the election was designed to dupe and confuse American voters. In disseminating fake news and hacking the Democrats' email system, the Russian government sought to aid the Trump campaign without the knowledge of the American electorate. Worse yet, Trump himself aided and abetted the Russian effort to hide the truth. The success of a democracy depends on voters making informed choices. In 2016, the American people should have been fully informed of the nature of Russia's intervention in the election. But the combination of the lack of an effective regulatory structure and the Trump campaign's concerted effort to conceal the truth deprived voters of information that should have been available to them.

History must not be allowed to repeat itself. In keeping with its constitutional obligation to protect the country, Congress should demand transparent elections in order to defend American democracy from covert foreign interference. As Ian Vandewalker and Lawrence Norden of the Brennan Center have argued, "Lax enforcement can make foreign powers confident in their ability to interfere without getting caught, whether they seek to influence politics through the internet, dark money groups, or business firms."[263] In addition to the timely reporting of foreign campaign contacts, it is long overdue for Congress to finally require politically-active nonprofit 501(c) organizations to disclose their donors.[264] At present, federal law permits

263. Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, BRENNAN CTR. FOR JUSTICE 21 (Apr. 2018).

264. *See* Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 KINGS L.J. 239 (2017); Chisun Lee, *How Politicians Use Nonprofits to Hide Dark Money*, BRENNAN CTR. FOR JUSTICE (Mar. 29, 2018), https://www.brennancenter.org/blog/how-politicians-use-nonprofits-hide-dark-money.

nonprofit groups to make independent campaign expenditures without disclosing their donors, a loophole that foreign governments could use to hide their involvement in American campaigns.[265] There is reason to believe Russia may already have exploited that loophole to direct funds to the National Rifle Association, a 501(c) organization.[266] Expanding disclosure rules to politically-active nonprofits would thus help prevent foreign governments from using "dark money" to secretly influence elections.[267]

But eliminating dark money is only a modest step in the fight against foreign interference. The fact is Russia did not need a nonprofit 501(c) organization to hack into the DNC computer system or to spread disinformation on the internet. The internet empowers foreign governments to shape public opinion to a degree unimaginable in the twentieth century. In light of that reality, congressional policy should focus on keeping the public fully informed. To that end, full disclosure of foreign contacts by American candidates and their campaign staffs is absolutely essential. If American candidates or their staffs have reached out—directly or indirectly—to foreign governments for campaign assistance, the voters need to know about it before Election Day.

In addition, Congress should give the Federal Election Commission the authority and resources necessary to monitor, investigate, and

265. Joseph Biden & Michael Carpenter, *Foreign Dark Money Is Threatening American Democracy*, POLITICO (Nov. 27, 2018), https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690 ("while super PACs are required to file financial disclosure reports, non-profit 501(c) organizations (for example, the National Rifle Association or the U.S. Chamber of Commerce) are not. So if a foreign entity transfers money to a 501(c), that organization can in turn contribute funds to a super PAC without disclosing the foreign origin of the money.").

266. Rosalind S. Helderman et al., *Russian gun-rights advocate who sought to build ties with NRA, charged with acting as a covert Russian agent*, WASH. POST (July 16, 2018), https://www.washingtonpost.com/local/public-safety/maria-butina-russian-gun-rights-advocate-charged-in-us-with-acting-as-russian-federation-agent/2018/07/16/d1d4832a-8929-11e8-85ae-511bc1146b0b_story.html?utm_term=.2a409c61c86d; Matt Apuzzo et al., *Mariia Butina, Who Sought 'Back Channel' Meeting for Trump and Putin, Is Charged as Russian Agent*, N.Y. TIMES (July 16, 2018), https://www.nytimes.com/2018/07/16/us/politics/trump-russia-indictment.html?emc=edit_cn_20180717&nl=first-draft&nlid=6918061320180717&te=1; Josh Meyer, *NRA got more money from Russia-linked sources than earlier reported*, POLITICO (April 11, 2018), https://www.politico.com/story/2018/04/11/nra-russia-money-guns-516804 ("The National Rifle Association reported this week that it received more money from people with Russian ties than it has previously acknowledged, but announced that it was officially done cooperating with a congressional inquiry exploring whether illicit Kremlin-linked funding passed through the NRA and into Donald Trump's 2016 presidential campaign.").

267. Wright, *supra* note 155, at 584 ("An important step would be to strengthen the disclosure rules to ensure that they are fully applicable to corporations, including LLCs and 501(c)(4)s that make independent expenditures and electioneering communications.").

publicly disclose foreign election meddling in real time. The Canadian federal elections agency—Elections Canada—is tasked by the Canadian Parliament to investigate foreign meddling in Canadian elections.[268] Congress should assign the same authority to the FEC. If, for example, the Russians post fake election-related news stories on social media, the FEC should investigate such postings and immediately alert the public to their foreign source. Although the Justice Department has criminal jurisdiction over foreign intervention in American campaigns, the criminal process is too slow to provide timely notice to voters of foreign involvement in American elections. By the time the Justice Department brings charges, the election will be long over, as was the case in the 2016 election.

Accordingly, the Justice Department, the intelligence community, and the FEC should work together to identify and publicize foreign influence campaigns. As former Director of National Intelligence James Clapper has warned, "It's absolutely crucial that the intelligence community lean forward, push the envelope on sharing as much of that information as possible."[269] The Justice Department has already taken promising steps in that direction.[270] In 2018, the Justice Department's Cyber Digital Task Force announced that it would not only warn candidates, organizations and targets of foreign election-related influence campaigns, but would also alert the public to foreign efforts to influence American elections.[271] In announcing the new policy, Deputy Attorney General Rod Rosenstein emphasized that "[f]oreign governments should not be secret participants [in American elections], covertly spreading propaganda and fanning the flames of division."[272] Congress would be wise to direct the Justice Department to work jointly with the FEC in investigating and exposing foreign election interference. As a central clearinghouse of election-related information, the FEC has subject matter expertise that perfectly com-

268. Elizabeth Thompson, *More needed to prevent foreign interference in Canadian elections, watchdog says*, CBC NEWS (Aug. 27, 2018), https://www.cbc.ca/news/politics/canada-elections-facebook-twitter-1.4799688.

269. Ellen Nakashima, *Justice Department plans to alert public to foreign operations targeting U.S. democracy*, WASH. POST (July 19, 2018), https://www.washingtonpost.com/world/national-security/justice-department-plans-to-alert-public-to-foreign-operations-targeting-us-democracy/2018/07/19/d010e3a6-8b8d-11e8-85ae-511bc1146b0b_story.html?utm_term=.5fbf1cb1d247.

270. *Id*.

271. *Report of the Attorney General's Cyber Digital Task Force*, DEP'T OF JUSTICE 10–15 (July 2, 2018), https://www.justice.gov/ag/page/file/1076696/download.

272. *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the Aspen Security Forum*, DEP'T OF JUSTICE (July 19, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-aspen-security-forum.

plements the Justice Department's investigative powers. A joint FEC-Justice Department effort would thus ensure that voters receive timely warning of foreign activity before they cast their ballots.

CONCLUSION

When Congress strengthened the foreign campaign ban in the 1970s, Senator Lloyd Bentsen declared that foreign nationals do not have "any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments."[273] Ironically, however, foreign interference in American elections has increased in the decades since Sen. Bentsen and Congress amended the law. The 2016 election made clear that the problem of foreign involvement in American politics is here to stay. Foreign governments will always have an interest in U.S. election outcomes and technological advances will continue to create new ways for those governments to intervene in American democracy.

The public policy goal, therefore, should be to bring all foreign interventions and campaign-related connections to light. Barack Obama in 2008 and Mitt Romney in 2012 made no secret of their foreign support, which in turn enabled American voters to cast informed ballots on Election Day. In contrast, the Trump campaign in 2016 hid its foreign connections and even falsely denied that Russia had intervened on its behalf. Throughout the campaign, Trump and his staff kept the American people in the dark, which meant voters lacked crucial information on Election Day.

Congress must not permit any future presidential candidate to engage in the secretive and deceitful tactics of the Trump campaign. Although mandatory campaign transparency will not eliminate foreign influence on elections, it will illuminate the foreign connections of American candidates. In the internet age, light is the most promising disinfectant available. As Patrick Henry warned during the constitutional ratification debate, "[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."[274] Two hundred and thirty-one years later,

273. Savrin, *supra* note 13, at 793.

274. KEEPING AMERICA INFORMED: THE U.S. GOVERNMENT PRINTING OFFICE 4 (2011), https://www.govinfo.gov/content/pkg/GPO-KEEPINGAMERICAINFORMED/pdf/GPO-KEEPINGAMERICAINFORMED.pdf.

Henry's warning remains as timely as ever. The best defense for American democracy against foreign and domestic threats alike is full and complete election transparency.

COMMENT

If the Feds Watching[1]: The FBI's Use of a "Black Identity Extremist" Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection

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1. *See* 2 CHAINZ & PHARRELL WILLIAMS, *Feds Watching*, *on* B.O.A.T.S. II: ME TIME (Def Jam 2013).

> *"[T]he power of the white world is threatened whenever a black man refuses to accept the white world's definitions."*[2]

INTRODUCTION

In August 2017, the Federal Bureau of Investigation ("FBI" or the "Bureau") issued an assessment identifying a new domestic terrorist threat.[3] The largest emerging domestic terrorist threat is right wing terrorism,[4] perpetrated by white supremacists emboldened by President Donald J. Trump's refusal to denounce their ideology and violence.[5] Instead of addressing this issue, the FBI has determined that "Black Identity Extremists" ("BIEs") are the latest domestic terrorist threat.[6] The FBI has provided a very broad definition for a "Black Identity Extremist," which seems to encompass any black person who protests and speaks out against the unequal treatment of black and brown bodies by police officers.[7] The FBI assessment states that black Americans are committing "ideologically motivated, violent criminal activity" against police officers in response to "alleged police abuse against African Americans" and "perceptions of police brutality."[8] The problem with the FBI stating that these abuses are "alleged" and "perceived" is that it ignores the real, historic, and persistent problem of brutality faced by black Americans[9] at the

2. James Baldwin, *Letter from a Region in My Mind*, NEW YORKER (Nov. 17, 1962), https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind.

3. *See* COUNTERTERRORISM DIV., FED. BUREAU OF INTELLIGENCE, INTELLIGENCE ASSESSMENT: BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS 1 (2017) [hereinafter BIE ASSESSMENT], https://www.documentcloud.org/documents/4067711-BIE-Redacted.html.

4. David Neiwert & The Investigative Fund, *Charlottesville Underscores How Homegrown Hate is Going Unchecked*, REVEAL NEWS (June 17, 2017), https://www.revealnews.org/article/home-is-where-the-hate-is/.

5. Ben Jacobs & Warren Murray, *Donald Trump Under Fire After Failing to Denounce Virginia White Supremacists*, THE GUARDIAN (Aug. 13, 2017), https://www.theguardian.com/us-news/2017/aug/12/charlottesville-protest-trump-condemns-violence-many-sides.

6. *See* BIE ASSESSMENT, *supra* note 3. It is worth noting that while the FBI assessment was published nine days before the events in Charlottesville, Virginia, this increase in the domestic terrorism threat caused by white supremacists predates the horrific events of Charlottesville. *See* Neiwert, *supra* note 4 (showing statistics as far back as 2008).

7. *See* BIE ASSESSMENT, *supra* note 3, at 2.

8. *Id.*

9. While the FBI assessment and DOJ reports refer to "African Americans," I will refer to the group of black people living in the United States as "black Americans." This is because the term "black Americans" is more encompassing of black people living in the United States, but who identify with an ethnicity from elsewhere in the African diaspora.

hands of law enforcement in the United States.[10] While black Americans comprise only thirteen percent of the United States population, they are killed by police at a rate of 27%.[11] Black people are also more likely to be unarmed and less likely to be threatening someone when killed.[12]

The FBI's use of a BIE assessment to address national security and law enforcement safety, while ignoring the dangers that white supremacists pose to those very interests, has several equal protection implications. The Fourteenth Amendment of the United States Constitution provides, in relevant part, that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[13] These protections of the Fourteenth Amendment only apply to state action.[14] The Fourteenth Amendment directly applies to state and local governments and equal protection is reverse incorporated to the federal government through the Fifth Amendment of the U.S. Constitution.[15] Because black people were not considered in the phrase "We the People" at the time of the U.S. Constitution's creation,[16] the Reconstruction Amendments, and more specifically the Equal Protection Clause of the Fourteenth Amendment, are important for protecting the rights of black people.

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10. Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/.

11. MAPPING POLICE VIOLENCE, 2017 POLICE VIOLENCE REPORT (2017), https://policeviolencereport.org.

12. *Id.* (showing that out of 1,147 people killed by police in 2017, 149 total were unarmed, 35% of black people were unarmed and 34% were unarmed and not attacking).

13. U.S. CONST. amend XIV, § 1.

14. *See* Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.").

15. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore we do not imply that the two are always interchangeable phrases.

16. *See* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 692 (2018); Dred Scott v. Sanford, 60 U.S. 393, 410 (1857) ("The general words [that all men are created equal] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration[.]"); *The Bill of Rights: A Brief History*, ACLU (last visited January 29, 2019) ("And it was well understood that there was a "race exception" to the Constitution.") https://www.aclu.org/other/bill-rights-brief-history.

The problem with the application of equal protection as it pertains to racial discrimination is that the case law is complex. Although the Supreme Court in *Brown*[17] held that the *de jure* racial segregation in schools was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment,[18] the constitutional issues that black people have faced are beyond prejudicial laws. Black Americans face constitutional violations from arguably more insidious forces—federal agencies. These violations come in the form of intelligence assessments like the BIE assessment and internal policies that criminalize opinions critical of the U.S government.

In what is now considered "the most famous footnote in constitutional law,"[19] Justice Stone articulated that "more exacting scrutiny" should apply to cases where there is "prejudice against discrete and insular minorities."[20] This footnote was the foundation of applying strict scrutiny to cases of racial discrimination. To determine if strict scrutiny will apply, there needs to be either a racial classification that exists on the face of the government action or a government action that was facially neutral with a discriminatory impact.[21] The Black Identity Extremist assessment is obviously a racial classification on its face because the very name of the intelligence assessment includes the racial classification "black." The problem lies in it not being narrowly tailored.

This comment argues that the FBI's use of a BIE designation violates equal protection while ignoring the danger that white supremacy poses to the United States. Part I will discuss COINTELPRO, the FBI's lack of outside regulation and the aftermath of the Church Committee. In Part II, domestic terrorism will be defined. In this section, the argument will be made that "BIEs" are not the emerging domestic terrorist group and the actual emerging group is being ignored in favor of this BIE designation. Part III will explain the BIE assessment and the flaws in the FBI's rationale. In Part IV, I will offer solutions that address white supremacy as a domestic terrorism threat.

17. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

18. *Id.*

19. Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. Tex. L. Rev. 163 (2004).

20. U.S. v. Carolene Prod. Co., 304 U.S. 144, 152 n. 4 (1938).

21. Erwin Chemerinsky, Constitutional Law: Principles and Policies 670 (Vicki Been et al. eds., 3rd ed. 2006).

I. THE FBI'S REPRESSIVE HISTORY AND ITS GOVERNING GUIDELINES

> The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.
>
> –Senate Select Committee to Study Government Operations with Respect to Intelligence Activities.[22]

A. The FBI Has a History of Targeting and Using Harsher Methods for Black Dissent

Between 1956 and 1971, the FBI formally engaged in a series of covert action programs known as COINTELPRO.[23] The techniques used against domestic "threats" were adapted from the methods that the FBI used against hostile, foreign agents.[24] The covert action programs were primarily focused on five groups who were deemed a "threat" to the United States. They included the "Communist Party, USA" program, the "Socialist Workers Party" program, the "White Hate Group" program, the "Black Nationalist-Hate Group" program, and the "New Left" program.[25] The Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, nicknamed the "Church Committee" after its chairman Senator Frank Church, determined that the use of the term "counterintelligence" was not appropriate to explain the conduct of the FBI.[26] Counterintelligence was defined as "those actions by an intelligence agency intended to protect its own security and to undermine hostile intelligence operations."[27] The Committee believed that the actions of the FBI were more akin to "covert action," which was defined as "the label applied to clandestine activities intended to influence political choices and social values."[28]

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22. SEN. SELECT COMM. TO STUDY GOV'T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94–755, 94th Cong., 2d Sess. bk. III, at 3 (1976) [hereinafter SELECT COMM. FINAL REPORT].

23. COINTELPRO is an acronym for counterintelligence program. The program began, in part, because of Supreme Court decisions that limited the power to attack dissident groups. *Id.* at 3–4.

24. *Id.* at 4.

25. *Id.*

26. *Id.*; Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1080 (2002).

27. SELECT COMM. FINAL REPORT, *supra* note 22, at 4.

28. *Id.*

The stated purpose of the COINTELPROs was to "protect[ ] national security, prevent[ ] violence, and maintain[ ] the existing social and political order by disrupting and neutralizing groups and individuals perceived as threats."[29] This section will focus on whether the similarities and differences between the White Hate Group COINTELPRO and the Black Nationalist-Hate Group COINTELPRO violates equal protection.

1. COINTELPRO – White Hate Group

In the aftermath of the murder of three Freedom Summer workers near Philadelphia, Mississippi by Klansmen, the FBI began the process of transferring investigation of the Ku Klux Klan (KKK) and other related right-wing groups from the General Investigative Division (GID) to the Domestic Intelligence Division (DID).[30] The three young men were working to register African-American voters as part of the Freedom Summer campaign and later traveled to investigate the burning of a church in Neshoba County.[31] The young men's murders were caused in part by Neshoba County deputy sheriff, Cecil Price, a member of the White Knights of the Ku Klux Klan.[32]

The "White Hate Group" program was conducted from 1964 to 1971.[33] A directive was sent to seventeen FBI field offices implementing a COINTELPRO that was meant to "expose disrupt and otherwise neutralize the activities of the various Klans and hate organizations, their leadership and adherents."[34] The FBI targeted seventeen Klan organizations and nine hate organizations for counter-

29. *Id.* at 5.

30. DAVID CUNNINGHAM, THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE 88 (2004); Emily Wagster Pettus & Rebecca Santana, *Man convicted of 3 killing civil rights workers dies in jail*, AP (Jan. 12, 2018), https://www.apnews.com/3d82e778b5d643088268c3214ae904f8.

31. Jason Daley, *After 52 Years, the "Mississippi Burning" Case Closes*, SMITHSONIAN (June 23, 2016), https://www.smithsonianmag.com/smart-news/after-52-years-mississippi-burning-case-closed-180959533/. Their murders were the inspiration for the movie Mississippi Burning.

32. *Id.*

33. *Id.* at 4. The origins of the White Hate Group program started on July 30, 1964 with the reorganization of the General Investigative Division to the Domestic Intelligence Division. *Id.* at 18. The White Hate Group COINTELPRO itself started on September 2, 1964. *Id.* at 19.

34. Letter from FBI Headquarters to Atlanta Field Office (Sept. 2, 1964) (on file with author) [hereinafter FBI Headquarters Letter]; *see also* SELECT COMM. FINAL REPORT, *supra* note 22, at 19.

intelligence action.[35] The White Hate Group COINTELPRO was primarily limited to the primary targets.[36]

The existence of a COINTELPRO program designed to disrupt the Klan seems contradictory when compared to the FBI's abuses during the Black Nationalist-Hate Group COINTELPRO. However, the Klan's organized violent tactics were a threat to the FBI's authority because they showed a lack of faith in established authority.[37] Unlike the "civil rights and black liberation groups targeted in COINTELPRO–Black Nationalist/Hate Groups,"[38] the FBI did not perceive the beliefs of the KKK to be insurgent because "the Klan was not threatening to predominantly white power structures in American communities."[39] The larger impact of the COINTELPRO–White Hate Group was that liberal support for the program provided Hoover and his FBI with "sufficient insularity and autonomy to establish counterintelligence programs against domestic targets without the approval of Congress or other actors outside the FBI."[40]

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35. FBI Headquarters Letter, *supra* note 34; *see also* SELECT COMM. FINAL REPORT, *supra* note 22, at 19. These seventeen Klan organizations targeted were the Association of Arkansas Klans of the Knights of the Ku Klux Klan; Association of Georgia Klans; Association of South Carolina Klans, Knights of the Ku Klux Klan; Christian Knights of the Ku Klux Klan, Hinton, West Virginia; Dixie Klans, Knights of the Ku Klux Klan, Inc.; Improved Order of the U.S. Klans, Knights of the Ku Klux Klan, Inc.; Independent Klavern, Fountain Inn; Independent Klan Unit, St. Augustine, Florida; Knights of the Ku Klux Klan, Aka; Mississippi Knights of the Ku Klux Klan; National Knights of the Ku Klux Klan, Inc.; Original Knights of the Ku Klux Klan; Pioneer Club, Orlando, Florida; United Florida Ku Klux Klan; United Klans of America, Inc., Knights of the Ku Klux Klan; U.S. Klans, Knights of the Ku Klux Klan, Inc.; and White Knights of the Ku Klux Klan of Mississippi. FBI Headquarters Letter, *supra* note 34.

The nine hate organizations targeted were the Alabama States Rights Party; American Nazi Party; Council for Statehood, aka, Freemen; Fighting American Nationalists; National States Rights Party. National Renaissance Party; United Freeman; Viking Youth of America, and White Youth Corps. *Id.*

36. SELECT COMM. FINAL REPORT, *supra* note 22, at 19.

37. *See* CUNNINGHAM, *supra* note 30, at 122.

38. *Id.* at 126.

39. *Id.*

> Nor was it a threat to traditional American values, either politically through a connection to Communist interests or culturally through adherence to a way of life that, like the New Left, rejected existing authority structures. The Klan, while upholding a set of ideas about race shared at the time by a considerable number of "respectable citizens" throughout the South, was subversive because its actions did not recognize and respect the nonviolent approach that allowed anti–civil rights interests to maintain their good name. In the eyes of the Bureau, this devotion to violent means—presumably a product of poverty and ignorance—made the Klan and other radical right- wing groups worthy targets of COINTELPRO activities. Unlike the New Left, the presence of the Klan itself, detached from its traditional use of violent means, was not objectionable. *Id.*

40. *Id.* at 32.

2. COINTELPRO – Black Nationalist/Hate Group

The "Black Nationalist/Hate Group" of COINTELPRO ran from 1967 to 1971.[41] Unlike the White Hate Group program, the program's name had no clear definition and included organizations that weren't characterized as black nationalist, but were primarily black.[42] The program originated in 23 FBI field offices with the purpose to "expose, disrupt, misdirect, discredit, otherwise neutralize the activities of black nationalist, hate-type organizations and groupings. Their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder. . .[e]fforts of the various groups to consolidate their forces or to recruit new or youthful adherents must be frustrated."[43] The initial targets were the Southern Christian Leadership Conference, the Student Nonviolent Coordinating Committee (SNCC), Revolutionary Action Movement (RAM), Deacons for Defense and Justice, Congress of Racial Equality (CORE), the Nation of Islam, Stokely Carmichael, H. "Rap" Brown, Elijah Muhammed, and Maxwell Stanford.[44] They were targeted either due to a "propensity for violence or their 'radical and revolutionary rhetoric and actions'".[45]

On March 4, 1968, the program expanded to 41 field offices.[46] The memo that announced the expansion of the program laid out five goals:

> (1) to prevent the 'coalition of militant black nationalist groups,' which might be the first step toward a real 'Mau Mau'[47] in America;

41. SELECT COMM. FINAL REPORT, *supra* note 22, at 4. The originating letter for the program was dated August 25, 1967.

42. The Committee determined the titles of the programs did not correspond to the groups and people targeted. An example is the Southern Christian Leadership Conference, which was placed under the Black Nationalist-Hate Group COINTELPRO program even though it advocated nonviolence. *Id.* at 4.

43. *Id.* at 20 (citing the originating letter dated August 25, 1967).

44. *Id.*

45. *Id.*

46. *Id.* at 21.

47. The Mau Mau uprising was a rebellion launched by the Kikuyu, Kenya's largest ethnic group, who had been pushed off their fertile lands by European settlers. The Mau Mau were forced to live on reserves and had a special permit to travel in the country. Increasing unrest lead the British government to get wind of a Mau Mau movement, which they banned in 1950. By 1952, rebels started attacking farms and killing people who supported the government, causing the British to declare a state of emergency. The British government implemented a system where the local population was tortured, mutilated, killed, and/or taken to detention camps. The fighting ended in 1956 after the capture of the Mau Mau leader Dedan Kimathi, who was executed. The state of emergency was finally lifted in 1960. The rebellion accelerated Kenya's independence which they gained in 1963. *See* Jose Miguel Calatayud & Phil Moore, *"We are the*

> (2) to prevent the rise of a 'messiah' who could 'unify, and electrify,' the movement, naming specifically Martin Luther King, Stokely Carmichael, and Elijah Muhammed;
> (3) to prevent violence on the part of black nationalist groups, by pinpointing 'potential troublemakers' and neutralizing them 'before they exercise their potential for violence;'
> (4) to prevent groups and leaders from gaining 'respectability' by discrediting them to the 'responsible' Negro community, to the white community (both the responsible community and the 'liberals' – the distinction is the Bureau's), and to Negro radicals; and
> (5) to prevent the long range growth of these organizations, especially among youth, by developing specific tactics to 'prevent these groups from recruiting young people.'[48]

By November 1968, the Black Panther Party (BPP) had attained enough recognition and become active enough to be the central target of the program.[49] Though not one of the groups originally targeted, the BPP became the "most targeted and sought after by the FBI through COINTELPRO operations[.]"[50] The Party's ability to support and unite other black political groups made it a target of the program.[51] The FBI soon started fabricating documents that created a false impression that honorary BPP Prime Minister Stokely Carmichael was an undercover CIA operative[52] which led to Carmichael fleeing the U.S. in fear for his life.[53]

The FBI also created and enflamed tensions between the BPP and other radical black groups.[54] With the aim of weakening of the influence of both groups, the FBI pitted the BPP against the United Slaves, a California based black nationalist group.[55] In an attempt to weaken the influence of the two groups, the Hoover-led FBI released defamatory cartoons of both groups which led to increased tension between them.[56] The FBI's efforts escalated to murder when they led a raid on the Chicago BPP headquarters and killed two Panther lead-

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Mau Mau": Kenyans Share Stories of Torture, AL JAZERRA (May 5, 2016), https://www.aljazeera.com/indepth/features/2016/04/mau-mau-kenyans-share-stories-torture-160428131800531.html.

48. SELECT COMM. FINAL REPORT, *supra* note 22, at 20–21 (citing the expansion memo dated March 4, 1968).

49. *Id.* at 22; CUNNINGHAM, *supra* note 30, at 33.

50. Eric W. Buetzow, *The Powers That Be: The American Endeavor to Suppress Black Political Voices*, 1 LAW & SOC'Y REV. UCSB 89, 91 (2001–2002).

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.* at 91–92.

ers, Fred Hampton and Mark Clark.[57] The remaining Panthers who were not killed in the raid, were beaten and arrested.[58] These events, along with the FBI's continued war on the Panthers, led to the collapse the Panthers in the early 1970s.[59]

The FBI's efforts with the COINTELPRO–White Hate Group "used comparatively few techniques which carried a risk of serious physical emotional or economic damage to the targets while the Black Nationalist COINTELPRO used such techniques extensively."[60] However, the FBI's targeting of groups for COINTELPRO was based more on the threat these groups had to American ideals and the status quo. Although the treatment of the individuals targeted under COINTELPRO–Black Nationalist/Hate Group was harsher, an equal protection argument fails here because arguably the FBI used the least restrictive means when they targeted groups not solely based on race, but also based on the social threat that group posed. While the FBI's COINTELPRO program was a severe abuse of power and could not be upheld under other constitutional provisions, the FBI's targeting of groups based on political messages,[61] race,[62] and threat to the status quo undermines an argument that the COINTELPRO activities of the FBI violates equal protection.

B. The FBI's Governing Guidelines

On June 29, 1908, Attorney General Charles J. Bonaparte ordered the creation of a force of special agents within the Department of Justice.[63] With his order, Bonaparte was able to reassign 23 investigators who already worked for the Department in addition to hiring eight more agents from the Treasury Department.[64] Originally named the Bureau of Investigation ("BOI"),[65] the Bureau currently serves as

57. *Id.* at 92.

58. *Id.*

59. *Id.*

60. SELECT COMM. FINAL REPORT, *supra* note 22, at 16.

61. This includes the Communist Party program, the Socialist Workers Party program, and the New Left program.

62. This includes the Black Nationalist/Hate Group program and the White Hate Group program.

63. *History: Timeline*, FED. BUREAU OF INVESTIGATIONS, https://www.fbi.gov/history/timeline (last visited Feb. 5, 2019).

64. *Id.*

65. *Id.* The FBI has gone through a series of name changes. In March of 1909, then Attorney General George W. Wick named the force the Bureau of Investigation. In 1932, the BOI was renamed the United States BOI (USBOI) and within a year was renamed again. This time it

the primary investigative agency of the federal government.[66] The FBI traces its authority to investigate all federal crimes not exclusively assigned to another agency from 28 U.S.C. § 533. It grants the Attorney General the power to appoint officials "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General."[67] The activities and responsibilities of the FBI are governed by a series of guidelines that are maintained by the Attorney General.[68] While these guidelines are not legal authorities, the changes to them are not based on the real domestic terrorism threats to the U.S. This makes the guidelines ineffective in dealing with domestic terrorism, but effective in maintaining a system of white supremacy.

1. Attorney General Guidelines

On March 8, 1971, a group identifying themselves as the Citizens' Commission to Investigate the FBI broke into an FBI office in Media, Pennsylvania and stole most of the FBI's documents.[69] The documents contained evidence that the FBI was spying on political groups.[70] After discovering the documents, the group sent them to several newspapers, which resulted in reports being published on the subject.[71] On January 27, 1975, a congressional committee, led by Senator Frank Church, was formed to investigate allegations that the U.S. government was spying on American citizens.[72] The committee issued a report that found that the FBI "conducted a sophisticated vigilante operation. . .on the theory that preventing the growth of dan-

was changed to the Division of Investigation (DOI). The Bureau's name was finally and officially changed to the Federal Bureau of Investigation at the beginning of the 1936 Fiscal Year.

66. OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 5 (2008) [hereinafter MUKASEY GUIDELINES].

67. 28 U.S.C. § 533 (1966); *Where is the FBI's authority written down?*, FED. BUREAU OF INVESTIGATIONS, https://www.fbi.gov/about/faqs/where-is-the-fbis-authority-written-down (last visited Feb. 14, 2019); *see also* 28 C.F.R. § 0.85 (1969).

68. *See* Exec. Order No. 12333, 3 C.F.R. 200 (1981), *amended by* Exec. Order No. 13284 (2003), Exec. Order No. 13355 (2004), Exec. Order No. 13470 (2008) (placing the responsibility of supervision and regulation of the FBI onto the Attorney General).

69. Mark Mazzetti, *Burglars Who Took On F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014), https://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html.

70. *Id.*

71. *Id.*

72. NCC Staff, *Looking back at the Church Committee*, CONST. DAILY BLOG (Jan. 27, 2018), https://constitutioncenter.org/blog/looking-back-at-the-church-committee.

gerous groups and the propagation of dangerous ideas would protect the national security and deter violence."[73]

The Church Committee recommended that Congress pass a charter governing the FBI's activities and limiting its investigative powers.[74] As a strategy to avoid statutory reform of the FBI and implement the suggestions of the Church Committee, Attorney General Edward Levi, issued the first set of Attorney General Guidelines (AGG).[75] The first AGG, known as the Levi Guidelines,[76] were implemented in 1976 to govern the FBI's domestic intelligence activities and included many of the Church Committee's recommendations.[77] The Levi Guidelines aimed to prevent government monitoring of individuals or groups with unpopular political views.[78]

The Levi Guidelines set a permissible purpose for domestic security investigations and established three investigative phases: preliminary, limited, and full investigations.[79] For each successive investigative phase, a higher threshold of suspicion was required to proceed, the investigative tools used by the agency got more intrusive, and the procedural safeguards became more stringent.[80] This basic structure has been retained in all versions of the AGG.[81] The different levels of investigatory activity and the higher thresholds needed to advance to the next level, helped to ensure that the FBI had sufficient evidence to increase the amount of intrusion into a target's life.[82]

Under the Levi Guidelines, the number of domestic security investigations decreased drastically. In 1973, prior to the passage of the Levi Guidelines, the Bureau was conducting 21,414 domestic security investigations.[83] This number significantly decreased to 102 domestic security investigations in 1978, two years after the Levi Guidelines

73. SELECT COMM. FINAL REPORT, *supra* note 22, at 3.

74. EMILY BERMAN, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 9 (2011).

75. *Id.* at 10.

76. The Guidelines are often referred to using the last name of the Attorney General at the time.

77. BERMAN, *supra* note 74, at 10.

78. *Id.* at 11.

79. *Id.*; *see also* THE ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATIONS (Apr. 5, 1976), *reprinted in FBI Statutory Charter: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 18–23 (1978) [hereinafter LEVI GUIDELINES].

80. BERMAN, *supra* note 74, at 11.

81. *Id.*

82. *Id.* at 12.

83. CHAIRMAN OF THE SUBCOMM. ON SECURITY AND TERRORISM, 98TH CONG., REP. ON IMPACT OF ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (THE LEVI GUIDELINES) 5 (1983).

were established.[84] While there was some decrease in numbers between 1973 and the passage of the Levi Guidelines, the most dramatic dip in the number of domestic security investigations was after the implementation of the guidelines, which suggests that the guidelines were the reason that this decrease occurred.

Although the Levi Guidelines were effective in curtailing the abuses of the FBI, former officers and agents of agencies, such as the U.S. Secret Service, U.S. Park Police, and local agencies, argued in appearances before the Subcommittee on Security and Terrorism that the decline in FBI domestic intelligence activities also created a decline in the amount of useful information that other agencies received.[85] Based on the findings from these hearings, the subcommittee made several recommendations which included extensively revising the Levi Guidelines.[86] This lead to significant changes between the Levi Guidelines and the 1983 Smith Guidelines.[87]

In 1980, Attorney General Civiletti took the Levi Guidelines and added rules for investigating general crimes and racketeering enterprises.[88] The AGG changed more in 1983 when Attorney General William French Smith "expand[ed] the concept of domestic security investigations-labeling them 'criminal intelligence investigations' to include both terrorism investigations and racketeering enterprise investigations."[89] Under the Smith Guidelines, the three tier investigative process was replaced with a single step investigative scheme.[90] One of the biggest changes between the Levi and Smith Guidelines

84. *Id.*

85. *Id.* at 11. *See generally id.* at 11–29 (showing how the decline in FBI investigations affected other agencies and the problems that the FBI Director and FBI agents saw with the Levi Guidelines).

86. *Id.* at 34. The subcommittee stated that the revisions should include

> (a) The deletion of the criminal standard as the threshold for initiating domestic security investigations; (b) A specific authorization for the investigation of systematic advocacy of violence, illegal activities, or other activities calculated to weaken or undermine the Government of the United States or of any State; (c) The extension of the time limits for investigations, especially those for preliminary and limited investigations; (d) Relaxation of current restrictions on the recruitment and emplacement of new informants; and (e) Lowering of the threshold for the initiation of limited investigations and relaxation of current restrictions on techniques permissible in investigations (for example, physical surveillance and interviews for purposes other than identification of the subject of investigation should be permitted at the preliminary level of investigation).

Id. at 34–35.

87. *See* John T. Elliff, *Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785 (1984).

88. BERMAN, *supra* note 74, at 13.

89. *Id.*

90. Press Briefing, U.S. Dep't of Justice (Mar. 7, 1983), *reprinted in Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Sub-*

was the standard for an investigation. Under the Levi Guidelines, a full investigation could only be authorized "on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law for one or more of the purposes enumerated in IA(l)-IA(4)."[91] Under the Smith Guidelines, the standard for domestic security/terrorism investigations was relaxed to "facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States."[92] The difference in these standards was likely a response to the testimony of the intelligence community during the hearings on the Levi Guidelines.[93] When asked about the threat his guidelines posed to lawful political dissent, Attorney General Smith stated "Well, we don't see any problem with respect to that kind of activity, so long as the activity does not involve itself in the types of criminal activity that we're talking about."[94] When asked whether terrorism was a greater risk in the country in 1983 than it was in 1976, then FBI Director William Webster stated that the number of domestic security cases had decreased, and the FBI did not expect an increase under the new guidelines.[95] However, the Smith Guidelines set the AGG down a path that would lead to increased constitutional abuses by the FBI.

Prompted by the attacks of September 11th, Attorney General John Ashcroft instituted another set of significantly revised Guidelines.[96] After 9/11, it was argued that the FBI's guidelines were out-

comm. on Security and Terrorism of the S. Comm. on the Judiciary, 98th Cong., 1st Sess. 66 (1983) [hereinafter Smith Press Briefing].

91. LEVI GUIDELINES, *supra* note 79, at 22. Those factors are "(1) the magnitude of the threatened harm; (2) the likelihood it will occur; (3) the immediacy of the threat; and (4) the danger to privacy and free expression posed by a full investigation." *Id.*

92. THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (Mar. 7, 1983), *reprinted in Attorney General's Guidelines for Domestic Security Investigations (Smith Guidelines): Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 61 (1983) [hereinafter SMITH GUIDELINES]. Also note that the category changed from domestic security investigations to domestic security/terrorism investigations.

93. *See* discussion *infra* part I; *see also* Allison Jones, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. PUB. INT. L.J. 137, 146 (2009).

94. Smith Press Briefing, *supra* note 90, at 67.

95. *Id.* at 70.

96. *See* BERMAN, *supra* note 74, at 14. While there were other revisions to the AGG by Attorneys Generals, those revisions were not as significant as the one this note focuses on.

dated and did not provide the FBI with enough flexibility.[97] To address this, Attorney General John Ashcroft made significant changes to the AG Guidelines.[98] These guidelines created a category that comes before the preliminary investigation, called the "the prompt and extremely limited checking of initial leads."[99] This level of investigative activity is extremely broad and explained in two sentences.

> The lowest level of investigative activity is the "prompt and extremely limited checking out of initial leads," which should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of criminal activity is warranted. This limited activity should be conducted with an eye toward promptly determining whether further investigation (either a preliminary inquiry or a full investigation) should be conducted.[100]

This first step is not only very broad, but not well explained, leaving room for broad interpretation by the Bureau.

In addition to the Ashcroft Guidelines, Attorney General Ashcroft also issued the National Security Investigation Guidelines. Under these guidelines, the FBI can authorize threat assessments, which do not require a preliminary investigation to be carried out.[101] A threat assessment allows the FBI to engage in activities, such as obtaining publicly available information, accessing and examining FBI and DOJ records, and using online sources to investigate or collect information relating to threats to national security.[102]

The current guidelines were revised by Attorney General Michael B. Muskasey. Instead of the unclear "prompt and extremely limited checking of initial leads," the Mukasey Guidelines established "assessments" as the first level of investigative activity which require an authorized purpose, but not any particular factual prediction.[103]

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97. *Attorney General Guidelines for FBI Criminal Investigations, National Security Investigations, and the Collection of Foreign Intelligence: Hearing Before the Select Comm. on Intelligence*, 110th Cong. 2d Sess. (2008) (opening statement of Senator Christopher S. Bond) [hereinafter *2008 Hearings*].

98. *See* OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 1 (2002) [hereinafter ASHCROFT GUIDELINES].

99. *Id.*

100. *Id.*

101. OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION (2003) [hereinafter NSI GUIDELINES]; *see also 2008 Hearings*, *supra* note 98, at 4.

102. NSI GUIDELINES, *supra* note 101, at §2(A).

103. MUKASEY GUIDELINES, *supra* note 66, at 17.

The establishment of "assessments" is arguably the biggest issue with the Mukasey Guidelines. Assessments allow the FBI to "proactively draw on available sources of information" and use authorized methods such as "obtaining publicly available information, checking government records, and requesting information from members of the public."[104] Under the Mukasey Guidelines, the FBI is opening assessments at a rate similar to the opening of investigations during the pre-Levi Guidelines era. From March 25, 2009 to March 31, 2011, the FBI opened 82,325 assessments on people and groups, which only led to a little over 3,000 preliminary or full investigations.[105] This broad investigative net is dangerous because according to former FBI agent Michael German, the FBI retains the data it collects on a target, even if it turns out that the person or group is innocent.[106] The overly broad assessment category needs to be revised to prevent the FBI from repeating history.

The current guidelines severely deviate from their original purpose during Attorney General Levi's tenure. The Levi Guidelines were implemented after COINTELPRO and in response to the abuses of the FBI. The current implementation of lax guidelines, that give the FBI broad discretion in its decision-making, allows the same abuses that existed during COINTELPRO to occur now. If the DOJ continues to relax the standards in response to the FBI's—and other law enforcements'—demands, the FBI will no longer have an effective check on their actions. This will allow the FBI to revert back to its old ways and abuse its power to suppress black activists' impact.

The other problem with the increasingly lax standards of the Guidelines is that they have not changed to address domestic terrorism threats associated with white supremacy, but instead have been amended to satisfy the intelligence community.[107] The relaxation of these standards to appease U.S. intelligence agencies, such as the FBI, poses a threat to democracy.

104. *Id.* at 17–18.

105. Charlie Savage, *F.B.I. Focusing on Security Over Ordinary Crime*, N.Y. TIMES (Aug. 23, 2011), https://www.nytimes.com/2011/08/24/us/24fbi.html.

106. *Id.* But Valerie E. Caproni, the FBI's General Counsel, argues that agents were able to clear someone from wrongdoing without engaging in a more intrusive investigation. *Id.*

107. *See infra* part II.

II. DOMESTIC TERRORISM

After the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) which President George W. Bush signed on October 26, 2001.[108] The Act presented a broad definition of domestic terrorism and allowed for enhanced surveillance powers, which threaten the civil liberties of United States citizens.[109] The FBI's view that a "Black Identity Extremist" ideology poses a domestic terror threat opens the possibility that black activists who fight against police brutality will be subjected to the enhanced surveillance powers of the Bureau due to the assessment falling under the purview of the Counterterrorism Division.[110]

In the simplest of terms, domestic terrorism is terrorist activity that occurs on the homeland.[111] In the U.S., the FBI is the lead domestic terrorism agency, "working to identify and prevent domestic terrorism acts before they occur and investigate them when they do take place."[112] The FBI primarily relies on two sources to define domestic terrorism.[113] The Code of Federal Regulations defines "terrorism" as including "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[114] The most important element of terrorism, distinguishing it from plainly criminal acts, is that the act must be in furtherance of a political or social objective. Contrarily, a criminal act does not go beyond the act itself.[115] In other words, establishing the perpetrator's motive is very important in determining whether a violent attack is an act of terrorism.[116]

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108. NANCY CHANG & CTR. FOR CONSTITUTIONAL RIGHTS, SILENCING POLITICAL DISSENT 13, 43 (2002).

109. *Id.* at 13.

110. BIE ASSESSMENT, *supra* note 3.

111. JEROME P. BJELOPERA, CONG. RESEARCH SERV. R44921, DOMESTIC TERRORISM: AN OVERVIEW 3 (2017).

112. Federal Bureau of Investigation, *Domestic Terrorism in the Post-9/11 Era*, FBI (Sept. 7, 2009); *see also* 28 C.F.R. § 0.85 (1969) (listing the general functions of the FBI).

113. CONG. RESEARCH SERV., *supra* note 111, at 3.

114. 28 C.F.R. § 0.85(l) (1969).

115. Matthew James Enzweiler, *Swatting Political Discourse: A Domestic Terrorism Threat*, 90 NOTRE DAME L. REV. 2010, 2015 (2015).

116. *Id.* at 2011.

Second, the USA PATRIOT Act expanded the definition of terrorism to classify "domestic terrorism" separately from the umbrella term of "terrorism."[117] The definition of domestic terrorism was established in Section 802 of USA PATRIOT Act and codified at 18 U.S.C. § 2331(5). It states:

> (5) the term "domestic terrorism" means activities that—
>
> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the territorial jurisdiction of the United States.[118]

This definition of domestic terrorism is very expansive, as it does not require "actual violence, injury, or death in terrorist actions."[119] This broad definition of domestic terrorism presents challenges in application.[120] The definition is extremely flexible and allows the label "domestic terrorist" to be more easily used against groups who are constitutionally protected. The lack of an actual violence, injury, or death requirement[121] increases the likelihood of such abuse. Domestic terrorist threats are grounded in ideologies that are constitutionally protected; as such, the domestic terrorism definition should only be applied in cases where actions based on those ideologies are magnified to the point of exceeding constitutional protection.[122]

Black Lives Matter ("BLM") is not explicitly listed in the BIE assessment, but could likely be classified as a domestic terror threat by the assessment. Black Lives Matter is an organization whose mission "is to build local power and to intervene in violence inflicted on black communities by the state and vigilantes."[123] The movement became even more prominent during the Ferguson protests following the

117. *Id.* at 2015.
118. 18 U.S.C. § 2331(5) (2001); USA PATRIOT Act, 115 Stat. 272 (2001).
119. Enzweiler, *supra* note 115, at 2017.
120. *Id.* at 2018.
121. *Id.* at 2017.
122. *Id.* at 2018.
123. BLACK LIVES MATTER, *About*, Black Lives Matter, https://blacklivesmatter.com/about/what-we-believe/.

shooting of Michael Brown.[124] The protests of the movement can be seen to fit within the broad definition of "domestic terrorism" even though the peaceful protests organized by Black Lives Matter, are protected under the First Amendment.[125] The assessment's explicit use of the term domestic terrorism in reference to the events in Ferguson, where protests sometimes turned violent, shows that the FBI means to silence groups who advocate for peaceful protests against state sanctioned violence towards black people by creating a new classification for that group. Protests, even if they intend to be and start peaceful, have the potential to "involve acts dangerous to human life"[126] when the term is not clearly defined. There are examples of protests, such as the protests in Baltimore after the death of Freddie Gray, that turned violent although they started out peaceful.[127] While BLM and many black activists advocate for peaceful protests, the actions of a few individuals can affect the perceptions of their cause. Those individuals' actions, coupled with media outlets who exploit those events, sometimes lead to dangerous circumstances that the FBI can use in targeting black activists as domestic terrorists.

Protests are also meant to institute social or political change which can be misconstrued "to influence the policy of a government by intimidation or coercion" under the statute.[128] What the statute does not consider (or maybe it does) is how institutional racism plays a role in what and who is considered "intimidating." While President Trump believes that white nationalists can be "very fine people,"[129] the intelligence assessment shows that the U.S. intelligence agencies, under his administration, see black people as a threat to national security. With this designation, it may be difficult for black Americans to fight against the injustices we are faced with every day.

Protests against state sanctioned violence towards black people also occur within the territory of the United States because the pur-

124. *See* 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.

125. Anthony D. Romero, *Equality, Justice and the First Amendment*, ACLU (Aug. 15, 2017, 6:00 P.M.), https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment.

126. *See supra* note 118.

127. Christina Tkacik, *Remembering the Baltimore Riots after Freddie Gray's Death, 3 Years Later*, THE BALTIMORE SUN (Apr. 27, 2018, 6:15 A.M.), https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-riots-three-years-later-20180426-story.html.

128. 18 U.S.C. § 2331(5) (2001).

129. 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/.

pose is to fight against a system where police officers are not punished for abusing and murdering black and brown people at disproportionate rates. The United States Code's ambiguous definition allows for the statute to be manipulated by government agencies, such as the FBI, for various purposes including silencing political and social opposition.

The biggest problem with the application of the term domestic terrorism in regards to the BIE assessment, is that it is understanding of white supremacy. In 2019, New York faced its first conviction of a white supremacist on terrorism charges.[130] This is despite data from the Anti-Defamation League that shows that white nationalists are a far greater threat to law enforcement, having killed 51 police officers since 1990.[131] While white nationalists have been a threat to domestic law enforcement long before the attacks on September 11th, since the events of that day, the Justice Department has prioritized international terrorism—which primarily targets Muslims.[132]

On April 19, 1995, the most damaging domestic terrorist attack ever committed on U.S. soil, was committed by two right wing extremists.[133] On that day, Timothy McVeigh and Terry Nichols bombed the Murrah federal building in Oklahoma City, killing 168 people and injuring another 680.[134] It was originally speculated that Islamic radical terrorists were the source of the attack, but the perpetrators were actually white right wing extremists.[135]

In 1996, a man affiliated with the Christian Identity movement[136] orchestrated a bombing at Centennial Olympic Park in Atlanta, re-

130. Jan Ransom, *White Supremacist Who Killed Black Man to Incite Race War Sentenced to Life in Prison*, N.Y. TIMES (Feb. 13, 2019), https://www.nytimes.com/2019/02/13/nyregion/james-harris-jackson-timothy-caughman.html.

131. ANTI-DEFAMATION LEAGUE CENTER ON EXTREMISM, MURDER AND EXTREMISM IN THE UNITED STATES IN 2017 12 (2017) [hereinafter ADL 2017 EXTREMISM REPORT], https://www.adl.org/resources/reports/murder-and-extremism-in-the-united-states-in-2017; Kate Irby, *White and Far-Right Extremists Kill More Cops, but FBI tracks black extremists more closely many worry*, MCCLATCHY (Jan. 24, 2018), http://www.mcclatchydc.com/news/nation-world/national/article196423174.html. This is in contrast to left wing extremists groups, which included black nationalists, which killed eleven police officers in the same time frame.

132. MICHAEL GERMAN & SARA ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM 2 (2018).

133. David Neiwert, *Alt-America: the time for talking about white terrorism is now*, THE GUARDIAN (Nov. 26, 2017, 06:00 AM), https://www.theguardian.com/world/2017/nov/26/alt-america-terrorism-rightwing-hate-crimes.

134. *Id.*

135. *Id.*

136. The Christian Identity Movement is a white supremacist, anti-Semitic domestic terrorist group. *See generally* Federal Bureau of Investigation, Christian Identity Movement (1989) (detailing the beliefs of this terrorist group).

sulting in the death of two people and leaving more than 100 people injured.[137] In 2015, a white supremacist murdered nine people in a church in Charleston, South Carolina.[138] Although the 22-year old man told investigators that he hoped to start a race war, he was charged with hate crimes, not domestic terrorism.[139] In 2019, another white supremacist and Coast Guard lieutenant, plotted a mass killing and mused about "establishing a white homeland."[140] These are just a few examples of a growing number of white supremacists who have targeted the U.S. and its citizens.

Domestic terrorism attacks by right wing extremists[141] show a failure on the part of the federal government to adequately address the real domestic terrorism threat to law enforcement while focusing resources on international terrorism which targets minority groups.[142]

A database from The Investigative Fund at The Nation Institute and Reveal from The Center for Investigative Reporting showed that far right plots and attacks on U.S. soil outnumber Islamic incidents by about two to one.[143] From 2008 to 2016, the database identified sixty-three case of Islamist domestic terrorism[144] and the vast majority of these were foiled plots, meaning no attack took place.[145] During the

137. Ben Mathis-Lilley, *The Long List of Killings Committed by White Extremists Since the Oklahoma City Bombing*, SLATE (Aug. 14, 2017, 03:15 PM), https://slate.com/news-and-politics/2017/08/white-extremist-murders-killed-at-least-70-in-u-s-since-1995.html (listing out a long list starting in 1995 and ending I 2017, of killings committed by white supremacists); *Olympic Park Bombing Fast Facts*, CNN (July 16, 2018, 08:16 AM), https://www.cnn.com/2013/09/18/us/olympic-park-bombing-fast-facts/index.html.

138. Feliks Garcia & Rachael Revesz, *Dylann Roof found guilty of racially-motivated killings at Charleston church*, INDEPENDENT (Dec. 15, 2016), https://www.independent.co.uk/news/world/americas/dylann-roof-verdict-guilty-hate-crime-charleston-emanuel-ame-church-latest-a7478201.html.

139. *Id.* ("[T]hey convicted Roof of nine counts of hate crimes resulting in death, three counts of hate crimes involving an attempt to kill – there were three survivors – nine counts of obstructing the exercise of religion resulting in death, three counts of that charge with an attempt to kill, and nine counts of using a firearm to commit murder during a crime of violence.").

140. Elliott Hannon, *White Supremacist Coast Guard Lieutenant Was Allegedly Plotting Mass Terrorist Attack*, SLATE (Feb. 20, 2019), https://slate.com/news-and-politics/2019/02/white-supremacist-coast-guard-lieutenant-hasson-mass-terrorist-attack.html.

141. Which includes white nationalists and white supremacists.

142. *See id.* ("International terrorism investigations often involve aggressive monitoring and infiltration of Muslim, Arab, Middle Eastern, South Asian, and African American communities throughout the United States.").

143. David Neiwert et al., *Homegrown Terror*, REVEAL NEWS (June 22, 2017), https://apps.revealnews.org/homegrown-terror/ (examining a nine-year period, from 2008–2016).

144. David Neiwert, *Trump's fixation on demonizing Islam hides true homegrown US terror threat*, REVEAL NEWS (June 21, 2017), https://www.revealnews.org/article/home-is-where-the-hate-is/ ("meaning incidents motivated by a theocratic political ideology espoused by such groups as the Islamic State"). This number is out of 201 incidents.

145. *Id.* Seventy-six percent of the cases were foiled plots. *Id.*

same time frame, "right-wing extremists were behind nearly twice as many incidents"[146] and thirty-five percent were foiled plots.[147] The majority of these incidents were acts of terrorist violence that involved deaths, injuries or damaged property.[148] While right wing extremist terrorism was more deadly than Islamic terrorism,[149] the number of deaths from Islamic terrorist incidents was higher.[150] This is due largely to "three mass shootings in which nearly all the casualties occurred: in 2009 at Fort Hood, Texas, and in 2015 in San Bernardino, California, and Orlando, Florida, in 2016."[151]

While the U.S. government has chosen to focus on international terrorism, it is ignoring the threat that white supremacy poses to domestic tranquility. The FBI's creation of the "Black Identity Extremist" creates a new domestic terrorism threat while failing to address the group that is statistically more likely to target police officers.

III. THE FBI'S "BLACK IDENTITY EXTREMIST" INTELLIGENCE ASSESSMENT

On August 3, 2017, the FBI completed an assessment entitled, "Black Identity Extremists Likely Motivated to Target Law Enforcement Officers" which classifies "Black Identity Extremists" as an emerging domestic terror threat.[152] The assessment defined Black Identity Extremists as "individuals who seek, wholly or in part, through unlawful acts of force or violence, in response to perceived racism and injustice in American society and some do so in furtherance of establishing a separate black homeland or autonomous black social institutions, communities, or governing organizations within the United States."[153] The assessment goes on to clarify that "[t]he mere advocacy of political or social positions, political activism, use of strong rhetoric, or generalized philosophic embrace of violent tactics

146. *Id.* They were behind 115 incidents. *Id.*
147. *Id.*
148. *Id.*
149. Neiwert, *supra* note 144 ("[N]early a third of incidents involved fatalities, for a total of seventy-nine deaths").
150. *Id.* ("[J]ust 8% of Islamist incidents caused fatalities.").
151. *Id.*
152. BIE ASSESSMENT, *supra* note 3, at 1; *see also* Hansford, *supra* note 16, at 703.
153. BIE ASSESSMENT, *supra* note 3, at 2. The FBI's assessment needs to explain the reasoning behind the belief that Black Americans who fight against racism want to establish a separate black homeland. The assessment states that this desire for "physical or psychological separation" is influenced by a religious or political system based on a belief in racial supremacy. *Id.* at 2. While insisting that there is a convergence between the sovereign citizen extremist and black identity extremist movements, the FBI does not provide clear examples.

may not constitute extremism, and may be constitutionally protected."[154]

The use of the term Black Identity Extremist is so vague that it is difficult to determine what exactly could make an individual a BIE. Does the advocation of retaliatory violence for injustices faced in the black community make one a BIE? Does the use of strong rhetoric, which "may not" constitute extremism, mean that there is still a possibility that an individual will be classified as a BIE for such language? Former FBI agent, Michael German, said it best when he said, "Basically, it's black people who scare them[.]"[155] The threat that this assessment poses to black activists is not an imaginary one. It is an imminent one. In December 2017, less than a year after the assessment was created, Christopher Maurice Daniels[156] is believed to be the first person targeted and charged under the BIE designation.[157]

On December 12, 2017, Daniels was at home when armed FBI agents in tactical gear stormed into his apartment and forced both Daniels and his 15-year-old son outside of their home in Dallas, Texas.[158] Daniels later discovered that his arrest was based in part[159] on the fact that FBI agents had been monitoring him for years be-

154. *Id.*

155. Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists'*, FOREIGN POLICY (Oct. 6, 2017, 11:42 AM), http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/.

156. Rakem Balogun's legal name is Christopher Daniels. Because he is referred by his legal name in many articles about his arrest and in court documents, I will be referring to him as Christopher Daniels ("Daniels"). *See* Sam Levin, *Black activist jailed for his Facebook posts speaks out about secret FBI surveillance*, GUARDIAN (May 11, 2018, 03:01 PM), https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance ("Investigators began monitoring Balogun, whose legal name is Christopher Daniels, after he participated in an Austin, Texas, rally in March 2015 protesting against law enforcement, special agent Aaron Keighley testified in court.").

157. Nicole Hemmer, *The government prosecution of a "black identity extremist" fell apart. Meanwhile, white supremacists are on the march.*, VOX (May 19, 2018, 08:27 AM), https://www.vox.com/the-big-idea/2018/5/18/17368328/black-identity-extremist-fbi-klan-white-supremacy-black-lives-matter-balogun.

158. Levin, *supra* note 156. Daniels' Facebook posts included: "'They deserve what they got. LMAO!'" after five police officers were killed in Dallas in July 2016 and his participation in an anti-police rally in Texas where some black men were carrying firearms and chanted "'The only good pig is a pig that's dead.'" Hemmer, *supra* note 157.

159. Mr. Daniels' arrest was in partnership with the Bureau of Alcohol, Tobacco and Firearms for "possessing rifles after being convicted of misdemeanor domestic assault in Tennessee in 2007." Creede Newton, *US judge orders release of 'first Black Identity Extremist'*, ALJAZEERA (May 5, 2018), https://www.aljazeera.com/amp/news/2018/05/judge-orders-release-black-identity-extremist-180504115412408.html. Daniels arrest seemed to primarily be for the possession of firearms by a prohibited person. His anti-police sentiment as expressed in his Facebook posts seem to be used as evidence for that charge. *See generally* U.S. v. Daniels, No. 3:18-CR-005-D, *slip op.* at (N.D. Tex. Jan. 30, 2018) (denying Daniels' motion to revoke a magistrate's order directing that he be detained until trial).

cause of his Facebook posts criticizing police officers.[160] Christopher Daniels was held in pretrial detention for five months while U.S. attorneys tried and failed to prosecute him.[161] While Daniels was eventually released, the way his prosecution was handled causes concern for black activists. The FBI had no evidence of specific threats from Daniels towards law enforcement.[162] It signals that the FBI is more concerned with suppressing black activism, than dealing with the real threat to law enforcement officers—far right extremists.

The FBI's reasoning behind the designation of Black Identity Extremists seems more political and sinister than national security reasons, given the statistics on violence against police officers.[163] While the FBI sees black resistance as a threat to law enforcement, the real threat to the safety of police officers is far right extremists.[164] Since 2001, when the USA PATRIOT Act was enacted, right wing extremists, which includes white supremacists, have accounted for 34 police officer deaths.[165] Between 2011 and 2017, there were 10 right wing extremist related officer deaths.[166] Since 2001, there have been 10 police murders committed by left-wing extremists, which includes black nationalists.[167] That includes the 8 police deaths committed by left-wing extremists between 2011 and 2017.[168] The 2011–2017 statistics are important because they include the year 2014, when Michael Brown was shot and a grand jury failed to indict the officer involved, which the FBI has designated as the catalyst to the BIE ideology and increase in police violence.[169] When the number of deaths are compared, it is obvious that right-wing extremists and white supremacists pose a greater threat to law enforcement. And while the data shows that white supremacists are a greater risk to law enforcement—there is not an equivalent designation to "Black Identity Extremists" for

160. Levin, *supra* note 156.

161. *Id.*

162. *Id.*

163. ADL 2017 EXTREMISM REPORT, *supra* note 131.

164. Irby, *supra* note 131. *But see* ADL 2017 EXTREMISM REPORT, *supra* note 131 ("The year 2017 was the second year in a row in which black nationalists have committed murders in the United States. Combined with other violent acts by black nationalists in recent years, these murders suggest the possibility of an emerging problem.").

165. ADL 2017 EXTREMISM REPORT, *supra* note 131.

166. *Id.*

167. *Id*.

168. *Id.*

169. BIE ASSESSMENT, *supra* note 3 at 2.

white extremists.[170] That shows exactly whose actions the FBI is trying to suppress.

The FBI's assessment on Black Identity Extremists was created days before the "Unite the Right" rally in Charlottesville, Virginia on August 12, 2017.[171] White supremacists and neo-Nazis gathered near the campus of the University of Virginia to protest the city's removal of the statute of Confederate General Robert E. Lee from the city park.[172] The night before the rally, white nationalists, neo-Nazis, and members of the Ku Klux Klan marched through the campus of the University of Virginia brandishing torches, and shouting, "White Lives Matter," "You will not replace us," and "blood and soil."[173] A brawl later broke out when the white nationalists surrounded and attacked a group of peaceful counter-protestors.[174] The police were able to separate the groups after declaring it an "unlawful assembly."[175]

The events the next day turned deadly. Organizers of the white nationalist rally hoped to draw a large following to "take America back,"[176] however, they were met with counter protesters which led to violent clashes.[177] The "Unite the Right" rally was supposed to start at noon, but by 11:30 am a state of emergency was declared.[178] Some people came armed, throwing rocks and projectiles, and swinging poles.[179] The event resulted in three deaths and at least thirty-three injured.[180] One of the victims, thirty-two year-old paralegal Heather Heyer, was a Charlottesville resident protesting against the rally who was killed when a white nationalist pillaged through a group of

170. Irby, *supra* note 131.

171. The assessment is dated August 3, 2017. BIE ASSESSMENT, *supra* note 3 at 1.

172. German Lopez, *Charlottesville protests: a quick guide to the violent clashes this weekend*," VOX (Aug. 14, 2017), https://www.vox.com/identities/2017/8/14/16143168/charlottesville-va-protests.

173. *Id*.; Dara Lind, *Nazi slogans and violence at a right-wing march in Charlottesville on Friday night*," VOX (Aug. 12, 2017), https://www.vox.com/2017/8/12/16138132/charlottesville-rally-brawl-nazi.

174. Lind, *supra* note 173.

175. *Id.*

176. Benjamin Hart & Chas Danner, *3 Dead and Dozens Injured After Violent White-Nationalist Rally in Virginia*, N.Y. MAG (Aug. 13, 2017), http://nymag.com/daily/intelligencer/2017/08/state-of-emergency-in-va-after-white-nationalist-rally.html.

177. *Id.*

178. Bryan McKenzie, *White Nationalist Rally Turns Fatal*, DAILY PROGRESS (Aug. 12, 2017), http://www.dailyprogress.com/news/local/ohio-man-charged-with-second-degree-murder-after-car-plows/articleef4ba358-7f6a-11e7-84cf-8f840f442510.html.

179. Hart & Danner, *supra* note 176.

180. Two of the fatalities were not directly related to the rally. Two state troopers died in a helicopter accident as they were assisting local police. *Id.*

counter protestors with his car.[181] He was later arrested and charged.[182]

When addressing the violence in Charlottesville, President Donald J. Trump stated that there was "hatred, bigotry and violence on many sides."[183] This was met with strong criticism when Trump refused "to denounce far-right extremists who had marched through the streets carrying flaming torches, screaming racial epithets and setting upon their opponents."[184] President Trump's statements directly conflict with the statements of his Attorney General at that time. Following the events in Charlottesville, Jeff Sessions stated that the events that led to the death of Heather Heyer were an "evil" act of domestic terrorism.[185] U.S. Senator Ron Wyden, a Democrat from Oregon, also called the car attack an act of domestic terrorism.[186] Trump's statements were also criticized by members of Congress from both parties for failing to specifically condemn the actions of white supremacists. Republican senators Marco Rubio, Cory Gardner, and Orrin Hatch were amongst the many in the president's own party condemning his complacency.[187] And yet, while events like the one in Charlottesville and statistical data show that the increasing domestic terror threat is right wing extremism, the FBI's focus continues to be on black activists and their constitutionally protected activities.

The FBI's assessment also uses technical language that suggests that the examples of violence detailed in the assessment are related and frequent enough as to provide justification for the creation of the BIE terrorism designation. The BIE assessment concludes that it is "very likely" that BIE's perception of police brutality against African Americans caused an increase in violence against law enforcement.[188] In Appendix A of the assessment, the FBI clarifies what "Expressions of Likelihood" such as "very likely" means.[189] Based on the appendix, the term "very likely" is equivalent to "highly probable" and a

181. *Id.*
182. *Id.*
183. Ben Jacobs & Warren Murphy, *Donald Trump under fire after failing to denounce Virginia white supremacists*, THE GUARDIAN (Aug. 13, 2017, 10:52 AM), https://www.theguardian.com/us-news/2017/aug/12/charlottesville-protest-trump-condemns-violence-many-sides.
184. *Id.*
185. Charlie Savage & Rebecca R. Ruiz, *Sessions Emerges as Forceful Figure in Condemning Charlottesville Violence*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/politics/domestic-terrorism-sessions.html.
186. Jacobs & Murphy, *supra* note 183.
187. *Id.*
188. BIE ASSESSMENT, *supra* note 3, at 2.
189. *Id.* at 8.

80–95% probability of chance.[190] The FBI also stated that it has "high confidence" in the assessment based on incidents the FBI has attributed to individuals acting on their ideological beliefs as documented in "FBI investigations and other law enforcement and open source reporting."[191] In Appendix B, the FBI defines "Confidence in Assessments and Judgments Based on a Body of Information."[192] According to the FBI, high confidence "generally indicates that the FBI's judgments are based on high quality information from multiple sources[ ]"[193] however the FBI makes sure to clarify that high confidence does not mean that the FBI's judgment is a fact and these judgments might be wrong.[194]

The BIE assessment lists six unrelated incidents to support their BIE designation, four of which the FBI alleges were perpetrated by individuals "motivated by a mix of BIE ideology and Moorish sovereign citizen extremist (SCE) ideology, a category of SCE ideology."[195] It cites the July 7, 2016 incident in downtown Dallas, Texas, where Micah Johnson ambushed and shot eleven police officers, killing five.[196] Johnson informed police negotiators that he was upset about recent police shootings, and expressed a desire to kill white people, particularly white police officers.[197] Although law enforcement officers stated that they could find no link between Johnson, and any domestic extremists groups,[198] the FBI assessment states that "he appeared to have been influenced by BIE ideology."[199]

Another example of violence that the FBI used to justify the assessment is the case of Zale H. Thompson. Thompson attacked four New York Police Department (NYPD) officers in Queens, New York with a hatchet.[200] One officer received an injury to the head, while

190. *Id.*
191. *Id.*
192. *See id.* at 9.
193. *Id.*
194. *Id.* ("High confidence generally indicates the FBI's judgments are based on high quality information from multiple sources. High confidence in a judgment does not imply the assessment is a fact or a certainty; such judgments might be wrong. While additional reporting and information sources may change analytical judgments, such changes are most likely to be refinements and not substantial in nature.").
195. *Id.* at 4–6.
196. *Id.* at 4.
197. *Id.*
198. Merrit Kennedy & Tanya Ballard Brown, *What We Know About The Dallas Suspected Gunman*, NPR (July 8, 2016), https://www.npr.org/sections/thetwo-way/2016/07/08/485239295/what-we-know-about-the-dallas-suspected-gunman.
199. BIE ASSESSMENT, *supra* note 3, at 4.
200. *Id.*

the other received injuries to his arm.[201] The other two NYPD officers at the scene shot Thompson, killing him.[202] While Thompson was believed to have been angered by recent deaths at the hands of police, he had previously converted to Islam and his online presence showed that he had recently visited websites related to the "Islamic State, Al Qaeda and Al Shabab, the military Islamist group based in Somalia, and viewed videos of beheadings[.]"[203] The FBI assessment however, claims that Thompson had tattoos that indicated he was affiliated with a black separatist group (although they do not specify which one), and a pocket lighter indicating he may have been associated with another black separatist group.[204]

Within the BIE category, the FBI assessment also focuses on the convergence of BIE and Moorish Sovereign Citizen Ideology.[205] The assessment gives four examples of attacks against police officers committed because "BIE adoption of a Moorish SCE identity reinforced a sense of disenfranchisement from society and a perception that the criminal justice system is unjust."[206] The examples include an individual who shot at two different police stations in Indianapolis, Indiana; Gavin Eugene Long who shot six police officers in Baton Rouge, Louisiana; an incident in Phoenix, Arizona where an individual drove his vehicle into three police officers; and the arrest and conviction of an individual who purchased explosives to be used in the Ferguson area in response to the grand jury verdict in the shooting of Michael Brown.[207]

While the FBI has created this designation, "Black Identity Extremists," even former Attorney General Jeff Sessions was unclear as to what constitutes a BIE. During his testimony before the House of Representatives, Representative Karen Bass (D-CA) asked Attorney General Jeff Sessions, "Do you believe there is a movement of African Americans that identify themselves as black identity extremists

201. *Id.*
202. *Id.*
203. Michael Schwirtz & William K. Rashbaum, *Attacker with Hatchet Is Said to Have Grown Radical on His Own*, N.Y. TIMES (Oct. 24, 2014), https://www.nytimes.com/2014/10/25/nyregion/man-who-attacked-police-with-hatchet-ranted-about-us-officials-say.html.
204. BIE ASSESSMENT, *supra* note 3, at 4.
205. *Id.*
206. *Id.* at 4–5.
207. *Id.* at 5.

and what does that movement do?"[208] The AG responded that he knew there were groups with "an extraordinary commitment to the racial identity" that turned violent.[209] When further asked by Representative Bass if he could name an African American organization that has committed violence against police officers, Attorney General Sessions replied that he would need to "confirm that and submit it to [the representative] in writing[.]"[210]

The FBI sees the issue of police brutality against black Americans as "perceived"[211] even though the data and the Department of Justice investigations on various police departments in the United States[212] show that police brutality is a systemic issue at both the federal and state levels. A black, former FBI counterterrorism agent in Minnesota leaked classified documents to a reporter because he "felt he had to act against a culture in the bureau that often treats minority communities with suspicion and disrespect."[213] In 2016, Terry J. Albury, the FBI agent accused of the leak, was the only black agent assigned to the counterterrorism squad and began photographing documents that described FBI tactics in identifying potential extremists and recruiting potential informants.[214] Albury sent the documents to The Intercept, which published the files in a series entitled, "The FBI's Secret Rules."[215] The documents included unredacted versions of the

208. Sarah K. Burris, *Rep. Karen Bass Blasts Jeff Sessions over Justice Department Report on "Black Identity Extremists*," Raw Story (Nov. 14, 2017), https://www.rawstory.com/2017/11/rep-karen-bass-lights-up-jeff-sessions-over-justice-department-report-on-black-identity-extremists/.

209. *Id.*

210. *Id.*

211. BIE Assessment, *supra* note 3, at 2.

212. *See generally* U.S. Dep't of Justice Civil Rights Div., Investigation of the Baltimore City Police Department (2016), https://www.justice.gov/crt/file/883296/download [hereinafter Baltimore Report] (finding the use of unconstitutional practices by the Baltimore City Police Department in a report that was created after the death of Freddie Gray); U.S. Dep't of Justice Civil Rights Div., Investigation of the Ferguson Police Department (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter Ferguson Report] (examining the Ferguson Police Departments police practices after the shooting of Michael Brown); U.S. Dep't of Justice Civil Rights Div., Investigation of the Chicago Police Department (2017), https://www.justice.gov/opa/file/925846/download [hereinafter Chicago Report] (finding patterns and practices of excessive force and constitutional violations by the Chicago Police Department).

213. Steve Karnowski, *Former Minnesota FBI Agent Cites Racism in Explaining Leak*, U.S. News (Apr. 17, 2018), https://www.usnews.com/news/politics/articles/2018-04-17/former-minnesota-fbi-agent-pleads-guilty-to-leaking-to-media.

214. Charlie Savage & Mitch Smith, *Ex-Minneapolis F.B.I. Agent Is Sentenced to 4 Years in Leak Case*, N.Y. Times (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/us/politics/terry-albury-fbi-sentencing.html.

215. *See The FBI's Secret Rules*, Intercept (Jan. 31, 2017), https://theintercept.com/series/the-fbis-secret-rules/. The series includes articles entitled "Hidden Loopholes Allow FBI Agents To Infiltrate Political And Religious Groups," "National Security Letters Demand Data Compa-

FBI's internal manuals and led to an entire series of articles on The Intercept.[216] Albury was sentenced to four years in prison after pleading guilty to "unauthorized disclosures of national security secrets."[217] The information that Albury leaked which includes internal FBI manuals are helpful to understand the FBI's race problem—both internally and externally.[218] But racial bias is not just happening at the federal level. After the shooting death of Michael Brown, the DOJ's report into the Ferguson Police Department—and the reports of other local police departments such as Baltimore and Chicago—show a much larger issue.

The BIE assessment cites the 2014 shooting of unarmed black teenager, Michael Brown, and the failure of the grand jury to indict the police officer involved, as the catalysts to the increase in violence against law enforcement by BIEs.[219] This event also happens to coincide with the expansion of the use of the hashtag #BlackLivesMatter.[220] On August 9, 2014, Michael Brown was shot and killed by white Ferguson police officer, Darren Wilson.[221] After telling Michael not to walk in the middle of the road, Wilson claimed that he recognized Michael as a robbery suspect from a nearby convenience store.[222] Wilson attempted to stop Michael, but an altercation ensued.[223] While Wilson claimed that Michael charged at the police officer, eyewitness stated that Michael was surrendering to Wilson at the time he was shot.[224] Wilson opened fire on Michael from his vehicle, and when Michael ran, Wilson fired more shots, alleging that it was

nies Aren't Obligated to Provide," and "Despite Anti-Profiling Rules, the FBI Uses Race and Religion When Deciding Who to Target."

216. *Id.*

217. Savage & Mitch, *supra* note 214.

218. *See infra* part IV.

219. BIE ASSESSMENT, *supra* note 3, at 2 ("The FBI assess it is very likely this increase began following the 9 August 2014 shooting of Michael Brown in Ferguson, Missouri, and the subsequent Grand Jury November 2014 declination to indict the police officers involved.").

220. *See generally* Monica Anderson & Paul Hitlin, *The hashtag #BlackLivesMatter emerges: Social activism on Twitter*, PEW RES. (Aug. 15, 2016), http://www.pewinternet.org/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/ (explaining the expansion of the use of the hashtag #BlackLivesMatter).

221. German Lopez, *The 2014 Ferguson Protests Over the Michael Brown Shooting, Explained*, VOX (Jan. 27, 2016, 6:19 P.M.), https://www.vox.com/cards/mike-brown-protests-ferguson-missouri/mike-brown-shooting-facts-details.

222. *Id.*

223. *Id.*

224. *Id. But see* Joseph Stromberg, *One Thing the Prosecutor in Ferguson is Right about: Eyewitness Testimony Can't Be Trusted*, VOX (Nov. 25, 2014, 11:10 A.M.), https://www.vox.com/2014/11/25/7281037/ferguson-eyewitness-testimony (showing that eyewitness accounts of the encounter between Michael and Wilson were slightly inconsistent, but Darren Wilson's account was dubious and unlikely).

out of fear that Michael was charging at him.[225] Michael died 150 feet from Wilson's car after he was shot six times.[226] His teenage body was left in the street on that August day for hours.[227]

The shooting triggered protests in Ferguson, Missouri as demonstrators gathered to rally against police brutality towards black men.[228] Tensions erupted the day after a vigil took place resulting in violence and looting of businesses.[229] The next evening, similar demonstrations led to a petrol station being burned down.[230] Police officers in riot gear used dogs, tear gas, and rubber bullets against protestors chanting, "Hands up, don't shoot."[231] The Ferguson Police Department's (FPD) responses to the protests were met with criticism and disapproval as military grade equipment was used by the nearly all-white police force against a predominately black population.[232] United States Attorney General Eric Holder traveled to Ferguson in the aftermath of the shooting to review the Justice Department's independent investigation into Michael's death.[233] Holder, who met with members of the Ferguson community, noted that the residents' consistent stories of systematic police targeting and excessive fines provided "compelling" concerns about the local law enforcement agency's prac-

225. Lopez, *supra* note 221.

226. *Id.*

227. Annys Shin, *Recalling the Protests, Riots After Fatal Police Shooting of Michael Brown*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/lifestyle/magazine/recalling-the-protests-riots-after-fatal-police-shooting-of-michael-brown/2017/08/01/9992f044-5a8d-11e7-a9f6-7c3296387341_story.html?utm_term=.854f9032ac4d.

228. *Id*.

229. Ashley Fantz et al., *Gunshots, Tear Gas in Missouri Town Where Police Shot Teen*, CNN (Aug. 12, 2014), http://www.cnn.com/2014/08/11/us/missouri-teen-shooting/.

230. Jon Swaine, *Michael Brown shooting: "They killed another young black man in America*," THE GUARDIAN (Aug. 14, 2014, 4:46 P.M.), https://www.theguardian.com/world/2014/aug/12/ferguson-missouri-shooting-michael-brown-civil-rights-police-brutality.

231. *Id.* The phrase "hands up, don't shoot" originates from eyewitness accounts of the shooting of Michael Brown. Some witness accounts stated that Michael Brown had his hands up and was mouthing "don't shoot," when he was shot by Ferguson police officer Darren Wilson. Others disputed this fact. While the Department of Justice could not find evidence that conclusively supported that phrase, it became, and still is, a rallying cry during protests. *See* Michelle Ye Hee Lee, *"Hands up, don't shoot" Did Not Happen in Ferguson*, WASH. POST (Mar. 19, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm_term=.655af0ce70d3.

232. Wesley Lowery et al., *Federal, State Officials Take Sweeping Steps in Response to Ferguson, Mo., Unrest*, WASH. POST (Aug. 14, 2014), https://www.washingtonpost.com/politics/federal-state-officials-take-sweeping-steps-in-response-to-ferguson-mo-unrest/2014/08/14/7c9c6de0-23f8-11e4-86ca-6f03cbd15c1a_story.html?noredirect=on&utm_term=.d66094c629df.

233. David Hudson, *Attorney General Holder: "The Eyes of the Nation and the World Are Watching Ferguson Right Now*," OBAMA WHITE HOUSE BLOG (Aug. 21, 2014, 6:01 PM), https://obamawhitehouse.archives.gov/blog/2014/08/21/attorney-general-holder-eyes-nation-and-world-are-watching-ferguson-right-now.

tices.[234] In response to complaints of profiling and the use of excessive force, the Department of Justice, under Holder, launched a broad civil rights investigation into the Ferguson Police Department ("FPD") and other police departments in St. Louis County, Missouri.[235]

Seven months after the Michael Brown shooting, the DOJ released the results of that investigation in a "scathing"[236] report that concluded that the FPD "engaged in a pattern or practice of conduct that violates the First, Fourth, and Fourteenth Amendments of the Constitution."[237] However, the Justice Department also announced the results of its independent, federal investigation into the fatal shooting of Michael Brown and found that the evidence did not support federal civil rights charges against Darren Wilson.[238] While Wilson was not found criminally liable under federal law, the examples of intentional discrimination with the FPD and municipal courts are alarming and supported by substantial evidence. For example, Ferguson's own data established clear racial disparities that impacted Black Americans.[239] The DOJ found that Ferguson's approach to law enforcement both reflected and reinforced racial bias which was evident in law enforcement practices that overwhelmingly impacted Black Americans.[240] The DOJ found that "[d]espite making up 67% of the population [in Ferguson], African Americans accounted for 85% of FPD's traffic stops, 90% of FPD's citations, and 93% of FPD's arrests from 2012 to 2014."[241] In addition, "every canine bite incident for

234. Amanda Sakuma & Zachary Roth, *Ferguson Welcomes Federal Civil Rights Police Investigation*, MSNBC (Sept. 4, 2014, 11:21 AM), http://www.msnbc.com/msnbc/doj-open-civil-rights-investigation-ferguson-police.

235. Sari Horwitz et al., *Justice Dept. to Probe Ferguson Police Force*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02_story.html?utm_term=.5260f1fe5141.

236. Wilson Andrews et al., *Justice Department's Report on the Ferguson Police Department*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-racial-discrimination.html.

237. Press Release, United States Department of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015) (on file with author).

238. *Id.* ("Federal statutes require the government to prove that Officer Wilson used unreasonable force when he shot Michael Brown and that he did so willfully, that is, he shot Brown knowing it was wrong and against the law to do so. After a careful and deliberative review of all of the evidence, the department has determined that the evidence does not establish that Darren Wilson violated the applicable federal criminal civil rights statute").

239. FERGUSON REPORT, *supra* note 212, at 2.

240. *Id.* at 4. While the report also addresses the racial biases in Ferguson's municipal courts, this comment is focused on the police practices.

241. *Id.* at 62.

which racial information is available, the person bitten was African American."[242] These disparities were not merely because black Americans were committing more crimes, but because of racial bias.[243] The BIE assessment threatens all that has been learned from these investigations because it gives local law enforcement a reason to target the communities that the DOJ previously said they were abusing.

Overall, the BIE assessment does not seem to be based on any data. The abuse that black Americans face at the hands of law enforcement is not perceived, but a very real threat that the DOJ, the parent agency of the FBI, has investigated multiple times. The suspects identified in the assessment as BIEs, had very little in common besides being black. Four out of the six incidents identified by the FBI as being influenced by BIE ideology were committed by Moorish sovereign citizen extremists. Instead of including the Moorish sovereign citizen extremists in a broader sovereign citizen extremist (SCEs) category (since the FBI stated in the assessment that Moorish sovereign citizen extremist was a category of sovereign citizen extremist and that sovereign citizens are violent towards law enforcement),[244] the FBI has chosen to target Moorish sovereign citizen extremists by their race. If those examples are taken out of the assessment and put in a broader SCE assessment, then the two remaining incidents do not support the BIE assessment. The case of Zale Thompson is two years before Micah Johnson's Dallas attack, and besides being black and angry at law enforcement, the two men did not have anything in common. The use of these examples to justify the BIE assessment is weak.

The BIE assessment is a racial classification on its face.[245] The assessment is entirely based on the premise that Black Identity Extremists pose a domestic terrorism threat. The Supreme Court has held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[246] In order to be constitutional the classifica-

242. *Id.* at 5.

243. *Id.* at 4–5 ("African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search.").

244. *See* BIE ASSESSMENT, *supra* note 3.

245. A law that has a classification that is discriminatory on its face is one where the "express words of the [government action]" make the classification. Galloway, *supra* note, at 128.

246. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

tion must be "narrowly tailored measures that further compelling governmental interests."[247]

The safety of law enforcement and extremism are matters of national security[248] and thus compelling governmental interests. National security refers to "the protection of a nation from attack or other danger by holding adequate armed forces and guarding state secrets."[249] Because law enforcement officers protect the safety of the country and are necessary to protect U.S. citizens, the threat posed to them by extremists should be treated as a matter of national security. The Supreme Court has stated that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[250] The problem with the BIE assessment is not that it addresses threats to police officers, but that it targets the *wrong* group—meaning it is not narrowly tailored.

In *Floyd v. City of New York*, a federal judge concluded that the NYPD implemented stop and frisk in a way that intentionally discriminated based on race.[251] *Floyd* was a class action that challenged the NYPD's racial profiling of black and Hispanic New York residents under unconstitutional stop and frisk policies.[252] One of the judge's conclusions was that the NYPD's "use of race is sufficiently integral to the policy of targeting 'the right people' that the policy depends on express racial classifications."[253] The court asserted that "[w]hen an officer is directed to target 'male blacks 14 to 21' for stops in general based on local crime suspect data—a practice that the City has defended throughout this litigation—the reference to 'blacks' is an express racial classification subject to strict scrutiny."[254] The City failed to defend how the use of race was narrowly tailored to achieve a compelling government interest, which led the court to find that the policy violated the Equal Protection Clause.[255]

The BIE assessment also fails the narrowly tailored prong because as in *Floyd*, the FBI is targeting black Americans with no real

247. *Id.*
248. *See* UNDERSTANDING THE THREAT, https://www.nsa.gov/what-we-do/understanding-the-threat/ (last visited Feb. 16, 2019).
249. *National Security*, USLEGAL.COM (last visited Feb. 26, 2019) https://definitions.uslegal.com/n/national-security/
250. Haig v. Agee, 453 U.S. 280, 307 (1981).
251. Floyd v. City of New York, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013).
252. *See generally id.* (delivering the opinion and order of the case).
253. *Id.*
254. *Id.*
255. *Id.*

data to back the information up. The FBI uses unrelated examples to justify the creation of a BIE category. The six suspects that the FBI identified had little in common except that they were black. Even more importantly, four of the six were identified as Moorish sovereign citizen extremists. Instead of including the Moorish sovereign citizens in a report with Sovereign Citizen Extremists, who have a history of perpetuating violence against law enforcement,[256] the FBI included them as the bulk of the examples in the report to add weight to so called "BIEs." Two-thirds of the examples given by the FBI as the basis behind the creation of the FBI intelligence assessment can easily fit within another rising threat, except for the fact that they are black. This shows that the FBI is more worried about the race of the suspects than the ideological extremism underlying their actions, violating equal protection.

If the FBI is interested in protecting law enforcement officers as a national security issue, then the Bureau needs to follow the data, which shows that far right extremists—specifically white supremacists —are the real threat to law enforcement.[257] Because "BIEs" are not the real threat to law enforcement, the BIE assessment is not narrowly tailored to achieve the compelling governmental interest. The FBI can better curtail violence against police officers by addressing white supremacy and those who perpetuate violence in its name.

IV. SOLUTIONS

To address the issue of domestic terrorism, especially as it pertains to violence towards police officers, the FBI needs to address the real issue—white supremacy. FBI action against far-right wing groups—such as white supremacists—would satisfy strict scrutiny. There is a racial classification on the face of the FBI's actions if they choose to target white supremacy. The classification is in the name. It has already been determined that national security and the protection of law enforcement are compelling governmental interests, but unlike the BIE assessment, targeting white supremacists would be narrowly tailored. Unlike in the *Floyd* case and the BIE assessment, there is plenty of data to back up claims that white supremacists and far right

256. *See* J Oliver Conroy, *They hate the US government, and they're multiplying: the terrifying rise of 'sovereign citizens'*, GUARDIAN (May 15, 2017, 06:00 AM), https://www.theguardian.com/world/2017/may/15/sovereign-citizens-rightwing-terrorism-hate-us-government.

257. *See infra* parts II & III.

extremists are a growing domestic terrorism threat.[258] As discussed, the data that shows that white supremacists pose a far greater threat to domestic peace in U.S. than Islamic terrorists and left wing extremists would be enough to prove and support a government action against white supremacy.

For the FBI to address white supremacists, they would have to ensure that they are not violating First Amendment speech. The First Amendment protects speech and expressive conduct from being regulated by the government.[259] The Supreme Court struck down as overbroad a law in St. Paul, Minnesota that made it illegal to burn a cross with the intent to intimidate a person or group.[260] The case arose because "petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family"[261] and were prosecuted for it. In holding that the St. Paul, Minnesota ordinance was facially unconstitutional, the Court stated that "it prohibits otherwise permitted speech solely based on the subjects the speech addresses."[262] The Court emphasized that

> St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.[263]

The Supreme Court again addressed cross burning to intimidate a person or group in *Virginia v. Black*.[264] The Court concluded that a State "may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form."[265] The Court stated that the statute in this case differentiated from the one in *R.A.V.* because "the Virginia statute does not just target cross burning "on the basis of race, color, creed, religion or gender."[266]

258. *See infra* parts I–III.
259. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
260. *Id.* at 380.
261. *Id.* at 379.
262. *Id.* at 381.
263. *Id.* at 393–94.
264. 538 U.S. 343 (2003).
265. *Id.* at 347–48.
266. *Id.* at 351–52.

New legislation would not adequately address the issue and would likely be abused to target a wide range of political dissent groups. The FBI would not have to implement any new procedures to address the threat that white supremacists pose to the U.S. They already have the framework. If the FBI takes a note from the opinion in *Black*, all they have to do is adequately and evenly apply the definition of domestic terrorism from the USA PATRIOT Act. Because white supremacists use many of the same tactics as international terrorists,[267] it would be difficult to argue that they are being targeted for their ideology. Instead, it would be argued that committing acts that fit within the definition of terrorism justifies the dismantling of white supremacists. By utilizing the tools already at its disposal, the Bureau has no reason not to address the threat of white supremacy.

The BIE assessment also highlights how the FBI's lack of diversity has a profound impact on the perceptions of minority groups. The FBI's special agent force is 4.4% African American and its intelligence analysts force is 8.9% African American.[268] The number of black special agents is down from about 6.5% a decade ago[269]. These number are especially small when compared to white special agents which comprise of 83.4% of the population and 77.9% of the intelligence analysts.[270] The lack of diversity is not news to the FBI. Former FBI Director James Comey has admitted that the Bureau has become less diverse in the last decade.[271]

Thirty years ago, the Bureau was sued by a group of black agents accusing the Agency of systematic discrimination in the quality of assignments, performance reviews, rates of promotions and overall workplace culture.[272] A federal judge concluded that there was statistical evidence of systemic discrimination at the FBI and a settle-

267. Kathy Gilsinan, *How White-Supremacist Violence Echoes Other Forms of Terrorism*, ATLANTIC (Mar. 15, 2019), https://www.theatlantic.com/international/archive/2019/03/violence-new-zealand-echoes-past-terrorist-patterns/585043/.

268. DIVERSITY–FBI JOBS, https://www.fbijobs.gov/working-at-FBI/diversity (last visited Feb. 11, 2019).

269. Alice Speri, *The FBI's Race Problems Are Getting Worse. The Prosecution of Terry Albury Is Proof*, THE INTERCEPT (Apr. 21, 2018, 08:30AM), https://theintercept.com/2018/04/21/terry-albury-fbi-race-whistleblowing/.

270. *Id.*

271. *See* Devlin Barrett, *FBI Director Comey Calls Agency's Lack of Diversity a 'Crisis'*, WSJ (July 13, 2018, 12:08 PM), https://www.wsj.com/articles/fbi-director-comey-calls-agencys-lack-of-diversity-a-crisis-1468426138.

272. Topher Sanders, *The FBI — 'Fidelity, Bravery, Integrity' — Still Working on Diversity*, PROPUBLICA (Mar. 20, 2018, 12:08 PM), https://www.propublica.org/article/the-fbi-fidelity-bravery-integrity-still-working-on-diversity.

ment—promising reform—was reached in 1993.[273] Five years later, the black agents went back to court stating that the FBI failed to deliver on its promises, and another settlement was reached in 2001.[274] The numbers show that not much has changed and it is hard to imagine that with these biases in their workforce, the FBI is not biased in its practices.

To combat these biases, the FBI needs to revisit its internal guidelines. There is a culture at the Bureau that creates an unpleasant experience for black and brown agents who deal with racism and discrimination within the Bureau in addition to racism and discrimination in the Bureau's policing and investigating.[275] This discrimination from an agency whose motto is "Fidelity, Bravery, and Integrity"[276] is both contradictory and dangerous.

The need for diversity in the FBI's ranks is especially urgent when white supremacists have been infiltrating law enforcement communities.[277] In 2006, the FBI drafted an intelligence assessment that addressed white supremacist infiltration of law enforcement.[278] The assessment is severely redacted and does not paint a broad enough picture of the extent of the infiltration.[279] In 2014, two Florida police officers were fired from Fruitland Park Police Department after the FBI reported that they were both members of the KKK.[280] This was the second time in five years that Klansmen were discovered to work for this police department. In February 2019, a Virginia police sergeant was placed on administrative leave "after being identified by an anti-fascist group as having an 'affinity with white nationalist groups.'"[281] These are only a few of the many examples that have come to light in recent years. There is no way that the FBI and other state actors will be able to adequately address the threat of white

273. *Id.*
274. *Id.*
275. *See id.*
276. ABOUT, https://www.fbi.gov/about/mission (last visited Feb. 11, 2019).
277. Natasha Lennard, *Even the FBI Thinks Police Have Links to White Supremacists — but Don't Tell the New York Times*, INTERCEPT (Nov. 5, 2018, 04:40 PM), https://theintercept.com/2018/11/05/new-york-times-police-white-supremacy/.
278. *See* FBI COUNTERTERRORISM DIVISION, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT (2006)
279. *See generally id.* (providing an overview of the infiltration of law enforcement communities by white supremacists).
280. Michael Winter, *KKK membership sinks 2 Florida cops*, USA TODAY (July 14, 2014, 06:23 PM), https://www.usatoday.com/story/news/nation/2014/07/14/florid-police-kkk/12645555/.
281. Matt Stevens & Elisha Brown, *Virginia Police Sergeant Suspended After Antifa Group Identifies White Nationalist Ties*, N.Y. TIMES (Feb. 6, 2019), https://www.nytimes.com/2019/02/06/us/virginia-cop-white-supremacist.html.

supremacy when white supremacist infiltration of law enforcement is such a problem.

CONCLUSION

The FBI's Black Identity Extremist intelligence assessment violates the equal protection component of the Fifth Amendment because it is not the least restrictive means to protect the federal government's interests in national security and law enforcement safety. While the FBI is able to deflect arguments that COINTELPRO–Black Nationalist/Hate Group was a violation of equal protection, it is unable to do the same for the BIE intelligence assessment. To remedy this issue, the FBI needs to retract the BIE assessment and address the real threat to domestic tranquility in the U.S.—white supremacy. To do this, the Bureau needs to readjust its perceptions to see where the problem truly lies. If they fail to do this, they will make J. Edgar Hoover proud.

COMMENT

Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers

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* J.D. Candidate, Howard University School of Law, Class of 2019; B.A., The University of Virginia, 2014. I sincerely thank God for the continuous strength and wisdom he has given me throughout my life. I also want to thank my faculty advisor, Professor Andrew I. Gavil, for the invaluable depth of knowledge and guidance that he provided for my Comment, as well as the *Howard Law Journal* for their dedication and commitment to excellence with every publication. I dedicate this Comment to my parents who sacrificed so much to ensure that I always had the best education possible and for their constant encouragement for me to do my best in every endeavor.

INTRODUCTION

Trevor Martin and Thomas Cassell, social media influencers[1] in the online gaming industry, each posted YouTube videos of themselves gambling on their website "csglotto.com."[2] This website allows players to use virtual currency, called "skins," to gamble.[3] These skins can be bought, sold, and traded for real money.[4] Martin's videos were titled "HOW TO WIN $13,000 IN 5 MINUTES (CS-GO Betting)" and "$24,000 COIN FLIP (HUGE CSGO BETTING!) + Giveaway," and Cassell's videos were titled "INSANE KNIFE BETS! (CS:GO Betting)" and "ALL OR NOTHING! (CS:GO BETTING)."[5]

1. What is a Social Media Influencer? "A Social Media Influencer is a user on social media who has established credibility in a specific industry. A social media influencer has access to a large audience and can persuade others by virtue of their authenticity and reach." *What is a social media influencer?*, PIXLEE, https://www.pixlee.com/definitions/definition-social-media-influencer. *See also Influencers*, BUS. DICTIONARY, http://www.businessdictionary.com/definition/influencers.html [https://perma.cc/ATZ3-S9FN]. "Individuals who have the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position, or relationship."

2. Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

3. *Id.*

4. *Id.*

5. *Id.*

Their videos were viewed 5.7 million times, and Martin and Cassell both failed to disclose their connection to CSGO Lotto.[6] Additionally, Martin and Cassell allegedly paid other influencers between $2,500 and $55,000 to promote the CSGO Lotto website while prohibiting the influencers from making any negative comments about their site.[7] These well-known social media influencers promoted the website on social media platforms such as YouTube, Twitch, Twitter, and Facebook.[8]

After an investigation of these alleged acts and practices, the Federal Trade Commission ("FTC") filed a complaint against Martin and Cassell alleging that they had reason to believe that the respondents violated Section 5(a) of the Federal Trade Commission Act ("the Act") because their actions could be unfair or deceptive against consumers.[9] Unfair or deceptive advertising is not the type of commercial speech that is protected by the First Amendment.[10] The FTC entered into a settlement agreement with Martin and Cassell that prohibited them from misrepresenting that any endorser they hire is an independent user or ordinary consumer of a product or service.[11] Also, the settlement requires "clear and conspicuous" disclosures of any unexpected material connections with endorsers.[12] Following the settlement, Martin and Cassell were not fined because the FTC lacks authority to impose fines for a violation of Section 5.[13] However, if they violate the provisions of the settlement, they would be subject to fines totaling $40,654 per infraction.[14]

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6. *Id.*

7. *Id.*

8. *Id.*

9. Analysis of Proposed Consent Order to Aid Public Comment, 82 Fed. Reg. 176 (Sept. 7, 2017); *see* The Federal Trade Act, 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *see also* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

10. U.S. CONST. amend. I.

11. Analysis of Proposed Consent Order to Aid Public Comment, 82 Fed. Reg. 176 (Sept. 7, 2017); *see* Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

12. Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

13. *Id.*

14. *Id.*

Prior to *In re CSGO Lotto, Inc.*, the *FTC Guidelines Concerning Use of Endorsements and Testimonials in Advertising* ("the Guidelines") have been available to help all endorsers comply with Section 5 of the Act, so Martin and Cassell could have used the Guidelines as a source for reference in operating their website.[15] The purpose of the Guidelines is to serve as "administrative interpretations" of Section 5 of the FTC Act by providing guidance to the public on advertising in conformity with the law.[16] Most importantly, the Guidelines strive to prevent "physical injury or financial loss" to consumers from deceptive posts made by social media influencers.[17] In evaluating endorsements and testimonials for deception, the Commission will use the general principles set forth in the Guidelines.[18] Although the Guidelines provide examples of how the principles should be applied, the Guidelines do not cover every possible endorsement situation.[19] Ultimately, the specific factual context of the endorsement or testimonial determines if it is deceptive.[20]

This Comment will argue that the Guidelines lack the necessary mechanisms for (1) detection, (2) deterrence, (3) education, and (4) compliance. In regard to detection, the Guidelines are vague and minimal in the policing of social media influencers. Ultimately, they place the responsibility on consumers to file complaints rather than the FTC to implement effective detection measures proactively. For first-time violators of the statute, the FTC has historically issued warnings to social media influencers and companies because they lack the authority to issue fines. However, the FTC should be granted the authority to issue civil fines and the FTC should utilize its disgorgement authority to deter social media influencers and companies from violating them. Additionally, the need for detection and deterrence tactics could be lessened if the FTC implemented more social media advertising and discussions to increase awareness of the Guidelines to social media influencers, brands, and consumers. Lastly, in order for social media influencers to maintain compliance with the Guidelines, the FTC should incorporate a recommended standard disclosure state-

15. 16 C.F.R. § 255.0(a) (2018).

16. *Id.*

17. *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

18. *Id.*

19. *Id.*

20. *Id.*

ment, so that there is a uniform way for social media influencers to comply with the Guidelines.

Part I of this Comment discusses the history of commercial speech, and how it applies to social media endorsements. Part II discusses the history of the FTC and its investigative and law enforcement authority, as well as the most significant revisions that have occurred to the Guidelines in regards to social media endorsements. Part III will conclude by identifying the specific ways the Guidelines fail to hold social media influencers accountable for their violations of the Act and the needed reforms of the Guidelines to decrease the violations. The inadequacies of the current Guidelines include: (1) lack of sufficient detection and policing of social media influencers and companies, (2) lack of sufficient deterrence through disgorgement and the authority to fine first-time violations by social media influencers and companies, (3) absence of efforts to thoroughly publicize the Guidelines to educate[21] social media influencers, and (4) the ineffective compliance measures within the Guidelines, and the need for a recommended standardized disclosure statement for all social media influencers' posts.

I. A BRIEF HISTORY OF THE EVOLUTION OF COMMERCIAL SPEECH AND SOCIAL MEDIA INFLUENCERS

A. The First Amendment Protects Truthful, But Not "False Or Deceptive" Commercial Speech

Social media influencers use the protections afforded to them from commercial speech in order to promote products and services for various advertisers and brands on social media platforms. Yet, these protections may present obstacles to the FTC's guidance because it could constrain the FTC's ability to apply Section 5 without sufficient evidence to satisfy the tests set out in the following commercial speech cases.

The First Amendment prohibits Congress from making any law prohibiting or "abridging the freedom of speech."[22] This includes

21. *Division of Consumer & Business Education*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-consumer-business. "The Division of Consumer and Business Education's mission is to give people the tools they need to make informed decisions – and give businesses the tools they need to comply with the law. The Division creates free, plain language information online, in print, and on video."

22. U.S. CONST. amend. I.

conduct and oral or written speech.[23] The main goal of the First Amendment is to prevent the Government from "chilling" speech by scaring individuals into not speaking in fear of liability.[24] Underlying the First Amendment, is an interest to promote a variety of viewpoints, not regulations that prevent them.[25]

There are two forms of speech: core expressive speech and commercial speech, and both have different protections under the First Amendment.[26] Core expressive speech requires the government to overcome the strict scrutiny standard if it is seeking to regulate its content.[27] However, it is difficult for the government to overcome the strict scrutiny standard because the government's interest must be compelling and the regulation must be narrowly tailored to that compelling interest.[28] Specifically, the regulation must be the least restrictive alternative, meaning there are no other means that will serve the interest the same way while restricting less speech.[29] Lastly, the regulation must not be "underinclusive," meaning it must cover all speech implicated by the interest.[30]

In contrast, commercial speech has less protection than core expressive speech.[31] Commercial speech was defined in *Virginia State*

23. *See* Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 65–66 (2006) ("[W]e rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,' [rather] we have extended First Amendment protection only to conduct that is inherently expressive.").

24. *See* Laird v. Tatum, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.").

25. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." (first citing Associated Press v. United States, 326 U.S. 1, 20 (1945); then citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); and then citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

26. Lauren Myers, *A Picture is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission's Endorsement Guides*, 66 DUKE L.J. 1371, 1383 (2017).

27. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989) (explaining that a restriction preventing expression based on the message it conveys is subject to strict scrutiny).

28. *See* Carey v. Brown, 447 U.S. 455, 461–62 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.").

29. *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (holding that the Child Online Protection Act was invalid under the First Amendment because there were "plausible, less restrictive alternatives to the statute").

30. *See Carey*, 447 U.S. at 471 (finding that a regulation was invalid because it only banned labor picketing, instead of all picketing, that inhibited residential privacy).

31. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position

Board of Pharmacy v. Virginia Citizens Consumer Council.[32] In that case, pharmacists were prevented from advertising or promoting the price of pharmaceutical drugs under Virginia law.[33] The advertisers alleged that the law violated their free speech under the First Amendment.[34] The Court struck down the Virginia law and held that "paid advertisements and speech that solely proposed commercial transactions retained some First Amendment protection."[35] The Court defined commercial speech as speech that proposed a commercial transaction as long as it is "so removed from any exposition of ideas and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government that it lacks all protection."[36]

A more distinct definition of commercial speech was established in *Bolger v. Youngs Drug Products Corp*.[37] In that case, the challenged statute prevented mailing unsolicited advertisements for contraceptives.[38] In reference to pamphlets, the Court provided three characteristics to define commercial speech by stating that the pamphlets: (1) were conceded to be advertisements, (2) referenced a specific product and (3) had an economic motive.[39] The Court has not defined commercial speech any further since the definitions provided in *Virginia State Board of Pharmacy* and *Bolger*.

Only the lower courts have addressed the boundaries of the commercial speech doctrine in the context of social media. In *Bihari v. Gross*, the court concluded that a website that steered consumers to a different competitor's site constituted commercial speech because posting hyperlinks to other websites that promote commercial services makes those links commercial speech.[40]

In determining whether a commercial-speech regulation violates the First Amendment, courts apply the *Central Hudson* test.[41] In *Central Hudson*, an energy regulatory agency banned advertisements that

in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

32. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).
33. *Id.* at 752.
34. *Id.* at 754.
35. *Id.* at 771–72.
36. *Id.* at 762 (citations omitted).
37. *See generally* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
38. *Id.* at 61.
39. *Id.* at 67.
40. Bihari v. Gross, 119 F. Supp. 2d 309, 318 (S.D.N.Y. 2000).
41. Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

might increase demand for electricity during a period of shortage.[42] When the agency continued the ban past the shortage, the utility company sued.[43] The main issue in the case was whether a regulation of the Public Service Commission of the State of New York violated the First and Fourteenth Amendments, because it completely banned promotional advertising by an electrical utility company.[44]

In applying the *Central Hudson* test, first, the Court asks whether the commercial speech related to unlawful or misleading activity.[45] If it does not, the government has less regulatory power and the regulation is subject to a three-factor test to determine its validity:(1) whether there is a substantial government interest, (2) the regulation directly advances that interest, and (3) the regulation does not govern more speech than necessary.[46] With this test, the Court held that the ban was unconstitutional because it was not narrowly-tailored and it reached all promotional advertising regardless of its impact on overall energy use.[47] Yet, the Court has also held that if the regulation is constitutional and the government wants to require disclosure "advertiser's rights [are] adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[48]

The key issue in requiring disclosures for social media influencers is whether the regulation is valid when commercial speech is mixed with noncommercial speech. In *Riley v. National Federation of the Blind*, the Court did not determine whether this type of mixed speech was commercial, but did state that speech does not "retain its commercial character when it is inextricably intertwined with [core expressive] speech."[49] In order to determine the appropriate standard to apply, the Court must examine the totality of the speech as a whole and the effect of the statement.[50]

Because sometimes it may be difficult for consumers to determine if a social media post is commercial speech, it is even more imperative for the FTC to improve its Guidelines to protect and bring to

42. *Id.* at 558.
43. *Id.* at 559.
44. *Id.* at 560.
45. *Id.* at 564.
46. *Id.*
47. *Id.* at 569–70.
48. Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 673 (1985).
49. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988).
50. *Id.*

light any deception by social media influencers. Nevertheless, it is also important to balance social media influencers' rights when it comes to commercial speech by making sure that the Guidelines incorporate the appropriate commercial speech tests when applying Section 5 to social media influencers.

B. Social Media Influencers Defined and Their Growing Impact on Consumers

Influencers, in general, are defined as "individuals who have the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position, or relationship," and they leverage their popularity on social media platforms to endorse third-party products.[51] Typical social media influencers are celebrities, star athletes, and other individuals with strong online followings.[52] Social media influencers are considered endorsers because they feed "advertising message[s] . . . that consumers are likely to believe reflect[ ] the opinions, beliefs, findings, or experiences of [the influencer, and not] the sponsoring advertiser."[53] Nevertheless, there are three primary categories of social media influencers: (1) mega-influencers, (2) macro-influencers, and (3) micro-influencers.[54] These categories look at not only the reach of social media influencers, but also the ability of social media influencers to directly impact behavior by examining three factors: (1) reach, (2) relevance, and (3) resonance.[55] Addition-

51. *See* Influencers, BUS. DICTIONARY, http://www.businessdictionary.com/definition/influencers.html [https://perma.cc/ATZ3-S9FN]; *see also* Michael R. Justus, *The Laws of Influence*, 32 COMMC'N LAWYER 25 (2016).

52. Ari Lazarus, *Is That Post #Sponsored?*, FED. TRADE COMM'N: BLOG (Apr. 19, 2017), https://www.consumer.ftc.gov/blog/2017/04/post-sponsored.

53. 16 C.F.R. § 255.0(b) (2017); *see also* Shafiel A. Karim, *"Clear and Conspicuous" Disclosures Between Celebrity Endorsers and Advertisers on Social Media Websites*, 25 J. ANTI, UCL & PRIVACY SEC. ST. B. CAL. 172, 179 (2016).

54. Liz Gottbrecht, *The Three Types of Influencers All Marketers Should Know*, MAVRCK (Oct. 18, 2016), http://www.mavrck.co/the-three-types-of-influencers-all-marketers-should-know-infographic/; *see also* Georgia Hatton, *Micro Influencers vs Macro Influencers*, SOCIAL MEDIA TODAY (Feb. 13, 2018), https://www.socialmediatoday.com/news/micro-influencers-vs-macro-influencers/516896/.

55. Veronika Šlogar, *Pillars of Influence—What The Hell Is That?*, MEDIA MARKETING (2016), http://www.media-marketing.com/en/opinion/pillars-of-influence-what-the-hell-is-that/. "Reach represents the size of the audience. It's defined by the number of people that can be reached through the follower base of an influencer. Relevance corresponds to the question of how relevant an influencer is to a particular topic, or which influencers have appeared in the search of keywords and key phrases that are important to you. Resonance is the result of reach combined with relevance. Resonance determines how much activity the influencer will spark with the publication of content. It refers to the level of engagement of the people following them – the number of shares, likes and comments."

ally, these three categories look at the network of people, the connection to the brand, and the ability to "drive a desired behavior from that network."[56]

Mega-influencers are the celebrities who have over a million followers.[57] This category of influencer usually has the broadest reach but the lowest resonance among audiences.[58] Macro-influencers are the executives, bloggers, and journalists.[59] They have the highest topical relevance.[60] Lastly, the micro-influencers are the everyday consumers or employees with 500-10,000 followers.[61] They typically have the highest brand relevance because they usually discuss their experience and their "strength of relationship with a network."[62]

Kylie Jenner and Kim Kardashian would be considered mega-influencers and celebrities because they both have approximately 125 million followers each on Instagram, and they are known for their reality show "Keeping Up With The Kardashians."[63] Consequently, their presence as social media influencers for various products is tremendous. The Kardashians[64] accumulate a lot of their wealth from their role as social media influencers on various social media platforms.[65] For example, Kylie Jenner posted a picture in a short white dress on Instagram, and her caption read "obsessed with my

56. Gottbrecht, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*; *contra* Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed To Curtail Deceptive Practices In Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1128 (2018). "Endorsements from influencers are distinguishable from traditional celebrity endorsements. As ordinary people sharing their everyday lives on social media, influencers are more relatable, and their endorsements are seemingly more authentic than endorsements from traditional celebrities. An influencer's endorsement is often equivalent to a peer recommendation and can carry significant weight with her followers."

61. Gottbrecht, *supra* note 54.

62. *Id.*

63. Kylie Jenner (@kyliejenner), INSTAGRAM, https://www.instagram.com/kyliejenner; Kim Kardashian (@kimkardashian), INSTAGRAM, https://www.instagram.com/kimkardashian.

64. Jennifer Calfas, *A Ranking of the Richest Women of the Kardashian-Jenner Clan*, TIME (Sept. 24, 2017), http://time.com/money/4950313/kardashian-net-worth/. The Kardashians are a multi-million-dollar family consisting of Kim Kardashian, Kourtney Kardashian, Khloe Kardashian, Robert Kardashian, and the younger Jenner sisters Kendall and Kylie Jenner. This family became famous and wealthy because of their hit reality television series "Keeping Up with the Kardashians." The Kardashian empire has a combined wealth of $380 million dollars because of the reality show along with highly profitable cosmetics lines, lucrative sponsorship deals, apparel companies and modeling careers.

65. Natalie Robehmed, *Inside the Business of Kardashian-Jenner Instagram Endorsements*, FORBES (Nov. 16, 2016, 8:55 AM), https://www.forbes.com/sites/natalierobehmed/2016/11/16/inside-the-business-of-celebrity-instagram-endorsements/#663c175a5724.

@fashionnova dress, get it at FashionNova.com #ad @fashionnova."[66] Endorsements such as this account for nearly twenty percent of Kylie Jenner's earnings per year.[67] Other celebrities such as Kendall Jenner, Selena Gomez, Taylor Swift, and Cara Delevigne charge a range of $230,000 to $550,000 per social media post when they post across social media platforms.[68] Celebrity social media influencers come from "sports, entertainment and celebrity for celebrity sake."[69]

Companies invest in social media influencers because the return on investment is great and "[forty-nine] percent of consumers rely on influencer recommendations when making purchasing decisions."[70] However, the Kardashians, for example, over the past few years have gotten into promotional disasters for not properly disclosing their endorsements on Instagram. In 2016, Truth in Advertising[71] sent a letter to the Kardashians warning them that they would notify the FTC if they did not take down posts that were paid product placements without proper disclosures.[72] In 2017, Kendall Jenner came under fire for receiving $250,000 to post an endorsement of the disastrous Fyre Festival[73] on Instagram without any proper disclosure to consumers.[74]

66. Kylie Jenner (@kyliejenner), INSTAGRAM (Sept. 19, 2017), https://www.instagram.com/p/BZPAI-olXq5/.

67. Robehmed, *supra* note 65.

68. Christopher Heine, *These 4 Celebrity Influencers Can Charge $230,000 for a Single Brand Post*, AD WEEK (Dec. 4, 2015), https://www.adweek.com/digital/these-5-celebrity-influencers-can-charge-230000-every-time-they-post-brand-168466/; *see also* Amy Callahan, *Stop Calling The Use Of Celebrities "Influencer Marketing"*, HUFF. POST (July 18, 2017, 10:59 AM), https://www.huffingtonpost.com/entry/stop-calling-the-use-of-celebrities-influencer-marketing_us_596e2131e4b07f87578e6c26. According to a report by HopperHQ, the top celebrities on Instagram are paid the following: Selena Gomez — $550,000 per post; Kim Kardashian — $500,000 per post; Cristiano Ronaldo — $400,000 per post; Kylie Jenner — $400,000 per post; Kendall Jenner — $370,000 per post.

69. Zain Dhanani, *Why Social Influencers Outsell Celebrities*, FORBES (Oct. 31, 2017, 9:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2017/10/31/why-social-influencers-outsell-celebrities/#1d89bf90425b.

70. Marty Swant, *Twitter Says Users Now Trust Influencers Nearly as Much as Their Friends*, AD WEEK (May 10, 2016), http://www.adweek.com/news/technology/twitter-says-user-snow-trust-influencers-nearly-much-their-friends-171367 [https://perma.cc/6MN4-6NNK].

71. *Truth in Advertising: Our Mission*, https://www.truthinadvertising.org/about/. "Truth in Advertising, Inc. (TINA.org) is a 501(c)(3) nonprofit organization based in Madison, CT, whose mission is to be the go-to online resource dedicated to empowering consumers to protect themselves and one another against false advertising and deceptive marketing. We aim to achieve our mission through investigative journalism, education, advocacy, and the promotion of truth in advertising."

72. Janko Roettgers, *Kardashians in Trouble Over Paid Product Endorsements on Instagram*, VARIETY (Aug. 22, 2016), http://variety.com/2016/digital/news/kardashians-instagram-paid-ads-product-placements-1201842072/.

73. Mary Hanbury, *These Photos Reveal Why the 27-year-old Organizer of the Disastrous Fyre Festival has been Sentenced to 6 Years in Prison*, BUS. INSIDER (Jan. 19, 2019), https://www.businessinsider.sg/fyre-festival-expectations-vs-reality-2017-4/. "Fyre Festival, which promised a

Her post, which is now deleted, consisted of a promotional video with the caption "[s]o hyped to announce my G.O.O.D. Music family as the first headliners for @fyrefestival. Get tix now at fyre festival.com. VIP access for my followers. . .use my promo code KJONFYRE for the next 24 hours to get on the list for the artists and talent afterparty on Fyre Cay. #fyrefestival."[75] These two examples illustrate why the FTC should consider providing additional guidance to social influencers. If well-known and high-profile influencers such as these remain unaware of their disclosure obligations, then it is important for the FTC to provide proper guidance to all social media influencers, especially in an industry that is expected to grow to $10 billion dollars in revenue by 2020.[76]

II. THE EVOLUTION OF THE FTC'S AUTHORITY AND GUIDELINES FOR ENDORSMENTS BY SOCIAL MEDIA INFLUENCERS

A. The History of the FTC and the Scope of its Authority

In order to understand why the FTC has approached the policing of deception by social media influencers as it has through the Guidelines and limited enforcement, it is important to understand and appreciate the scope and evolution of its authority. This section will explain how the FTC gained enforcement authority with respect to unfair methods of competition, unfair acts or practices, and deception. Regarding deception, it will address how it specifically concerns social media influencers and advertisers.

VIP experience on the island of Great Exuma in the Bahamas, turned into a nightmare situation as attendees were stranded with half-built huts to sleep in and cold cheese sandwiches to eat. Billy McFarland, the 27-year-old founder of the company behind the festival, was sentenced to six years in prison [ ] and faces a $26 million forfeiture order." *See also* FYRE: THE GREATEST PARTY THAT NEVER HAPPENED (Netflix 2019); FYRE FRAUD (Hulu 2019).

74. Jacob Shamsian, *People are Blaming Kendall Jenner for Promoting the Disastrous Music Festival that Descended into Chaos*, THIS IS INSIDER (Apr. 28, 2017), https://www.thisisinsider.com/kendall-jenner-promoted-fyre-festival-instagram-2017-4.

75. *Id.*

76. Giordano Contestabile, *Influencer Marketing in 2018: Becoming an Efficient Marketplace*, AD WEEK (Jan. 15, 2018), https://www.adweek.com/digital/giordano-contestabile-activate-by-bloglovin-guest-post-influencer-marketing-in-2018/.

1. Early History of the FTC

The FTC was created during a time of widespread public concern about monopolies and trusts.[77] In order to address the concerns of trusts, Congress enacted the first antitrust law with the Sherman Act in 1890 that outlawed "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[78] However, the Supreme Court in *Standard Oil Co. of New Jersey v. United States* held that the government could not prevent all activities in restraint of trade and that the courts have the responsibility of determining whether the concerted conduct, that falls within the scope of the Sherman Act, is reasonable, by evaluating the nature of the conduct, its context, and its actual or probable effects on competition.[79] Despite the Sherman Act and the *Standard Oil* precedent, trusts and monopolies continued to expand and businesses grew concerned that the reasonableness standard set in the Supreme Court case, *Standard Oil*, would result in unpredictable and incomplete enforcement.[80]

In order to combat these issues, Congress created the Bureau of Corporations on February 14, 1903, as a component of the Department of Commerce and Labor.[81] Its purpose was to document, investigate, and make recommendations about the regulation of all industries and to better understand the trust issue.[82] However, the Bureau of Corporations was partisan and under the authority of the President.[83] With the inadequacy of the Bureau of Corporations and the breadth of the Sherman Act, the enactment of the Federal Trade Commission Act created the FTC on September 26, 1914.[84] The principal prohibition within the Act is contained in Section 5, which banned "unfair methods of competition" and "unfair or deceptive acts

77. CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 3 (2016).

78. Sherman Antitrust Act, 26 Stat. 208 (1890).

79. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 63 (1911).

80. HOOFNAGLE, *supra* note 77, at 10.

81. Press Release, Fed. Trade Comm'n, FTC Commemorates 100th Anniversary of Predecessor, Bureau of Corporations (Feb. 14, 2003), https://www.ftc.gov/news-events/press-releases/2003/02/ftc-commemorates-100th-anniversary-predecessor-bureau.

82. Act Establishing the Department of Commerce and Labor, Pub. L. No. 57-87, § 6, 32 Stat. 825 (1903).

83. HOOFNAGLE, *supra* note 77, at 9.

84. Federal Trade Commission Act, 15 U.S.C. § 41 (2018).

or practices."[85] Also, the FTC Act gave the Agency the power of enforcement[86] and information gathering.[87]

In the FTC's early days, the courts limited the FTC's power to acts already illegal under common law, under the Sherman Act, or previous court decisions in determining Congress' intent to ban "unfair methods of competition" and "unfair or deceptive acts or practices."[88] However, that all changed with the Supreme Court's decision in *FTC v. R. F. Keppel & Bro., Inc.* There, the FTC sought to prevent a candy company from marketing its product to children with gambling inducements because it was against public policy.[89] The Court held that the FTC has the power to define a new body of illegal acts independent of the three categories: illegal at common law, under the Sherman Act, or behavior subject to previous litigation, and that the FTC's findings should be given weight in determining whether a practice is an unfair method of competition.[90] The Supreme Court further held that a practice could be unfair even if competitors were free to adopt it because competition that forces a competitor to adopt an immoral practice or have loss to their business is "thought to involve the kind of unfairness at which the statute was aimed."[91] Overall, the congressional intent of the creation of the FTC has evolved over time by evaluating and correcting new commercial practices.

85. Federal Trade Commission Act, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act.

86. Congress did not define the "specific acts and practices that constitute unfair methods of competition in violation of Section 5, recognizing that application of the statute would need to evolve with changing markets and business practices." However, in deciding whether an act or practice is an unfair method of competition, the Commission (1) "will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;" (2) "the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and" (3) "the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice." FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

87. Under Section 6(a) of the FTC Act, the Commission has authorization "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce . . . " 15 U.S.C. § 46(a) (2012); *see also* Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902, 1903 (2015).

88. HOOFNAGLE, *supra* note 77, at 29.

89. FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 307–08 (1934).

90. *Id.* at 309–10, 314.

91. *Id.* at 313.

One of the most important consumer protection amendments to the FTC Act was the Wheeler-Lea Amendments in 1938.[92] Prior to the Wheeler-Lea Amendments, the Supreme Court in *FTC v. Raladam* held that the FTC was powerless in preventing individuals and companies from using unfair acts or practices if there were no injuries to competitors or to a potential competitor.[93] With these Amendments to Section 5, the FTC not only considers "unfair methods of competition" unlawful but also "unfair or deceptive acts and practices in commerce."[94] Specifically, this provides the FTC with the power to bring actions or cases without the need for it to "offer evidence establishing injury to an actual or potential competitor."[95] Additionally, the Amendments to Section 5 provided that cease and desist orders become final after sixty days, unless appealed, and any violation of the orders results in a civil penalty of no more than $5,000 brought in federal court.[96] Despite these powers granted under the Wheeler-Lea Amendments, the FTC is still very limited compared to other agencies because of its low budget of approximately $300 million and small workforce of approximately 1,140 employees.[97] In comparison, the Food and Drug Administration has a budget of approximately $4 billion and a workforce of approximately 17,000 employees.[98]

2. Expansion of the FTC's Power

In the early years of the FTC, the agency played the role of primarily being a pro-business force that only focused on being an advisory body, while consumer advocates wanted more enforcement.[99] During the "consumerism" wave in the 1970s, the FTC's powers expanded further with court decisions and Acts passed by Congress. In *FTC v. Sperry & Hutchinson Co*., the Court affirmed the FTC's broad authority to define and prevent unfair practices even if they were not

92. HOOFNAGLE, *supra* note 77, at 36.

93. FTC v. Raladam Co., 283 U.S. 643, 654 (1931).

94. R. E. Freer, Comm'r, Address before The Annual Convention of the Proprietary Association (1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf.

95. *Id.*

96. *Id.*

97. FED. TRADE COMM'N, FISCAL YEAR 2018: AGENCY FINANCIAL REPORT 6, 13 (2018), https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2018/ftc_agency_financial_report_fy2018_1.pdf; *see also* HOOFNAGLE, *supra* note 77, at 26–27.

98. FOOD DRUG ADMIN., DETAIL OF FULL-TIME EQUIVALENT EMPLOYMENT (FTE) (2018), https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM566335.pdf.; *see also* HOOFNAGLE, *supra* note 77, at 27.

99. HOOFNAGLE, *supra* note 77, at 16.

included within the "spirit" of antitrust laws.[100] In that case, the FTC alleged that Sperry and Hutchinson was unfairly restraining the market for "trading stamps" by contractually prohibiting consumers' distribution of the stamps to others. The FTC thought this illegal and in violation of Section 5 of the FTC Act.[101] The Court affirmed the Agency's power to proscribe unfair competitive practice beyond the letter of the antitrust laws and the Agency's power to proscribe practices that harm consumers, even if they do not harm competition.[102]

The Supreme Court in *Sperry* also approved, in dicta, the three factors identified by the FTC in its 1964 policy statement as the factors it would use when deciding to exert its unfairness authority.[103] These three factors ask whether an act or practice: (1) caused consumers, competitors, or other business substantial injury; (2) offended public policy as established by statute, the common law, or otherwise; and (3) was immoral, unethical, or unscrupulous.[104] However, the FTC faced major backlash from Congress and the public when it sought to apply this approach to regulate children's advertising.[105] In order to satisfy Congress, the FTC issued a second policy statement in order to clarify the three previous factors. Regarding the first factor, the FTC established a separate three-part test for injury stating that an injury "[(1)] must be substantial; [(2)] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and [(3)] it must be an injury that consumers themselves could not reasonably have avoided."[106] For the second factor, public policy, "an act or practice's 'unfairness' must be grounded in statute, judicial decisions . . . or the Constitution."[107] Lastly, the third factor was removed for the unfairness test because it was seen as repetitive of the first two factors.[108] Overall, the policy statements and input from Congress helped shape the current standard for the FTC's authority in regard to unfairness, which requires applying the consumer-injury fac-

100. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

101. *Id.* at 234.

102. *Id.* at 244.

103. *Id.* at 244 n.5; *see also* Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8324, 8355 (July 2, 1964).

104. Sperry, *supra* note 100, at 244 n.5.

105. FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 243 (3d Cir. 2015).

106. Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/.ftc-policy-statement-unfairness.

107. LabMD, Inc. v. FTC, 894 F.3d 1221, 1229 (11th Cir. 2018).

108. *Id*.

tors test and whether the act or practice is supported in "well-established" legal policy.[109]

The analysis for the unfairness prong frequently overlaps with the analysis for the deception prong of Section 5 of the Act because "a practice may be both deceptive and unfair."[110] However, deception, which is the standard most relevant to social media influencers, has certain elements rather than factors that must be satisfied in order for the FTC to exert its authority.[111] The elements for deception will be satisfied according to the FTC "if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[112] The FTC finds that a consumer suffers harm based on whether the representation, omission, or practice was *material*, meaning the consumer "would have chosen differently but for the deception."[113] In relation to social media influencers, this is important to note because the financial rewards given to influencers without proper disclosure constitute deception in violation of Section 5 of the Act.

With the Trans-Alaska Pipeline Authorization Act,[114] the FTC was able to increase civil penalties from $5,000 to $10,000, the FTC could appear in court on its own behalf after consulting with the Department of Justice, and the FTC could demand documents from banks and common carriers if they had evidence relevant to an investigation of another entity.[115] Title II of the Magnuson-Moss Warranty Act expanded the Agency's jurisdiction from activities "in commerce" to those that were "in or affecting commerce."[116] Further, it gave the FTC the power to draft "interpretive rules and general statements of policy" defining specific practices as unfair or deceptive.[117] This was a legislative recognition of the holding in *National Petroleum v. FTC*, in which the DC Circuit read into the FTC Act the power to create trade-regulation rules that have the effect of law.[118] However, the

109. *Id.*

110. Wyndham, *supra* note 105, at 245; In re Figgie Int'l, 107 F.T.C. 313, 373 n.5 (1986) ("[U]nfair practices are not always deceptive but deceptive practices are always unfair.").

111. Fed. Trade Comm'n, FTC Policy Statement on Deception (October 14, 1983), https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

112. *Id.*

113. *Id.*

114. Trans-Alaska Oil Pipeline, Pub. L. No. 93-153 § 408, 87 Stat. 591, 592 (1973).

115. HOOFNAGLE, *supra* note 77, at 55.

116. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637 § 201, 88 Stat. 2193 (1975).

117. *Id.* at § 202.

118. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973).

procedures required by Congress in this Act make rule-making difficult for the FTC because the FTC is required to (1) be specific in detailing the reasons for proposing a rule, (2) engage public participation in the rule-making, (3) engage in more regulatory analysis, and (4) engage in more fact-finding and justification for the proposed rule.[119]

3. The Current Structure of the FTC

There are five commissioners for the FTC that are nominated by the President and confirmed by the Senate, and they all serve seven-year terms that are staggered.[120] Additionally, no more than three commissioners can hail from the same political party since the FTC is an independent agency.[121] Out of the five commissioners, the President selects a Chairman or Chairwoman of the FTC.[122] The Chair selects and supervises senior staff and some related personnel, distributes business among the staff, and manages the agency's budget.[123] The commissioners only have a voting right over major agency decisions.[124] Oversight of the FTC is held within six committees in Congress: the Commerce, Appropriations, and Judiciary committees in the House and Senate.[125]

The FTC has three bureaus: the Bureau of Consumer Protection, the Bureau of Competition, and the Bureau of Economics, along with eight regional offices.[126] The most relevant Bureau for this Comment is the Bureau of Consumer Protection. The duty of the Bureau of Consumer Protection is to stop unfair, deceptive, and fraudulent business practices through complaints received, suits against companies, the development of trade regulation and rules, and consumer education.[127]

119. HOOFNAGLE, *supra* note 77, at 55–56.
120. *Commissioners*, FED. TRADE COMM'N (Jan. 12, 2019), https://www.ftc.gov/about-ftc/commissioners [hereinafter *Commissioners*].
121. HOOFNAGLE, *supra* note 77, at 83.
122. *Commissioners*, *supra* note 120.
123. HOOFNAGLE, *supra* note 77, at 89.
124. *Id.*
125. *Id.* at 96.
126. *Bureaus & Offices*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices.
127. *Id.*

4. The Legal Powers of the FTC

The FTC has a quasi-judicial role.[128] It identifies violations of the FTC Act, brings adjudicative actions before an administrative law judge, and approves and hears appeals of the administrative law judge's determinations.[129] However, defendants in FTC enforcement actions can appeal Commission decisions to the Circuit Courts of Appeals.[130] The purpose of this quasi-judicial role of the FTC is to bring agency expertise to bear on its enforcement actions and to provide remedies and proceedings quickly, but it does raise concerns of separation of powers and due process.[131]

The FTC also has the power to bring complaints and actions in federal court against any person or entity when it has "reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce," and "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public."[132] Prior to bringing a complaint or action the FTC must first conduct investigations through in-person meetings, oral communications and the internet.[133] The main ways that investigations are initiated are through: "consumer complaints made on the Consumer Sentinel System, competitors exposing each other, members of Congress, or from staff members observations."[134]

Lastly, under the 1975 Magnusson-Moss Warranty Act, the FTC has the power to create rules that "[d]efine with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[135] However, this power is rarely used by the FTC because the procedural requirements are more demanding than the rulemaking standards of the Administrative Procedures Act.[136]

128. HOOFNAGLE, *supra* note 77, at 24.
129. *Id.*
130. *Id.*
131. *Id.* at 25.
132. *Id.* at 98–99; 15 U.S.C. §45(b).
133. 15 U.S.C. §46(a).
134. *Id.* at 103.
135. Pub. L. No. 93-637, 88 Stat. 2183 (1975).
136. HOOFNAGLE, *supra* note 77, at 101.

5. FTC Federal Court Cases versus Adjudicative Proceedings

The FTC can pursue actions in federal court or in adjudicative proceedings before an administrative law judge.[137] However, the best form of relief is usually obtained in federal district court because the court has the ability to issue equitable relief, such as restitution, disgorgement, and prohibitory injunctions to stop illegal practices.[138] Most of the FTC's litigation is brought in federal court because it allows the FTC to obtain restraining orders and preliminary injunctions.[139] Further, federal courts also create more legitimacy for the FTC since they are not acting as a judge over its own proceedings.[140]

In contrast, in administrative proceedings, administrative law judges are only able to recommend a cease and desist order or dismissal because civil penalties are not available in administrative actions and can only be obtained in federal court.[141] Lastly, public comment is also required before an administrative order can be finalized.[142] Nevertheless, there are some advantages to an administrative proceeding, such as: (1) judicial deference, (2) settlement of a matter without approval required from a federal judge, (3) appeal of an administrative decision goes to the Commission for review, and (4) a larger scope of the respondent's practices may be targeted by the Commission than a federal court action.[143]

Both administrative proceedings and federal cases are unusual, due to the large number of settlements entered between the FTC and an investigatory target.[144] In order to settle, the bureau director must give the staff authority to negotiate a settlement with the investigatory target.[145] Next, a consent agreement is negotiated and once approved by the FTC, a complaint is released detailing the alleged wrongdoing along with a press release and guidance to the industry.[146] The agree-

137. *Id.* at 109.

138. M. Sean Royall, Richard H. Cunningham, & Ashley Rogers, *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, 32 A.B.A. ANTITRUST 94 (2018); A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, FTC (July 2008), http:// www.ftc.gov/about-ftc/what-we-do/enforcement-authority (explaining court can award both prohibitory and monetary equitable relief).

139. HOOFNAGLE, *supra* note 77, at 110.

140. *Id.*

141. *Id.*

142. *Id.* at 110.

143. *Id.* at 110–111.

144. *Id.* at 111.

145. HOOFNAGLE, *supra* note 77, at 111.

146. *Id.*

ment is finalized once the notice-and-comment process is completed.[147] Individuals do not have a private right of action under the FTC Act.[148] However, some states have their own unfair and deceptive trade protection acts, many of which include a private right of action.[149]

In conclusion, the FTC's broad investigatory power allows it to identify threats to consumers, and it has the ability to issue guidelines and educate consumers and companies regarding Section 5 of the FTC Act. However, the burdensome rule-making process more than likely prevents the FTC from implementing necessary industry wide changes when it comes to social media influencers' disclosures on social media platforms, and its lack of fining authority likely limits its ability to deter deceptive practices.

B. The Evolution of the FTC Guidelines

With the consumerism wave, the FTC focused on prosecuting advertisers and their advertising agencies for deceptive advertising.[150] In order to show how advertisers should comply with Section 5 of the Act, the FTC promulgated various Guidelines. In the 1980 Guidelines, the FTC included the following sections: "definitions of the terms, expert endorsements, and endorsements by organizations."[151] These sections are still present within the later issued 2009 Guidelines.[152] On January 18, 1980, three final sections of the first Guidelines were incorporated: "[(1)] general considerations that advertisers should ponder when utilizing endorsements in a campaign; [(2)] a broad overview of consumer endorsements; and [(3)] disclosures of material organizations."[153] In comparison to the 2009 Guidelines, the 1980 Guidelines required a social media influencer to disclose connections between the endorser and the advertiser when a connection is "reasonably expected" by the consumer.[154]

Due to pressure from Commercial Alert, a watchdog group, and the media, the FTC revised the 1980 Guidelines to incorporate proce-

147. *Id.* at 111.
148. Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973).
149. HOOFNAGLE, *supra* note 77, at 113.
150. *See* J. Thomas Rosch, *Fed. Trade Comm'n, Looking Backward and Forward: Some Thoughts On Consumer Protection*, 2–3 (2009), http://www.ftc.gov/speeches/rosch/090311backwardforward.pdf.
151. 16 C.F.R. § 255 (2009).
152. *Id.*
153. 16 C.F.R. §§ 255.1, 255.2, 255.5 (1980).
154. *Id.*

dures concerning "word-of-mouth" bloggers, so that they would be required to disclose whether they were being paid by endorsers.[155] In contrast to the 1980 Guidelines, the 2009 Guidelines place a greater "responsibility on the advertiser and the individual endorser."[156] The 1980 Guidelines assumed that it was implied in the endorsement that celebrities were paid endorsers and that consumers understood that, thus the influencer did not have to disclose the relationship with the advertiser.[157]

In order to hold social media influencers more accountable for their endorsements, the FTC implemented new language under Section 255.1(d) of the 2009 Guidelines: "Endorsers . . . may be liable for statements made in the course of their endorsements."[158] Example three within this Section also warns that "a celebrity will be held accountable if she fails to disclose that they are being paid to endorse a product."[159] However, the 2009 Guidelines fail to explain how the influencer should make the disclosure, leaving it to the discretion of the endorser.[160]

Social media influencers can avoid violations of the Act by complying with the Guidelines. The Guidelines inform consumers about endorsement policies and principles, and they serve as "administrative interpretations of the laws administered by the Commission."[161] Ac-

155. Annys Shin, *FTC Moves to Unmask Word-of-Mouth Marketing: Endorser Must Disclose Link to Seller*, WASH. POST, Dec. 12, 2006, at D1.

156. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72, 374 (adopted Oct. 5, 2009) (to be codified at 16 C.F.R. pt. 255).

157. *See* Ira Teinowitz, *FTC Cracks Down on Celebrity Endorsements*, THE WRAP (Oct. 5, 2009), http://www.thewrap.com/article/ftc-cracks-down-celebrity-endorsements-8233.

158. 16 C.F.R. § 255.1(d) (2009).

159. See 16 C.F.R. § 255.5 (2009). Example 3 states: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive.

160. Jason Goldstein, *How New FTC Guidelines on Endorsement and Testimonials Will Affect Traditional and New Media*, 28 CARDOZO ARTS & ENT. L.J. 609, 618 (2010).

161. 16 C.F.R. § 1.5 (2009).

cording to the FTC, an endorsement is "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser."[162] The Guidelines require that all disclosures be "clear and conspicuous."[163] The goal of the Guidelines is for the FTC to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 of the Act might apply to those activities.[164]

The Guidelines do not have the force of law, but practices inconsistent with the Guidelines may result in law enforcement action.[165] In a law enforcement action under the FTC Act for deceptive use of testimonials or endorsements, the FTC would have the burden of proving that the challenged conduct violates the FTC Act.[166] Therefore, advertisers should use plain and unambiguous language and make the disclosure stand out.[167] The disclosures should be: "(1) close to the claims to which they relate; (2) in a font that is easy to read; (3) in a shade that stands out against the background; (4) for video ads, on the screen long enough to be noticed, read, and understood; and (5) for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand."[168] Thus, disclosures should not be hidden or buried in footnotes, in blocks of text people are not likely to read, or in hyperlinks.[169] "If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don't meet the 'clear and conspicuous' standard."[170]

Compared to the 1980 Guidelines, the 2009 Guidelines, which are currently used, provide examples illustrating "material connections"

162. Karim, *supra* note 53, at 179.
163. *Id.* at 181.
164. *Id.* at 179.
165. *Id.*
166. *FTC Publishes Final Guides Governing Endorsements, Testimonials: Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements*, FED. TRADE COMM'N (2009), https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials.
167. *Native Advertising: A Guide for Businesses*, FED. TRADE COMM'N (Dec. 2015), https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses.
168. *Id.*
169. *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.
170. *Id.*

such as payments or free products between advertisers and endorsers and how those connections that consumers would be unaware of must be disclosed.[171] This was the first time where the Guidelines mentioned that violations would be reviewed on a case-by-case basis.[172] The revised Guidelines also made clear that both advertisers and endorsers may be liable for false or unsubstantiated claims made in an endorsement or failure to disclose material connections between the advertiser and endorsers.[173] Celebrities also have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or on social media.[174]

In March 2013, the FTC specifically addressed how disclosures must be clear and conspicuous for mobile and online advertisers.[175] Also, the FTC went further in explaining that disclosures should be "as close as possible" to the relevant claim in order for the disclosure to be considered clear and conspicuous.[176] The most relevant change required influencers on social media platforms to still provide necessary disclosure even though they are space-constrained on social media platforms such as Twitter, for example.[177]

The FTC handled its first major case of an advertiser violating the federal statute with Sony where the FTC charged that it deceived consumers with false advertising claims about the "game changing" technology on its gaming console.[178] The settlement agreement barred Sony from making misleading advertising claims in the future and required it to provide consumers with a refund or a merchandise voucher for select video games.[179] The FTC initially issued an admin-

171. Press Release, Fed. Trade Comm'n, FTC Publishes Final Guides Governing Endorsements, Testimonials: Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements (Oct. 5, 2009), https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials.

172. *Id.*

173. *Id.*

174. *Id.*

175. Press Release, Fed. Trade Comm'n, FTC Staff Revises Online Advertising Disclosure Guidelines: "Dot Com Disclosures" Guidance Updated to Address Current Online and Mobile Advertising Environment (Mar. 12, 2013), https://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines.

176. *Id.*

177. *Id.*

178. Press Release, Fed. Trade Comm'n, Sony Computer Entertainment America To Provide Consumer Refunds To Settle FTC Charges Over Misleading Ads For PlayStation Vita Gaming Console: FTC Also Charges Los Angeles Ad Agency with Promoting Console through Deceptive Twitter Endorsements (Nov. 25, 2014), https://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer-refunds.

179. *Id.*

istrative complaint in this matter because it felt that there was "reason to believe" that the law has been or is being violated, and a proceeding is in the public interest.[180] This case established the legal foundation to challenge the conduct of social media influencers.

Recently, the FTC has added a new dimension to its Guidelines by addressing specific questions from consumers and social media influencers on Twitter. On September 20, 2017, the FTC held an influencer-specific session on Twitter to answer any questions regarding the disclosures social media influencers must make on social media platforms to ensure that they are abiding by Section 5 of the Act.[181] From that discussion on Twitter, the FTC informed the public that social media influencers should make disclosures on Snapchat or Instagram stories by superimposing over images, so that it is easy to notice and read the disclosures.[182] The FTC also discussed in that session what a social media influencer should do if they work for a brand, whether U.S. law still applies if a social media influencer travels abroad for a brand, whether images can be used for disclosure rather than text, and if a social media influencer is still required to disclose even though a company sent merchandise with no strings attached.[183] Additionally, the FTC discussed the preferred methods of disclosure, and if a company is responsible for a social media influencer's actions if they advised them on the proper disclosure and the influencer fails to comply.[184]

Overall, the history of the FTC's authority and the evolution of the Guidelines demonstrates that the FTC has made strides in the regulation of social media influencers. However, the Guidelines still need to be drastically improved, and the FTC needs to include recommended disclosures for social media influencers to use. This would allow the FTC to more effectively manage the large and profitable market of influencer advertising that is still developing and expanding.

180. *Id.*

181. Press Release, Fed. Trade Comm'n, FTC to Hold Twitter Chat on Social Media Influencer Disclosures (Sept. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/ftc-hold-twitter-chat-social-media-influencer-disclosures.

182. *The Federal Trade Commission Answers Common Influencer-Specific Questions*, THE FASHION L. (Sept. 20, 2017), http://www.thefashionlaw.com/home/the-ftc-answers-common-influencer-specific-questions.

183. *Id.*

184. *Id.*

III. SOLUTIONS TO THE FTC'S INEFFECTIVE GUIDELINES AND INADEQUATE AUTHORITY TO POLICE DECEPTION BY SOCIAL MEDIA INFLUENCERS

Although the FTC has the authority to provide Guidelines to social media influencers to help them avoid violations of Section 5 of the Act, the FTC has failed to effectively implement the Guidelines. The Guidelines should be more effectively implemented by policing and enforcing (1) deterrence tactics, (2) methods of detection, (3) improved education outlets to social media influencers and consumers, and (4) compliance.

First, for first-time violations of the statute, the FTC has historically only issued warnings to social media influencers and companies because it lacks the authority to impose fines that might help to deter them. Disgorgement amounts that are large enough to negatively impact an influencer and the benefits derived from sponsors would be the most effective deterrence for social media influencers and companies because they would know that they face significant consequences for violations of the Act, rather than a simple warning. Additionally, Congress should grant the FTC civil fining authority for first-time violations and beyond.

Second, the FTC could become more proactive in seeking to detect violations. Currently, the Guidelines are discretionary and when it comes to the policing of social media influencers, consumers are responsible for filing complaints, rather than the FTC proactively implementing effective detection measures. Making consumers responsible for detection of deceptive advertising is concerning because it will often be difficult for a consumer to decipher the deception.

Third, deterrence and detection tactics could be strengthened if the FTC started an initiative to provide more education to social media influencers, brands, and consumers. This would improve notice of the scope of prohibited conduct and provide a basis for holding all parties more accountable. Lastly, in order for social media influencers to maintain compliance with the Guidelines, the FTC should incorporate in the Guidelines a recommended disclosure statement.

A. The FTC's Past Deterrence Methods and the Need for Disgorgement and Civil Fining Authority

Congress should amend the FTC Act to authorize the FTC to implement regulations allowing the FTC to seek disgorgement and civil fines rather than just stern warnings to social media influencers that violate Section 5, because the negative impact on consumers is far too great. The following cases demonstrate how the FTC's history of warnings and requests for companies to request disclosures of their endorsers has had only limited success in deterring influencer deception.

In September 2015, the FTC charged an Xbox One Promoter, Machinima, Inc., with engaging in deceptive-advertising by paying "influencers" to post YouTube videos endorsing Microsoft's Xbox One System and several games.[185] Those social media influencers failed to disclose that they were being paid for their opinions.[186] The settlement agreement for this violation prohibited Machinima from misrepresenting, in any influencer campaign, that the endorser is an independent user of the product or service being promoted.[187] It also required the company to prominently disclose any material connection between the endorser and the advertiser, and prohibited Machinima from compensating any influencer who has not made the required disclosures.[188] Finally, the company was required to follow up within ninety days of the start of a campaign to ensure that disclosures were still being made.[189]

In March 2016, Lord and Taylor was charged by the FTC for deceiving consumers by paying for native advertisements, including an outwardly objective article in the online publication *Nylon* and a *Nylon* Instagram post, without disclosing that the posts actually were paid promotions for the company's 2015 Design Lab clothing collection.[190]

185. Press Release, Fed. Trade Comm'n, Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted by Paid 'Influencers' (Sept. 2, 2015), https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers.

186. *Id.*

187. *In re* Machinima, Inc., FTC Docket No. C-4569, FTC File No. 1423090 (Mar. 16, 2016) (consent order).

188. *Id.*

189. *Id.*

190. Press Release, Fed. Trade Comm'n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50

The FTC also charged that Lord & Taylor paid fifty social media influencers to post Instagram pictures of themselves wearing the same dress from the new collection, but failed to disclose they had given each influencer the dress, as well as thousands of dollars, in exchange for their endorsement.[191] In settling the charges, Lord & Taylor is prohibited from misrepresenting that paid ads are from an independent source and is required to ensure that its social media influencers clearly disclose when they have been compensated in exchange for their endorsements.[192] The FTC also established a monitoring and reviewing program for the company's endorsement campaign.[193]

In July 2016, Warner Bros. Home Entertainment, Inc. settled charges from the FTC that it deceived consumers during a marketing campaign for the video game *Middle Earth: Shadow of Mordor*, by failing to adequately disclose that it paid online "influencers," including the wildly popular "PewDiePie," thousands of dollars to post positive gameplay videos on YouTube and social media.[194] Over the course of the campaign, the sponsored videos were viewed more than 5.5 million times.[195]

The settlement agreement prohibits Warner Bros. from misrepresenting that any gameplay videos disseminated as part of a marketing campaign are independent opinions or the experiences of impartial video game enthusiasts.[196] Further, it requires the company to clearly and conspicuously disclose any material connection between Warner Bros. and any influencer or endorser promoting its products.[197] Finally, the order specifies the minimum steps that Warner Bros. must take to ensure that future campaigns comply with the terms of the order.[198] These steps include educating influencers regarding sponsorship disclosures, monitoring sponsored influencer videos for compli-

"Fashion Influencers" (Mar. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See* Press Release, Fed. Trade Comm'n, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos (July 11, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

ance, and, under certain circumstances, terminating or withholding payment from influencers or ad agencies for non-compliance.[199]

Unlike the previous examples where the FTC issued individual enforcement actions, in April 2017, the FTC took a more educational route by mailing out ninety warning letters to social media influencers.[200] These letters reminded influencers that if they had any relationship to a brand then they must clearly disclose that connection in the social media endorsement.[201] Even after these letters were sent, the FTC had to send twenty-one follow-up letters to those same influencers because FTC staff felt that social media influencers might not be in compliance with the FTC's Endorsement Guidelines.[202] The FTC only requested that the influencers let it know if they had a material connection to brands and if they did, then to take the steps in the future to make sure that they clearly disclose their material connections to brands and businesses.[203]

The repeated warning letters and previous settlement agreements demonstrate how the FTC is just giving social media influencers and companies endless chances to comply with its guidelines, but without any serious repercussions when they fail to do so. This undermines the purpose of Section 5 of the Act and does not protect consumers. For example, in January of 2019, the FTC settled with Creaxion Corporation and sports magazine publisher, Inside Publications, for allegedly "promot[ing] a brand of insect repellent using endorsements by Olympic gymnasts and advertisements disguised as regular content."[204] Additionally, they failed to disclose that that the consumer review program they oversaw consisted of company insiders reviewing

199. Press Release, Fed. Trade Comm'n, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos (July 11, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it.

200. Press Release, Fed. Trade Comm'n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.

201. *Id.*

202. Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 7, 2017, 11:11 AM), https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers.

203. *Id.*

204. Joseph Simons, Chairman, Fed. Trade Comm'n, Introductory Keynote: American Bar Association Consumer Protection Conference (Feb. 5, 2019); *see also* Creaxion Corp., Matter No. 1723066 (Nov. 13, 2018) (proposed consent order), https://www.ftc.gov/enforcement/cases-proceedings/172-3066/creaxion-corp.

the products.[205] Settlement agreements, such as the Creaxion settlement, only require social media influencers and companies to no longer advertise without properly disclosing if a social media influencer is paid or not.

However, these mechanisms by the FTC are still not enough. As stated by commenters on the FTC website, "[the FTC] need[s] to punish people who break FTC laws egregiously with real punishments . . . if the punishment for lying is a warning, and the lie makes them a lot of money, they'll tell the lie. They need to be fined an amount that makes it so that their lie was in fact, in the end, not profitable for them," and "I am sorry, that is all nice and shiny, but let's be frank: those criminals got away without anything changing and it's all the FTC's fault for not bringing them to justice."[206] These comments demonstrate even the public's dissatisfaction with the FTC's policing and support the proposition that a change needs to occur, primarily through the usage of fines. The current Chairman of the FTC, Joseph Simons, referenced the Creaxion case in a speech and agrees that the "inappropriate use of influencers" in social media endorsements needs to "remain a priority" and that the current remedies that the FTC employs needs to be "re[thought]."[207]

In order to get the attention of advertisers and influencers, the FTC should use its disgorgement authority. This authority derives from Section 13(b) of the Act which states that "the federal court [can] enjoin any conduct that is violating or is about to violate the Act."[208] This means that federal courts have the ability to "authorize[ ] . . . temporary restraining orders, preliminary injunctions, and final injunctions against such conduct."[209] Although this Section only references "injunctions" and not monetary relief, federal circuits have interpreted Section 13(b) to allow the FTC to seek monetary relief "on the theory that Congress's use of the word 'injunctions' permits

205. Simons, *supra* note 204; *see also* Creaxion Corp., Matter No. 1723066 (Nov. 13, 2018) (proposed consent order), https://www.ftc.gov/enforcement/casesproceedings/172-3066/creaxion-corp.

206. Daman Bouya and MaxiTB, Comment to *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 11, 2017, 5:12 PM), https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers.

207. Simons, *supra* note 204.

208. Thomas A. Donovan, Neil A. Baylis & Francesco Carloni, *U.S. Antitrust, Competition & Trade Regulation Alert: How Often Will the FTC Use Its Recently Reaffirmed Authority to Compel Disgorgement?*, K&L GATES (Sept. 8, 2018), http://www.klgates.com/how-often-will-the-ftc-use-its-recently-reaffirmed-authority-to-compel-disgorgement-09-06-2018/.

209. *Id.*

the FTC to seek equitable relief such as disgorgement."[210] For a court to order disgorgement, it "may exercise its equitable power only over the property casually related to the wrongdoing."[211] First, the FTC would need to "establish a reasonable approximation of the profits resulting from the violation[;]" second, the defendant would have the burden of showing that "the government's approximation of profits is unreasonable."[212] The FTC's disgorgement authority has not traditionally been used in deceptive endorsement cases that include social media influencers and advertisers, but the disgorgement authority has been used for online marketers.

For example, Bernheim and Rice Inc. agreed to pay $2.5 million to settle charges from the FTC.[213] According to the complaint filed in March 2017, the defendants offered free products without clearly disclosing that by accepting the "free" product, consumers were agreeing to be charged a monthly subscription.[214] Also, they allegedly misrepresented their return, refund, and cancellation policies.[215] Overall, this example demonstrates how the same risks in deceiving consumers by online marketers are also prevalent for consumers being deceived by social media influencers. However, the key difference is that the FTC is disgorging online marketers and not social media influencers. It is important that when a case dealing with social media influencers takes place in federal court, the FTC's disgorgement authority is used to deprive social media influencers and advertisers of benefit obtained through wrongdoing and restore consumers "to the position they would have enjoyed absent the wrongful conduct."[216] Also, similar to the United States Government Accountability Office's recommendation from stakeholders that the "FTC's internet privacy enforcement could be more effective with authority to levy civil penalties for first-time violations of the FTC Act," the FTC should also be granted the

210. Royall, *supra* note 138, at 94.
211. Donovan, *supra* note 208.
212. *Id.*
213. Francis Navarro, *Watch Out for these "free" kitchen and sports products*, KOMANDO (Sept. 16, 2017), https://www.komando.com/happening-now/419683/watch-out-for-these-free-kitchen-and-sports-products.
214. *Id.*
215. *Id.*
216. Donovan, *supra* note 208.

authority by Congress to issue civil fines for social-media influencer related violations of the Act.[217]

If disgorgement and civil fining authority are not viable options, then the FTC should also consider working with the social media platform to suspend the social media user or ban them from their site if there have been multiple violations of the law. This is an available option for the Advertising Standards of Canada ("ASC"), which is a not-for profit self-regulatory body that has been administering the Canadian Code of Advertising Standards since 1963.[218] Although the ASC does not have the ability to issue fines, it can still ask violators to cease their offending actions.[219] In the rare case of refusal, the ASC can also ask the social media platform, who is running the ad, to block its reoccurrence.[220] The Competition Bureau for Canada has the ability to fine and, unlike the FTC, has actually fined an advertiser $1.2 million "for having employees post fake reviews of its apps."[221]

If the FTC were to temporarily ban a social media influencer, the time period enforced could be for a week or even a few months, depending on the number of times the social media influencer has violated the Guidelines. For the temporary ban to be implemented, the social media influencer as well as the company should be allowed to be heard by the administrative judge or the district court. If the FTC were to permanently ban the social media influencer, then a more formal court proceeding process would more than likely need to take place to ensure that the ban is fair and not in violation of either party's First Amendment right. Overall, fines or banning social media influencers, temporarily or permanently, for their endorsement violations are important proposals that should be implemented into the Guidelines. These options would protect consumers and deter social media influencers and companies from improper endorsements on social media platforms.

217. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-52, INTERNET PRIVACY: ADDITIONAL FEDERAL AUTHORITY COULD ENHANCE CONSUMER PROTECTION AND PROVIDE FLEXIBILITY (2019) https://www.gao.gov/assets/700/696437.pdf.

218. Peter Nowak, *Canada's Ad Industry Cracking Down on Paid Endorsements on Social Media*, CBC (Aug. 30, 2016, 5:00 AM), http://www.cbc.ca/news/technology/influencers-paid-advertising-1.3739668.

219. *Id.*

220. *Id.*

221. *Id.*

B. Holding Companies Accountable and Improving the Complaint Process for Consumers

The FTC should revise its Guidelines to uniformly hold advertisers responsible for the failure of influencers they retain to comply with FTC disclosure requirements. This would hold advertisers more accountable and perhaps coerce them into acting diligently to ensure the influencers they hire are also more compliant with the FTC Guidelines. Additionally, this is important to address because it is usually not in a company's best interest to make sure that the social media influencer endorsing their product is disclosing that he or she is being paid. This would decrease the effectiveness of their message. Advertisers know that it is a difficult area for the FTC to regulate because social media has become so decentralized with bloggers and social media influencers taking over.[222] Additionally, key demographic groups receive media content primarily through social media platforms and the total ad spend of the social media influencer market will rise from "$500 million in 2015 to between $5 billion and $10 billion by 2020."[223] Overall, this is a very lucrative and cost-effective strategy for advertisers, causing them to forget or disregard the need to disclose, as well as smaller and mid-size companies not realizing or understanding that regulations apply to them as well.[224]

Advertisers' lack of fear of the repercussions by the FTC was also demonstrated by a 2016 survey of 347 influencers, conducted by the influencer platform SheSpeaks, which showed that "one out of four influencers said he or she had been asked not to disclose commercial arrangements with a brand."[225] However, the FTC has stated that "if law enforcement becomes necessary, [their] focus usually will be on advertisers or their ad agencies and public relations firms."[226]

The FTC may argue that they have effectively policed advertisers in the past with its settlement with Lord & Taylor. However, the FTC only held Lord and Taylor responsible, reactively—once the complaint was filed. Regardless, there are new social media influencers on social media platforms every day, making it hard for the FTC to police

222. *Social Media Endorsements: Where Will Marketers Draw the Line?*, THE WHARTON SCH. OF THE UNIV. OF PA.: KNOWLEDGE@WHARTON (May 23, 2017), http://knowledge.wharton.upenn.edu/article/social-media-influencers-will-marketers-draw-line/.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

each of them, but it is reasonable for the FTC to police brands. This could take place by the FTC requiring all advertisers to inform social media influencers to clearly and conspicuously disclose their relation to the advertiser to consumers. Currently, the FTC does not require advertisers to do this, but if it were recommended in updated FTC Guidelines, there would be an increased incentive for advertisers to assist in policing compliance.

The FTC should also invest in making the complaint process easier for consumers. This could be accomplished by revamping the current complaint system and by establishing an online portal for social media influencers requiring them to submit to the FTC any paid social media advertisements that they are endorsing on social media platforms. These options provide more proactive rather than reactive steps for protecting consumers. Currently, if a consumer would like to file a complaint with the FTC, they would submit the complaint to "www.ftc.gov/complaint" or call "1-877-FTC-HELP."[227] Although calling the FTC hotline is easy and straightforward, the steps for filing a complaint via the website are not. One must select a category relating to the issue, and the most relevant category for social media influencers would be "Internet Services, Online Shopping, or Computers" or choosing other.[228] If one were to choose the former option, then the site would direct him or her to choose a subcategory, and that subcategory would more than likely be "Internet Services" because it describes social networking within its options.[229] Once this option is selected the consumer must go through a number of pages before actually being brought to the page to tell the story of what occurred.

As a whole, this process is confusing and ineffective. The process is confusing because there is no true category specifically for social media influencers. This is concerning because of the vast amount of social media influencers who violate the FTC regulations on a regular basis and the possible hardships for consumers to alert the FTC of these violations. Instagram alone is a one-billion-dollar industry for social media influencers and companies, and statistics show that ninety-three percent of sponsored posts on Instagram violate FTC

227. *FTC Complaint Assistant*, FED. TRADE COMM'N, https://www.ftccomplaintassistant.gov/#crnt&panel1- (last visited Feb. 22, 2019).
228. *Id.*
229. *Id.*

guidelines.[230] With this information, it is alarming that there are other categories available for common violations on the FTC complaint portal, but not a category for social media influencers, even though it is likely that they violate the Act on a daily basis. Consequently, social media endorsement violations should at the very least be a subcategory compared to the current "other" option available.[231] Thus, the FTC should add a specific category labeled "Social Media Endorsement Violations," so that the process is easier for consumers to create timely complaints for deceptive advertising violations.

Further, the FTC could improve its policing efforts even more so by investing in an online portal system specifically for advertisers and social media influencers. This portal system would require social media influencers to provide direct links to their social media posts whenever they are endorsing a brand, in order to make sure that social media influencers are following the FTC Endorsement Guidelines. Additionally, the FTC could require advertisers and brands to submit the names and social media handles of social media influencers they have hired to endorse their products, so that the FTC has a specific list of individuals on social media platforms to police.

The portal could easily be used either through a direct link or through an application that social media influencers could download. The direct link would require social media influencers to go to the FTC website where they would provide their name or social media handle and the link from their endorsement via an input option. In contrast or in addition, depending on the budget, the FTC could also create and implement an application where social media influencers could input the link through a mobile app or allow the app to be synced with the social media influencers' specific social media platforms, so that they can directly link the endorsement through the social media platform, if that platform gives them permission.

Social media platforms would more than likely not see this as a major issue because it would be in their best interest to give permission to the FTC, so that major social media influencers would not be dissuaded from posting on their platform. The one problem with the application or link would be the costs of implementing it depending on the FTC's budget. However, endorsements for social media influ-

230. Alex D'Amore, *Over 93% of Celebrity Influencers are Violating FTC Guidelines*, SOC.MEDIAEXPLORER (July 6, 2017), http://socialmediaexplorer.com/content-sections/news-and-noise/93-celebrity-influencers-violating-ftc-guidelines-infographic/.

231. HOOFNAGLE, *supra* note 77, at 102.

encers is a billion-dollar industry, so it would more than likely be worth the investment by the FTC, in order to protect consumers. These options would hold social media influencers accountable for their actions because it would be apparent when they are purposely choosing to not follow the Guidelines, if their endorsement disclosures were not clear and conspicuous.

Additionally, the FTC would be more inclined to fine the violators if they either fail to provide the link to their post or if their post does not follow the proper guidelines. Although requiring social media influencers to report every endorsement post may seem excessive, the benefit to consumers tremendously outweighs this concern. The FTC would actually be adhering to its mission to protect consumers, and consumers would be reassured in knowing that what they view on social media is being adequately policed by the FTC.

Overall, the FTC could immensely improve its policing of brands and social media influencers by improving the complaint process for consumers and requiring social media influencers to notify the FTC of every endorsement that they post on social media platforms. However, reliance on uninformed consumers who are the target of influencers to police deception is very dubious, absent education efforts directed to consumers. Therefore, the focus on advertisers and companies for detection is the most appropriate, and it starts by properly educating them of the Guidelines.

C. Publicizing and Expanding the Educational Tools Available to Influencers and Consumers

Within the FTC's Bureau of Consumer Protection, there is a distinct division called the Division of Consumer & Business Education.[232] The purpose of this division is to help consumers and companies make informed decisions based on the free information provided from the division's blog posts, email alerts, and outreach events for its subscribers.[233] Additionally, this information to comply with the law is provided online, in print, and on video.

With advertisers employing new social media influencers on a daily basis, there should be more public knowledge of the FTC Act and Guidelines, and this awareness should be spearheaded by the Bureau of Consumer Protection and companies that hire social media

232. *Division of Consumer & Business Education*, *supra* note 21.
233. *Id.*

influencers. This is necessary because a lot of social media influencers lack awareness of the requirement of disclosure of advertisements. Also, more publicity would benefit consumers because they would understand what they should be looking out for in advertisements. Consequently, advertisers and social media influencers would be aware that they have more "eyes" on them, rather than just the FTC. Although the FTC has made a better effort of bringing awareness to social media influencers and the public with the issuance of ninety notices to social media influencers in violation of the Act and the FTC's live Twitter chat held in September 2017, the FTC's efforts are still trivial.

The FTC can also improve its efforts by increasing its presence on social media platforms. While the FTC has a Twitter handle, Facebook page, and YouTube profile, they do not have an Instagram or Snapchat account.[234] In order to bring awareness, the FTC should try to create accounts on all major social media platforms, including Instagram and Snapchat, the top platforms where violations of clear and conspicuous disclosure by social media influencers are taking place.

According to a study by Inkifi, out of the 71.5% of social media influencers who attempted to disclose their relationships with sponsors, only 25% of the disclosures were compliant with the Guidelines.[235] This demonstrates that the FTC needs to bring more public awareness to the Act and the Guidelines. Also, creating these accounts would be at no extra cost to the FTC because social media platforms are free to the public, and the FTC's Division of Consumer & Business Education already uses some social medial platforms to promote awareness of FTC regulations and Guidelines. Additionally, the FTC could even use its account on social media platforms to police social media influencers by commenting on posts that violate the Act. Thus, by the FTC increasing its social media presence, social media influencers and consumers will have an opportunity to remain educated and aware of the Act and the Guidelines, and the FTC could potentially police endorsements on social media platforms.

234. *See Stay Connected*, FED. TRADE COMM'N, https://www.ftc.gov/stay-connected (last visited Feb. 22, 2019).

235. Robert Williams, *Study: Just 25% of Instagram Influencers are Compliant with FTC Rules*, MOBILE MARKETER (Mar. 14, 2018), https://www.mobilemarketer.com/news/study-just-25-of-instagram-influencers-are-compliant-with-ftc-rules/519086/.

D. Recommending a Uniform Disclosure Statement Within the Guidelines for Social Media Influencers

Lastly, the Guidelines should create a highly recommended standard statement that includes the exact phrasing and placement necessary for compliant disclosure of social media influencers' endorsements on social media platforms. The standard disclosure statement could help decrease violations by social media influencers of the Act. Currently, the Guidelines requires endorsers to "clearly and conspicuously" disclose any material financial connection with advertisers in order to avoid a violation of the FTC Act.[236] A material financial connection is defined as "either the payment or promise of compensation prior to and in exchange for the endorsement."[237]

Although the Guidelines state what the FTC is looking for in disclosures, provides examples in question and answer format form common questions received, and holds twitter forum discussions for social media influencers, disclosure is still unclear. A recommended standard statement and proper placement of this statement for all social media platforms by the FTC would be the most effective mechanism to prevent violations by social media influencers of Section 5 of the Act. This disclosure statement could help prevent confusion and consumers would be able to quickly identify when a social media influencer is making an endorsement for a product or brand because they would be familiar with the standardized statement.

Standardized statements for consumer products are already a common practice for other federal agencies such as the U.S. Food & Drug Administration ("FDA"), for example, who oversees the approval and marketing of prescription drugs.[238] The FDA's authority is authorized by the Federal Food, Drug, and Cosmetic Act ("FD&C Act") that specifically addresses prescription drug advertising.[239] Similar to the FTC Act, the FD&C Act requires that advertisements for prescription drugs be "accurate and not misleading."[240] However, the FDA differs from the FTC because the FDA requires specific key

236. 16 C.F.R. § 255.5.

237. *Id.*

238. *Background on Drug Advertising*, FOOD & DRUG ADMIN., https://www.fda.gov/Drugs/ResourcesForYou/Consumers/PrescriptionDrugAdvertising/ucm071964.htm (last updated June 19, 2015).

239. *Id.*

240. *Id.*

components in product claim ads for prescription drugs.[241] Product claim ads name drugs and discuss its benefits and risks.[242] There are two type of product claims ads: (1) print and (2) broadcast (television, radio, telephone) claims ads.[243] The FDA requires that all product claims ads include in the main part of the ad: "the name of the drug, at least one FDA-approved use for the drug, and the most significant risks for the drug."[244]

Specifically, print product claim ads require a brief summary about the drug, and as of the Food and Drug Administration Amendments Act of 2007, advertisers are required to make the following statement: "You are encouraged to report negative side effects of prescription drugs to the FDA. Visit MedWatch or call 1-800-FDA-1088."[245] For broadcast product claim ads, advertisers must state the drug's most important risks and either all or a variety of sources for consumers to find the prescribing information for the drug.[246] Similar to print ads, broadcast ads are also provided by the FDA sources for finding a drug's prescribing information such as: a healthcare provider, a toll-free telephone number, the current issue of a magazine that contains a print ad, and a website address.[247] Overall, the FDA's standardized disclosure statements for drug advertising demonstrates that a standardized statement is feasible and that it is already used by a prominent government agency also tasked with protecting consumers from misleading advertisements.

In resistance to a required standardized statement and placement of disclosure, social media influencers may argue that social media platforms already incorporate ways for consumers to be aware of a social media influencer endorsing a product. For example, in 2017 Instagram launched a feature allowing social media influencers to make it more obvious when they are doing a post that is sponsored by a brand.[248] The new feature states "Paid partnership with . . ." at the

241. *Basics of Drug Ads: Overview*, FOOD & DRUG ADMIN., https://www.fda.gov/Drugs/ResourcesForYou/Consumers/PrescriptionDrugAdvertising/ucm072077.htm (last updated June 19, 2015).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Katie Notopoulos*, Instagram Made a Feature to Disclose Celebrity #Sponsored Posts*, BUZZFEEDNEWS (June 14, 2017), https://www.buzzfeednews.com/article/katienotopoulos/instagram-made-a-feature-to-disclose-celebrity-sponsored.

top of the Instagram post or story.[249] Also, YouTube in 2016 added a video feature that adds visible text to its videos for the first few seconds a viewer watches so that viewers are informed of a paid promotion.[250] This feature also allows social media influencers to add the text disclosure to past YouTube videos.[251] YouTube is also attempting to police paid promotion on their platform by requiring social media influencers to check a specific "video contains paid promotion" box in their Video manager.[252]

Although this would be a globally standardized option for social media influencers, the FTC has not approved this feature as compliant with the Guidelines and overall Act.[253] The FTC does not see the features as a guaranteed effective way for social media influencers to clearly and conspicuously disclose the connection to a brand.[254] The FTC is also concerned about the placement: if the disclosure is in a simple-to-read font with a contrasting background and if the disclosure is worded in a way that is understandable to a lay person.[255]

Although it is convenient and proactive for social media platforms to create their own globalized disclosure feature for social media influencers, ultimately, the FTC believes the responsibility for compliance with the "clear and conspicuous" disclosure standard is on the social media influencer and the brand, not the social media platform.[256] However, the creation and implementation of specific features on social media platforms could be a great opportunity for the FTC to collaborate with the platforms to create a standardized disclosure statement at presumably no cost to the FTC, while also decreasing disclosure violations by social media influencers and protecting consumers from deceptive social media advertisements.

CONCLUSION

As explained in this Comment, the First Amendment does not protect deceptive commercial speech, the FTC doctrine on deception

249. *Id.*
250. Muli Salem, *A New, Optional Feature for Paid Promotion Disclosure*, YouTube (Oct. 4, 2016), https://youtube-creators.googleblog.com/2016/10/a-new-optional-feature-for-paid.html.
251. *Id.*
252. *Id.*
253. Tricia Meyer, *Takeaways from FTC Twitter Chat on Disclosure*, PMA (Sept. 20, 2017), https://thepma.org/takeaways-ftc-twitter-chat-disclosure/.
254. *Id.*
255. *Id.*
256. *Id.*

is well developed, and the FTC has correctly extended the doctrine to social media influencers and begun some enforcement. However, the current Guidelines are inadequate to address the growing problem of deceptive influence. Hence, this Comment has provided an array of suggested reforms for the FTC that would provide greater deterrence by: (1) disgorging or banning social media influencers that violate Section 5 of the FTC Act; (2) improving the complaint process for consumers and holding companies responsible for social media influencers actions; (3) providing consumers, influencers, and companies with more avenues of information through the Bureau of Consumer Protection; and (4) creating a specific standardized statement that the FTC will recommend for social media influencers to use in order to properly disclose to consumers.

COMMENT

Fostered or Forgotten? Leveling the Playing Field for Foster Youth Aging Out of the Foster Care System

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"Aging out of foster care without a permanent home is the highest-risk outcome for a foster youth."[1]

INTRODUCTION

On the morning of his eighteenth birthday, Rashaad Piper was "dumped" at the local shelter because the State of Louisiana no longer had a legal obligation over him.[2] Rashaad was placed in foster care at the age of eight after reports of domestic abuse.[3] For the next ten years of his life, Rashaad endured over a dozen different foster care placements.[4] Then, as required by law, he aged out. Rashaad aged out with minimal skills, no support, several mental health disorders, and unfulfilled anti-psychotics prescriptions.[5] Four years later, Rashaad Piper is once again in the custody of the state—this time as an inmate.[6] He pleaded guilty to armed robbery which he committed with the help of another person suffering from severe mental illness.[7] Rashaad is now serving his five-year sentence at Elayn Hunt Correctional Center[8] where he will likely be the most secure and stable he has ever been.

1. STATISTICS ON YOUTH AGING OUT OF FOSTER CARE, NATIONAL CASA Chapter 7 (2018), http://nc.casaforchildren.org/files/secure/community/programs/Training/2016%20Pilot/Statistics%20on%20Youth%20Aging%20Out%20of%20Foster%20Care.PDF (citing a collection of statistics from the National Alliance to End Homelessness, Chapin Hall Midwest Study, Northwest Foster Care Alumni Survey, and Chapin Hall Midwest Study at Age 21).

2. Richard A. Webster, *'They Are Dumping Them': Foster Child Sent to Shelter on 18th birthday, Now in Prison*, NOLA.COM (Oct. 17, 2018, 05:45 AM), https://www.nola.com/expo/news/erry-2018/10/0edd6b617d1098/they-are-dumping-them-foster-c.html.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

It is too late to intervene in Rashaad Piper's case. The foster care system failed him. Sadly, Rashaad's story is not unique. Each year over 23,000[9] foster youth across the country "age out"[10] of the foster care system with no support and nowhere to go.[11] New legislation is needed to help foster youth transition from foster care to self-sufficiency.

Every state establishes an age of majority at which all state responsibility over a foster child is terminated.[12] This age ranges from eighteen to twenty-one.[13] To a foster youth, reaching the age of majority means losing everything: health care, financial and emotional support, and most troubling—housing.[14] Up to thirty-seven percent of foster youth who age out of foster care experience homelessness, and up to half experience precarious housing arrangements.[15] The adoption of federal legislation such as the John H. Chafee Foster Care Independence Program under the Foster Care Independence Act of 1990, and later the Fostering Connections to Success and Increasing Adoptions Act of 2008, have failed to make the impact in foster care reform that was anticipated and needed. Providing adequate transitional housing[16] assistance to former foster youth up to age twenty-three will increase these youth's ability to attain higher education, secure employment, and avoid criminal involvement.

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9. *51 Useful Aging Out of Foster Care Statistics: Social Race Media,* THE NAT'L FOSTER YOUTH INST. (May 26, 2017), https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/. The National Foster Youth Institute ("NFYI") is a national non-profit organization that works with legislators in the federal government and across the country to reform the child welfare system and enact laws aimed at protecting children and families.

10. "Age out" is the term used to describe children that will leave the foster care system at the age of majority because they were not reunified with their parents, placed in a permanent home, or were not adopted. Throughout this Comment the terms "former foster youth," "emancipated foster youth," or reference to a foster youth who has "aged out" are used interchangeably.

11. THE NAT'L FOSTER YOUTH INST., *supra* note 9 (finding that more than half of all young men in foster care also age out with criminal convictions).

12. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, tit. II, § 201(a)(8)(A), 122 Stat. 3949, 3957 (2008) (codified at 42 U.S.C. 675).

13. *Id.* § 201(a)(8)(B)(II)(iii).

14. Webster, *supra* note 2.

15. DION ET AL., U.S. DEP'T OF HOUSING AND URB. DEV., HOUSING FOR YOUTH AGING OUT OF FOSTER CARE, at ix (2014) ("The study was conducted by Mathematica Policy Research and Chapin Hall at the University of Chicago on behalf of the U.S. Department of Housing and Urban Development (HUD), Office of Policy Development and Research, and the U.S. Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation").

16. "Transitional Housing" refers to housing assistance that is usually coupled with transitional services such as therapy or skills courses that will enable emancipated foster youth to transition from foster care to self-sufficiency.

It is necessary that like other young adults, former foster youth have some form of support during difficult times. This Comment advocates for an amendment to current legislation which (1) has a deficiency in transitional housing support and places stringent eligibility requirements for the limited housing aid available; (2) has not increased the Independent Living Program's funding in nearly two decades; and (3) limits the amount of federal funds that can be used towards housing assistance. This Comment does not argue for an extension of foster care and all the services associated with being in foster care. Instead, this Comment argues that transitional housing assistance should be provided for youth aging out of the foster care system until age twenty-three.

Part I of this Comment will look at the history and structure of the foster care system in the United States as well as the governing federal law. Part II will address the importance of stable housing and the negative impact that the lack of housing for former foster youth has on these youth and on society at large. Lastly, Part III will discuss potential solutions, including: (1) amending current legislation to uniformly provide transitional housing assistance to emancipated foster youth up to age twenty-three; (2) increasing *Chafee*'s funding; and (3) removing the thirty percent spending limitation available for housing.

I. BACKGROUND AND LEGAL FRAMEWORK OF THE FOSTER CARE SYSTEM

The Supreme Court has long held that "the institution of the family is deeply rooted in this Nation's history and traditions,"[17] and that "the custody, care and nurture of the child reside first in the parents," which the Court has "respected [as] the private realm of family life which the state cannot enter."[18] However, under the *parens patriae*[19] power and the states' police power, a child may be removed from the parent and into the custody of the court if it is in the best interest of the child.[20]

17. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

18. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

19. *Parens patriae* is Latin for "parent of his or her country" and it is "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability," such as being underage. *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2016).

20. In re Jessica C., 505 N.Y.S.2d 321, 324 (N.Y. Fam. Ct. 1986) (stating that "the State, as *parens patriae* may intervene in parent-child relationship or its functional equivalent within family setting where it is necessary to protect a child.").

Although states have wide deference in their implementation of foster care related programs, federal statutes and policies fundamentally influence the foster care system. Current foster care legislation includes the Adoption and Safe Families Act of 1997,[21] the Foster Care Independence Act of 1999,[22] the Fostering Connections and Adoptions Act of 2008,[23] and most recently the Family First Prevention Service Act of 2018.[24] These past three decades of legislation have assumed some responsibility for preparing foster youth for the transition to self-sufficiency and adulthood, but there has been a lack of focus on housing support upon foster care exit.

The Foster Care Independence Act of 1999 was the first piece of legislation focused on foster youth aging out of the foster care system. The Act's purpose is to amend Title IV - Part E (Foster Care and Adoption Assistance) of the Social Security Act to "provide States with more funding and greater flexibility in carrying out programs designed to help children make the transition from foster care to self-sufficiency."[25]

One of the most notable aspects of the Foster Care Independence Act is the John H. Chafee Foster Care Independence Program ("*Chafee*"). *Chafee* is designed to "identify children who are likely to remain in foster care until 18" and to assist these children in: (1) "obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, [ ] budgeting and financial management skills . . . "; (2) attaining "the education, training, and services necessary to obtain employment"; (3) preparing "for . . . postsecondary training and education institutions"; (4) providing "personal and emotional support . . . through mentors and the promotion of interactions with dedicated adults"; and (5) providing "financial, *housing*, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21."[26] *Chafee* makes it clear that independent living is

21. *See generally* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

22. *See generally* Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (1999).

23. *See generally* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110–351, 122 Stat. 3949 (2008).

24. The Family First Prevention Service Act of 2018 was enacted as Title VII and a subsection of the Bipartisan Budget Act of 2018. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50701, 132 Stat. 232 (2018).

25. *See generally* Foster Care Independence Act.

26. *See* Foster Care Independence Act § 477(a)(1)–(5) (emphasis added).

not a permanent goal which should replace a goal of adoption or reunification with a child's biological family. However, once a child has been identified as one who will potentially remain in the foster care system until the age of majority, independent living services should be provided "beginning several years before high school graduation and continuing, as needed."[27]

The Foster Care Independence Act essentially doubled *Chafee's* budget from $70 million to $140 million.[28] Of the $140 million appropriated for this program, $2.1 million is set aside for program evaluations which are mandated by the Act.[29] The $137.9 million remaining is then divided among the states in proportion to the number of foster youth who reside in each State.[30] Once a state receives federal funding, it is then required to provide a twenty percent match using state funds.[31] Title IV of the Social Security Act was again amended in 2002 to grant states an additional $60 million to fund the Education and Training Voucher Program ("ETV") which "assist[s] the youth to develop skills necessary to lead independent and productive lives."[32] This funding is available to youth who will age out of the foster care system or who have otherwise exited the foster care system at the age of sixteen through guardianship or adoption.[33]

Prior to the implementation of the Foster Care Independence Act, states were completely prohibited from using Social Security Title IV funding on housing.[34] After realizing that securing housing was one of these youth's greatest needs, *Chafee* allowed for some funding to be used for this purpose.[35] However, *Chafee* capped how much of the states' Independent Living Program funding can be spent on hous-

27. *Id.* § 477(a)(5).

28. *Id.* § 477(h); *see also* H.R. Rep. No. 106-182, at 49 (1999).

29. Foster Care Independence Act § 477 (f)(1)(A) (requiring that each participating state collect and report data measuring performance. Performance is measured on "educational attainment, high school diploma, employment, avoidances of dependency, homelessness, nonmarital childbirth, incarceration, and risk behaviors."). It is important to note that even with this requirement in place, program developers and policy makers have few national studies which results in little knowledge on how to best prevent homelessness or instable housing arrangements for this vulnerable population. This lack of knowledge is arguably contributing to the high percentages of homelessness for this population and to the inefficiency of housing programs.

30. H.R. Rep. No. 106-182, at 24.

31. Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV., 183, 197 (2008).

32. John H. Chafee Foster Care Program for Successful Transition to Adulthood, 42 U.S.C. § 677(h)(2) (2002).

33. 42 U.S.C. § 677(i)(2) (2002).

34. Foster Care Independence Act § 477(h).

35. 42 U.S.C. § 677(a)(4) (2002).

ing at thirty percent of their annual budget.[36] While allowing the use of *Chafee* funds on housing assistance was a much-needed legislative amendment, this amendment was done without increasing the overall budget. Thus, the thirty percent of *Chafee* funds that can now be allocated towards housing assistance is taken away from other previously established independent living services.

Seven years after the enactment of the Foster Care Independence Act, the Adoption and Safe Families Act of 1997 ("ASFA")[37] was passed and subsequently became the primary federal statute governing entry into and placement under the current foster care system.[38] Although states are tasked with determining the circumstances under which removal is within the best interest of the child, ASFA provides general guidance.[39] Under ASFA, removal is within the best interest of the child when: (1) "the parent has subjected the child to aggravated circumstances . . . which . . . may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse"; (2) the parent has committed murder or involuntary manslaughter; (3) the parent "committed a felony assault that results in serious bodily injury to the child or another child of the parent"; or (4) "the parental rights of the parent to a sibling have been terminated involuntarily."[40] After removal, a child will be adjudicated abused or neglected after the state makes such a showing or after the parent stipulates to the abuse or neglect.[41] Once it has been determined that a child has been abused or neglected as defined by the state, the child will be placed in the foster care system and be subjected to the deadlines and procedures outlined in ASFA.[42]

Foster care is not meant to be a permanent solution. Foster care is supposed to aid parents of children who have been adjudicated abused or neglected by providing services and guidance so that parents can be reunited with their children.[43] According to ASFA, "reasonable efforts" must be made to reunify families.[44] However, other permanency goals should be explored when reunification is not a via-

36. *Id.* § 677(a)(3)(B).
37. *See generally* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. 671(a)(15)).
38. *Id.*
39. *Id.*
40. *Id.* § 101(a)(15)(D)(i)–(iii).
41. *Id.*
42. *Id.* § 101(a)(15)(E)–(F).
43. *Id.* at § 101 (a)(15)(B).
44. *Id.* (stating that "reasonable efforts shall be made to preserve and reunify families").

ble option. Other permanency goals include adoption, guardianship,[45] and independent living as a last resort.

One of ASFA's main purposes was to address the foster care drift that often makes independent living the only realistic permanency goal for many foster youth.[46] "Foster care drift" is the term used to describe a phenomenon where "[c]hildren often spend years in care, bouncing from foster home to biological home and back [or from foster home to foster home], repeatedly suffering abuse, and finally drifting toward adulthood as orphans in fact if not in law."[47] ASFA attempts to address the foster care drift by promoting adoption.[48] To do this, ASFA requires that states seek to terminate parental rights when a child has spent fifteen out of the last twenty-two months in the foster care system.[49] While this solution largely benefits younger children in foster care, older children and special needs children are less likely to be adopted and more likely to remain in the foster care system until they reach the age of majority.[50]

Congress once again amended Title IV - Part E of the Social Security Act by enacting the Fostering Connections to Success and Increasing Adoptions Act of 2008 ("Fostering Connections Act").[51] The Fostering Connections Act gives states flexibility to extend foster care or foster care related services from age eighteen to ages nineteen, twenty, or twenty-one as the state elects.[52] The Fostering Connections Act allows states to get federal reimbursements for the cost of foster

45. *Id.* §101(b) (defining legal guardianship as "a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making").

46. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 638–39 (1999).

47. *Id.* at 638.

48. *See generally* Adoption and Safe Families Act.

49. *Id.* § 103(a)(3).

50. CHILDREN ADOPTED FROM FOSTER CARE: CHILD AND FAMILY CHARACTERISTICS, ADOPTION MOTIVATION, AND WELL-BEING, U.S. DEP'T OF HEALTH & HUM. SERVICES OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, at Tbl. 1 (2011), https://aspe.hhs.gov/basic-report/children-adopted-foster-care-child-and-family-characteristics-adoption-motivation-and-well-being (showing that forty-five percent of children adopted from foster care were under the age of one, thirty-five percent were between the ages of one and five, and only twenty percent were six years of age or older at the time they were adopted).

51. *See generally* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110–351, 122 Stat. 3949 (2008).

52. *Id*. Title IV- Part E eligible youth in "extended foster care may receive the child welfare subsidy directly from the state (rather than the state giving the subsidy to a caregiver) and use the subsidy to pay for housing in a supervised yet independent living setting . . . ." DION ET AL., *supra* note 15, at 2.

care for Title IV- Part E eligible youth.[53] A youth is eligible for federal reimbursement after attaining eighteen years of age if he or she is: (1) "completing secondary education or an equivalent credential"; (2) "enrolled in an institution which provides post-secondary or vocational education"; (3) "participating in a program to promote or remove barriers to employment"; (4) "employed for at least 80 hours per month"; or (4) incapable of doing these activities due to a medical condition.[54]

Two other important aspects of the Fostering Connections Act impacted foster youth aging out of foster care. First, the Fostering Connections Act expanded the type of reimbursable dwellings to include supervised living arrangements such as host homes or college dormitories.[55] Secondly, the Fostering Connections Act requires that a caseworker assist each youth to develop an age out transition plan ninety days prior to reaching the state's age of majority.[56] This transition plan requires that the child be provided with a "personalized [plan] at the direction of the child, includ[ing] *specific options on housing* . . . ."[57] Although this personalized plan is mandated by the Act, actual rendition of services included within these plans are not required.[58]

Lastly, and outside the scope of this Comment, is the Family First Prevention Service Act of 2018.[59] The purpose of this subtitle is to enable states to use Title IV funds "to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services."[60] One notable aspect of this subtitle is the limitations imposed on the amount of federal funding that can be used for youth

53. *See generally* Fostering Connections to Success and Increasing Adoptions Act of 2008. Even before the implementation of the Fostering Connections Act, states could elect to extend foster care without receiving federal reimbursement.

54. Fostering Connections to Success and Increasing Adoptions Act § 201 (a)(II)–(III) (noting that eligibility is also extended to youth who were adopted or who entered a kinship guardian agreement after attaining sixteen years of age).

55. DION ET AL., *supra* note 15, at ix.

56. Fostering Connections to Success and Increasing Adoptions Act § 202 (3)(H).

57. *Id.* (emphasis added).

58. *Id.*; *see also* Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster: Defining Reasonable Efforts to Improve Consequences of Aging Out*, 17 CUNY L. REV. 145, 149 (2013).

59. The Family First Prevention Service Act of 2018, was enacted as Title VII and a subsection of the Bipartisan Budget Act of 2018. Bipartisan Budget Act, 42 U.S.C. § 622 (2018).

60. *Id.*

in foster care residing in group homes, child care institutions, agency operated foster homes, or other non-family foster homes.[61] Due to the recency of the enactment of this subsection and states' ability to defer enactment of the provision limiting the use of non-family foster homes, there is no data at this time on the impact of this law.

II. PROVIDING HOUSING ASSISTANCE WILL IMPROVE FORMER FOSTER YOUTH'S OUTCOMES AND WILL BENEFIT SOCIETY AT LARGE

On any given day, there are approximately 438,000 children in foster care.[62] Between 23,000 and 26,000 of these foster youth are forced to leave their foster homes once they reach the age of majority each year.[63] Notwithstanding the fact that foster children are exposed to traumatic experiences while in foster care, their fate does not fare any better once they have aged out of the system. At the very least, throughout the time a foster child spends in foster care, the state provides access to social workers, and foster parents who provide emotional support, housing, and basic necessities.[64] This support is abruptly taken away from the foster youth when he or she reaches the age of majority.

Part A of this section will detail the importance of having stable housing and the correlation between stable housing and self-sufficiency. Part B will look at the factors contributing to the housing instability for former foster youth, while Part C points to the current transitional housing assistance available to emancipated foster youth and argues that these programs are insufficient. Lastly, Part D of this section describes the negative impact that the lack of stable housing is having on former foster youth and on society at large.

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61. The Social Impact Partnership Application was enacted as Title VII and a subsection of the Bipartisan Budget Act of 2018. Bipartisan Budget Act, 42 U.S.C. § 1397n-1 (2018).

62. *Foster Care*, CHILDREN'S RIGHTS, https://www.childrensrights.org/newsroom/fact-sheets/foster-care/.

63. *See* AGING OUT OF FOSTER CARE IN AMERICA, JIM CASEY YOUTH OPPORTUNITIES INITIATIVE 2013, https://www.aecf.org/m/resourcedoc/JCYOI-AgingOutofFosterCareinAmerica-Handout-2013.pdf. The actual number of foster youth who age out ranges from year to year.

64. *See* Samantha Ley, *Foster Care Social Worker Job Description*, THE NEST, https://woman.thenest.com/foster-care-social-worker-job-description-9242.html (last visited Feb. 26, 2019); *see also* What Do Foster Carers Do? HSC ADOPTION AND FOSTER CARE, http://www.adoptionandfostering.hscni.net/fostering/what-do-foster-carers-do (last visited Feb. 26, 2019).

A. The Importance of Stable Housing

According to Maslow's hierarchy of needs, a widely-accepted theory, there are five levels of need beginning with the most basic human necessities to the more complex personal needs.[65] The first level includes biological and psychological needs such as air, food, drink, shelter, warmth, sex, and sleep.[66] The second level encompasses safety needs—protection from elements, security, order, law, limits, stability, and freedom from fear.[67] The third level is social needs such as a sense of belongingness, affection, and love from co-workers, family, friends, and romantic partners.[68] The fourth level deals with esteem needs such as achievement, mastery, independence, status, dominance, prestige, self-respect, and respect from others.[69] Lastly, the fifth and ultimate level deals with the most complex self-actualization needs.[70] Self-actualization includes realizing personal potential, self-fulfillment, seeking personal growth, and peak experiences.[71]

Every person starts off at level one and can only move to the next level in the hierarchy after satisfying the previous level.[72] It is important to note that having shelter is among the most basic necessities alongside food and sleep.[73] If one lacks shelter, it is almost impossible to achieve other important needs such as safety, self-respect, and a sense of belongingness.[74] This is in part why having adequate housing is vital.

Furthermore, the difference in having a house and having a home is significant in a person's ability to achieve the more complex human needs. Research has been done on the necessary housing attributes based on Maslow's hierarchy of needs.[75] This research shows that to meet a person's needs, housing should be more than just a physical structure.[76] Experts categorize housing under three different catego-

65. Saul McLeod, High Gate Counselling Center, Maslow's Hierarchy of Needs 2 (2007), http://highgatecounselling.org.uk/members/certificate/CT2%20Paper%201.pdf.
66. *Id.* at 4.
67. *Id.* at 3.
68. *Id.*
69. *Id.*
70. *Id.*
71. McLeod, *supra* note 65.
72. *Id.* at 2.
73. *Id.* at 7.
74. *Id.*
75. Sayyed Javad Asad Poor Zavei & Mahmud Mohd Jusan, *Exploring Housing Attributes Selection Based on Maslow's Hierarchy of Needs*, 42 Procedia and Behavioral Sciences 311, 315 (2012).
76. *Id.* at 312.

ries: shelter, house, and home.[77] Shelter would include any space provided to protect people, and a house is a more constant physical structure.[78] In contrast, a home is connotative of the deep structure of a social system reflective in family relationships.[79] This difference is fundamental.

Having a stable home creates "place attachment" which is one of the most influential factors in a human's psychological health, and in the development of one's identity.[80] Place attachment also aids in the development of ties to the community and ultimately a sense of responsibility to society.[81] When a person, particularly a young person, lacks stable housing and thus lacks place attachment they often experience what psychologists refer to as "uprootedness."[82] Uprootedness describes a traumatic stress reaction to the destruction of one's emotional ecosystem which interrupts personal identity, psychological health, and overall well-being.[83]

In addition to housing being a basic necessity, housing stability is intertwined with self-sufficiency.[84] Those with stable housing are more likely to stay in school, maintain employment, and to have access to physical and mental health care.[85] Therefore, homeless youth have an increased risk of physical and sexual victimization and substance abuse problems which often leads to deterioration of physical and mental health.[86] Even those former foster youth fortunate enough to have some form of shelter, often lack a stable home and the personal and societal benefits that come with place attachment.[87] The lack of transitional housing assistance, and a multitude of factors make it difficult for emancipated foster youth to obtain stable housing on their own.

77. *Id.* at 314.
78. *Id.*
79. *Id.*
80. *Id.* at 312.
81. Zavei & Jusan, *supra* note 65.
82. *Id.*
83. *Id.*
84. DION ET AL., *supra* note 15, at ix.
85. *Id.*
86. *Id.* at 2.
87. *See id.* at ix ("Studies that estimate that 25 to 50 percent of young adults exiting [foster] care couch surf, double up, move frequently within a short period of time, have trouble paying rent, and face eviction.").

B. Factors Contributing to the Housing Instability for Former Foster Youth

Transitional housing support for former foster youth is indispensable. Unlike most youth in the general population, foster youth often have "deficits in human and social capital, limited supportive relationships with adults, and a greater likelihood of being young parents or having a criminal record."[88] One significant barrier faced by most emancipated foster youth is the housing market which evidences a shortage of housing options for this vulnerable population.[89] Former foster youth often lack rental and credit history, and co-signers, which makes securing housing a difficult process.[90] Further, the disproportionate number of African American and Hispanic youth in foster care, leaves these youth to face racial discrimination when seeking housing.[91] Other factors include the lack of social capital. Foster youth, both current and former, often lack high school diplomas or GEDs, they are less likely to attend college, and they have fewer opportunities to establish a network of adults that can aid them in securing a job.[92] Other more practical barriers exist such as the inability to budget, time management, or knowing how to fill out housing or job applications.[93] These barriers coupled with child welfare agencies' insufficient resources and services leave foster youth unprepared for adulthood and reliant on housing programs and social services.[94]

C. Transitional Housing Assistance Currently Available to Former Foster Youth

To deal with the growing number of former foster youth who experience homelessness and housing instability, federal and state governments have implemented various housing assistance programs.[95]

88. *Id.* at ix, 7 (finding that young men aging out of the foster care system are more likely to have been involved with the criminal justice system than their peers in the general population).

89. *Id.* at 8 ("Despite laws against racial discrimination in the housing market, audit studies consistently demonstrate its persistence, posing a real problem for former foster youth, who are disproportionately non-white.") (internal citations omitted).

90. DION ET AL., *supra* note 15 at ix, 8. ("Those who are 18 or older may find that landlords are reluctant to rent to them because they lack a history of stable employment and good credit.").

91. *Id.* at 8.

92. *Id.* at 6.

93. *Id.* at 6–7.

94. *Id.* at ix.

95. *Id.* at ix–x (identifying programs like the Transitional Living Program, Public housing and the Housing Choice Voucher program, Continuum of Care, and Family Unification Program that continue in their efforts to fill in the housing gap).

The U.S. Department of Health and Human Services ("HHS") has four key policies that support youth exiting foster care.[96] These policies include the Fostering Connections Act which, as mentioned in Part I of this Comment, extends the age of eligibility for Title IV - Part E child welfare reimbursement from ages eighteen to twenty-one for youth who meet certain criteria;[97] the *Chafee* Foster Care Independence Program which provides funding for independent living services for youth in the foster care system;[98] the Transitional Living Program which provides supportive services to homeless youth ages sixteen to twenty-one; and the Educational and Training Voucher Program ("ETV") which provides up to $5,000 annually for youth who are attending a qualified postsecondary institution.[99] In addition to these programs, the U.S. Department of Housing and Urban Development ("HUD") also provides some housing support for former foster youth.[100] HUD programs include the Housing Choice Voucher ("HCV") and Continuum of Care programs,[101] as well as the Family Unification Program.[102]

These federal housing programs are not meeting the housing needs of a vast number of former foster youth. The main federal housing program is the Transitional Living Program which funds local and state governments, community-based organizations, and tribal entities to provide services and long-term housing for youth ages sixteen to twenty-one who cannot return home for a variety of reasons.[103] "Long-term" housing through Transitional Living Programs is limited to twenty-one months and funding is limited.[104]

The Education and Training Voucher Program ("ETV") also has major deficiencies. ETV's financial cap of $5,000 annually per eligible youth largely ignores these youth's related expenses such as food, clothing, and transportation needs.[105] This is particularly problematic because foster youth are often forced to take on full time jobs while

96. DION ET AL., *supra* note 15, at ix.
97. *Id.*
98. *Id.* at x.
99. *Id.*
100. *Id.*
101. *Id.* (stating that Housing Choice Voucher programs may give preference to former foster youth on their waiting lists, and that Continuum of Care receives HUD annual grants and is a community-based program that advocates for those experiencing homelessness by identifying needs and solutions to those needs).
102. DION ET AL., *supra* note 15.
103. *Id.*
104. *Id.* at 10.
105. *See id.* at 9.

attending school to supplement their ETV funding. Taking on full time employment while attending school often places a strain on a student's academic progress, which can lead to the revocation of ETV vouchers for not making "satisfactory progress"[106] towards their degree or program. ETV also ignores that for those few foster youth who manage to secure on-campus college housing, they are left with no housing during winter and summer breaks.[107] This lack of stable housing significantly affects foster youth's ability to make satisfactory progress in attaining higher education, often leaving foster youth more likely to drop out of school and lose the temporary housing that they had secured.

The Housing Choice Voucher program ("HCV"), formerly known as Section 8, subsidizes units to tenants for the equivalent of thirty percent of their adjusted gross income.[108] HCV vouchers can be retained if the tenant chooses to move and can be used for any housing unit that meets minimum health and safety standards.[109] While most former foster youth would meet the income requirements of HCV, the demand for these vouchers is high and waitlists are extensive.[110] Although HCV does not provide any supportive services that many former foster youth need, HCV is among the best housing programs for former foster youth because there is no time limitation on the housing vouchers.[111]

The Family Unification Program ("FUP") primarily provides vouchers to subsidize housing for families involved in the child welfare system whose lack of housing was the primary reason or is a delay to reunification.[112] Former foster youth, ages eighteen to twenty-one, who do not have adequate housing, or who left foster care at age sixteen or older, are also eligible for the FUP vouchers.[113] The FUP does not have a time limitation when dealing with families working

106. *See* John H. Chafee Foster Care Independence Program, 42 U.S.C. § 677(i)(3) (2008).
107. *See* DION ET AL., *supra* note 15, at 9.
108. *Id.* at 10.
109. *Id.*
110. *Id.*
111. *Id.* at 11.
112. *Id.* at 10.
113. DION ET AL., *supra* note 15, at 10–11.

towards reunification.[114] In contrast, the FUP, when awarded to former foster youth, is limited to eighteen months of rental assistance.[115]

In addition to these core national housing programs, an environmental national scan of state and local programs revealed fifty-eight diverse programs that serve youth who age out of foster care.[116] These fifty-eight programs can be categorized into three major types of housing programs: (1) single-site with supervision and services; (2) scattered-site with less supervision and support; or (3) multiple housing types and varying levels of supervision and support.[117] These programs are generally funded from a variety of sources including *Chafee* dollars, state and local funding, as well as private sector funding which includes foundations, corporations, and individual donors.[118]

Despite these programs' efforts to meet the housing needs of former foster youth, these programs are just not enough. The programs usually service a wide demographic of youth in need of housing such as youth exiting the juvenile justice system or other homeless youth.[119] Most of these programs only serve youth ages eighteen to twenty-one leaving very few programs that reach youth as young as sixteen and as old as twenty-four.[120] Some of these programs specifically target youth exhibiting mental health problems or other disabilities.[121] Most of these programs have stringent eligibility requirements surrounding employment, schooling, and the ability to contribute towards rent payments.[122] These programs' limited availability, long waitlists, housing time restrictions, and stringent eligibility requirements still leave many foster youth homeless or in precarious housing arrangements.

114. *Id.* at 11. In fact, FUP prohibits termination of housing for these parents even if the children have reached the age of majority or if the parent's parental rights have been involuntarily terminated.

115. *Id.*

116. *Id.* at 12 ("These programs identified do not represent the entire universe of housing programs, and descriptions reflect the data that could be obtained through a web-based search . . . .").

117. *Id.* at xi.

118. There is little information on the effectiveness of these housing programs on a national level. As a result, efforts such as The National Youth in Transition Databases ("NYTD") outcome surveys and the *Housing for Youth Aging Out of Foster Care* have been designed to begin filling in gaps of knowledge to help prevent homelessness among emancipated foster youth.

119. DION ET AL., *supra* note 15, at 12.

120. *Id.*

121. *Id.*

122. *Id.*

D. The Lack of Stable Housing is Negatively Impacting Former Foster Youth and Society at Large

Foster youth face a myriad of challenges that are exacerbated by the lack of stable housing. Several studies have found that former foster youth have high rates of housing mobility and are more likely to have been evicted.[123] Although housing mobility is normal among young people, multiple moves within a short timeframe creates harmful instability. This is evidenced by the disproportionately high rates of mental and physical medical conditions, and the disproportionately low levels of employment and educational attainment among foster youth.[124]

According to a study done by Harvard Medical School, former foster children suffer posttraumatic stress disorder at twice the rate of U.S. War Veterans.[125] An estimated thirty to eighty percent of these youth have chronic medical conditions, about fifty percent are high school dropouts, more than half are unemployed, and only six percent earn a two or four-year degree.[126] As stated in Part A of this section, stable housing is intertwined with self-sufficiency and young people with housing stability are "better able to stay in school and maintain employment, and they have an easier time accessing needed physical and mental health care and social services."[127]

As a society, we must stop ignoring the needs of these youth not only because we have a moral obligation to take responsibility over these children but also because it is having a negative financial impact on tax payers. Failing to provide foster youth with the tools they need to become self-sufficient is costing billions of dollars to taxpayers. On average, taxpayers pay $300,000 per foster youth who ages out of the foster care system.[128] This covers among other things, public assistance, incarcerations fees, or unemployment wages.[129] With an average of 26,000 foster youth aging out of foster care each year, at

123. *Id.* at 6.

124. *Id.* at 32.

125. PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY, CASEY FAMILY PROGRAMS 1 (2005), https://caseyfamilypro-wpengine.netdna-ssl.com/media/AlumniStudies_NW_Report_FR.pdf.

126. THE NAT'L FOSTER YOUTH INST., *supra* note 9, at https://www.nfyi.org/issues/education/.

127. DION ET AL., *supra* note 15, at ix (internal citations omitted).

128. AGING OUT OF FOSTER CARE IN AMERICA, JIM CASEY YOUTH OPPORTUNITIES INITIATIVE 2013, https://www.aecf.org/m/resourcedoc/JCYOI-AgingOutofFosterCareinAmerica-Handout-2013.pdf.

129. *Id.*

$300,000 per youth, tax payers are paying about $7.8 billion each year for youth who have aged out without proper support.[130] This is the equivalent of an average of fifty-five dollars per tax payer each year.[131] It is also important to note that tax payers can potentially be paying not only for the approximately 26,000 foster youth who age of foster care each year, but also for the approximately 74,000 youth between ages sixteen and twenty who are in foster care any given year.[132]

III. RESOLUTION

Transitional housing assistance for former foster youth up to age twenty-three will allow these youth to successfully transition to self-sufficiency. To ensure this, the *Chafee* budget must be increased and the thirty percent spending limitation available for housing must be removed. Foster care reform advocates often call for the adoption of a nationally uniform emancipation age.[133] Although increasing the age of majority to twenty-one across the country would likely have a positive impact on former foster youth, this solution is both unrealistic and insufficient. Proposing an amendment to the current foster care structure so that all states have a nationally uniform emancipation age is likely to get a lot of resistance by individual states, particularly those states not participating in the extension of foster care through the Fostering Connections Act. These states are likely to resist an adoption of a national model because the number of foster youth and the number of services available vary from state to state, and overall states enjoy wide flexibility in the selection and implementation of services and programs. Even if a universal emancipation age could be enacted, increasing the age of majority will provide stable housing to foster youth for a longer period of time, but a new age out age cliff will be created. That solution will still leave former foster youth homeless or in precarious housing arrangements when they reach the increased age of majority. Thus, proposing an amendment to how all states handle services for former foster youth is much more likely to be accepted and implemented.

130. *Id.*

131. This is calculated based on 139.6 million taxpayers who filed tax forms in 2014. *See* The Annie E. Casey Foundation. *See also* TAX FOUNDATION, https://taxfoundation.org/summary-latest-federal-income-tax-data-2016-update/ (last visited Feb. 8, 2019).

132. DION ET AL., *supra* note 15, at 2.

133. *See generally* Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV., 183 (2008).

With that in mind, this section argues that current legislation should be amended to: (1) nationally increase transitional housing assistance without stringent eligibility requirements; (2) increase the Independent Living Program funding that has remained stagnant for nearly two decades; and (3) remove the thirty percent cap on the amount of *Chafee* federal funds that can be used towards housing assistance. These suggestions would provide a sense of fairness across state lines, would better prepare foster youth to transition from foster care to self-sufficiency, and would not disrupt state specific emancipation systems.

A. Housing Assistance Should Uniformly be Provided for Former Foster Youth Up to Age Twenty-Three

Transitional housing assistance should be provided for former foster youth from the age they emancipate, as determined by the state, until age twenty-three. This solution would benefit all foster youth regardless of state specific policies. If implemented, this suggestion would make foster youth who emancipate at age eighteen eligible for transitional housing assistance for an additional five years after emancipation; a foster youth in a state where the age of majority is twenty-one would have two years to receive transitional housing assistance post-emancipation.

This suggestion is different from simply raising the emancipation age. Raising the emancipation age alone will not reduce the number of foster youth who experience homelessness or precarious housing arrangements. A study done by Chapin Hall at the University of Chicago examined the impact that extended foster care had on the rates of homelessness among foster youth.[134] The study concludes that with the implementation of the Fostering Connections Act; those states that opt in are essentially providing housing for foster youth up to their twenty-first birthday.[135] However, the study finds that youth face no better odds of securing permanent housing once they age out at twenty-one than if they had aged out at eighteen.[136] Forty percent of the youth sampled in this study had been homeless after aging out

134. *See generally* AMY DWORSKY & MARK COURTNEY, ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY, CHAPIN HALL (2010), https://www.chapinhall.org/wp-content/uploads/Midwest_IB2_Homelessness.pdf.

135. *Id.* at 2.

136. *Id.*

of extended foster care systems.[137] This and similar studies, show that raising the age out age alone is not sufficient in guaranteeing these youth an overall better quality of life.

1. Extending Housing Assistance to Age Twenty-Three Would Mitigate the High Rates of Homelessness for Former Foster Youth

Most young people are not prepared for self-sufficiency at age eighteen or at age twenty-one. The current generation of youth who are part of "intact families"[138] continue to receive assistance from their parents for many years after their eighteenth birthday.[139] The increased pressure and focus on attaining higher education has postponed the milestones that marked adulthood such as completing basic education, starting a career, leaving a parent's home, and starting a family.[140] During the industrial period, these milestones were being achieved by adults in their late teens to early twenties.[141] Currently, young adults are attending school for much longer, leaving the current generation of youth to complete these adult milestones during their late twenties or early thirties.[142]

According to *On the Frontier of Adulthood*, which conducted a series on mental health and development research on transitions to adulthood, society has developed another stage of life which the author refers to as "emerging adulthood."[143] The emerging adulthood life stage includes the late teenage years and early twenties.[144] This new stage of life is a result of the move away from labor related adult milestones.[145] We are now placing more value on intellectual maturity, certainty in one's identity and high levels of education, to determine these milestones.[146] Now, emerging adults are not only receiving

137. *Id.* at 3.

138. "Intact families" is the term used to describe families that have not been involved with the foster care system and who presumably have at least one parent in the home providing both emotional and financial support.

139. *See generally* RICHARD A. SETTERSTEN, ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY (Frank F. Furstenberg Jr. et al. eds., 2005)

140. *Id.* at 17.

141. *Id.*

142. *Id.* at 225.

143. *Id.* at 226.

144. *Id.* at 251.

145. *See generally id.*

146. *See id.* at 17.

but expecting parental guidance, and financial support for much longer than they had throughout history.[147]

As a society, we have come to accept this new path to adulthood.[148] Thus, we should not hold some of the most vulnerable youth to higher standards than their counter parts in the general population. Foster youth, like any other youth, should be given the tools to enter adulthood with a sense of identity and with opportunities to develop intellectual maturity. As our notions of parenting and adulthood continue to develop, we need to ensure that the foster care system which functions as parents to thousands of youth develops accordingly. Providing post-emancipation support up to age twenty-three will offer former foster youth a more reasonable time frame to achieve their educational goals, secure employment, and ultimately to secure stable housing on their own.

2. Stringent Eligibility Requirements for Housing Assistance Should be Removed

As mentioned in section I of this Comment, the Fostering Connections Act provides financial incentives to encourage states to raise the age of majority beyond eighteen.[149] Currently, only twenty-four states[150] and the District of Columbia have implemented Title IV - Part E extended foster care.[151] Those states that have Title IV - Part E extended foster care have done so through approved programs under the Children's Bureau.[152] However, a major limitation for foster youth seeking to take advantage of these extended services is the

147. *See id.*

148. The law, in the context of juvenile justice, has begun to recognize that brain development is not complete until age 25 and that teenagers are more likely to engage in risky behavior. *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2011); Miller v. Alabama, 567 U.S. 460 (2012).

149. *See generally* Fostering Connections Act, Pub. L. No. 110-351, 122 Stat. 3949 (2008).

150. The following states have an approved plan to extend some form of assistance to foster youth who are over the age of eighteen: Alabama, Arkansas, California, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington State, West Virginia, and Wisconsin. *See Extending Foster Care Beyond 18,* NAT'L CONF. OF ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx.

151. *Id.*

152. EXTENSION OF FOSTER CARE BEYOND AGE 18, CHILD WELFARE INFO. GATEWAY 1 (2017), https://www.childwelfare.gov/pubPDFs/extensionfc.pdf.

Fostering Connections Act's wide deference to states to determine the eligibility requirements for many of the available services.[153]

Every state has some form of independent living programs and most state programs are subject to stringent regulations and eligibility requirements. For example, ETV provides up to $5,000 annually, not to exceed the cost of attendance, to eligible youth who are making satisfactory progress towards a secondary education or training program.[154] The ETV program is premised on traditional pathways to higher education where young adults graduate high school at seventeen or eighteen and immediately enroll in college. Based on these presumptions, to receive ETV funding, foster youth must apply for ETV vouchers before they reach age twenty-one to receive funding and remain eligible until age twenty-three.[155] This traditional path is rare for current and former foster youth. With only six percent of foster youth working towards post-secondary education, ETV makes this aid unreachable to the vast majority of youth in foster care who have not graduated high school or enrolled in a training program at the age of majority.[156] Independent living programs such as ETV, though beneficial to some foster youth, have remained largely unsuccessful because of stringent eligibility requirements and limited funding.

These stringent eligibility requirements can also be found in the allocation of *Chafee* funds for housing assistance for former foster youth across the country. These eligibility requirements are often related to employment, schooling, and the ability to contribute towards rent payments. Current and former foster youth who are not receiving ETV funding are eligible to receive *Chafee* funds when available.[157] *Chafee* funds for housing are available from the time the foster

153. The Fostering Connections to Success and Increasing Adoptions Act states that "[a]t the option of a State, the [definition of an IV eligible child] shall include . . . . and that services can be provided until "18 years of age, or such greater age as the State may elect . . ." *See* Pub. L. No. 110-351, § 201 (a)(8)(B), (c)(i)(I), 122 Stat. 3949 (2008).

154. A foster youth who is receiving ETV at the age of twenty-one, and who is making satisfactory progress towards their degree or certificate can remain eligible for ETV until age twenty-three. *See* John H. Chafee Foster Care Independence Program, 42 U.S.C. § 677(i)(3) (2008).

155. *Id.*

156. THE NAT'L FOSTER YOUTH INST., *supra* note 9.

157. MICHAEL R. PERGAMIT ET AL., HOUSING ASSISTANCE FOR YOUTH WHO HAVE AGED OUT OF FOSTER CARE: THE ROLE OF THE CHAFEE FOSTER CARE INDEPENDENCE PROGRAM, U.S. DEP'T OF HEALTH & HUM. SERVICES OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, at iii (2012), https://aspe.hhs.gov/system/files/pdf/76501/rpt.pdf (noting that some states allow ETV recipients to also receive Chafee funding but most states do not).

youth ages out until they reach age twenty-one.[158] Each state then implements its own eligibility requirements.[159]

For example, Kansas—like many other states—has a prerequisite that a foster youth either be enrolled in school or employed.[160] School enrollment or employment is then verified using a multi-step verification process that requires submission of a school acceptance or employment letter and a continuous requirement to submit an academic transcript, employment evaluations, or other documentation.[161] Similarly, Michigan requires that a foster youth demonstrate sources of income, a detailed budget, and a list of the youth's needs to be considered for *Chafee* funding.[162] Other states like Kentucky, require that the foster youth actually be homeless before the youth can request housing assistance.[163]

These eligibility requirements are problematic and should be removed. Employment and educational requirements are difficult, if not impossible, for current and former foster youth to meet. Only about half of all former foster youth will be gainfully employed by the age of twenty-four,[164] and are thus much less likely to meet the employment requirement at age eighteen, or even twenty-one. Additionally, there is less than a three percent chance that a former foster youth will attain a college degree at any point in her or his life,[165] leaving most foster youth unable to meet education related eligibility requirements. Other factors that contribute to a foster youth's inability to meet stringent housing eligibility requirements include the disproportionally high rates of teen pregnancy, and involvement with the criminal justice system among foster youth.[166] At the other extreme, are those states which only grant housing assistance to youth who are already homeless.[167] This requirement is also problematic because it ignores the up to fifty percent of foster youth in precarious housing

158. *Id.* at 1.

159. *Id.*

160. *Id.* at 6.

161. *Id.*

162. *Id.* (explaining that Illinois and Utah also have similar requirements).

163. *Id.*

164. THE NAT'L FOSTER YOUTH INST., *supra* note 9.

165. *Id.* This is the reality for most foster youth even though seventy percent of foster youth regularly say that they would like to attend college one day. *Id.*

166. *Id.* (stating that seven out of ten girls who age out of the foster care system will become pregnant before the age of twenty-one and nearly sixty percent of young men who age out of the foster care system and are legally emancipated have been convicted of a crime.).

167. *See* PERGAMIT ET AL., *supra* note 157, at 6.

arrangements[168] and it allows former foster youth to endure the traumatic experience of being homeless before the state steps in and provides housing assistance.

Although employment and higher education attainment are not realistic eligibility requirements for current or former foster youth, states can rely on a multitude of other eligibility requirements to achieve their intended goals. The policy behind many of the stringent housing eligibility requirements is to ensure that current and former foster youth have a plan to achieve self-sufficiency.[169] This goal can be achieved by requiring foster youth to participate in money management counseling, tenant counseling, shopping skills workshops, and other life skills courses. Most independent living programs already have the systems in place to provide these types of services, thus the transition to more realistic eligibility requirements should not be a difficult one. However, relaxing the eligibility requirements for housing assistance alone will not be enough. With more relaxed requirements, more youth will become eligible for housing assistance, and independent living programs will need additional funding to meet the needs of the previously ineligible youth. Thus, *Chafee*'s budget must also be increased.

B. *Chafee*'s Funding Should be Increased and The Foster Care Independence Act's Thirty Percent Spending Limitation Available for Housing Should be Removed

Chafee-funded services are limited and evidence of their effectiveness is mixed.[170] *Chafee* funding has not increased from its $140 million per year allocation for almost two decades despite the increase of foster youth.[171] As mentioned in section I of this Comment, from *Chafee*'s budget, only thirty percent, $42 million per year, can be used on housing-related costs.[172] Housing-related costs include funds used to teach foster youth skills on finding and maintaining housing, inde-

168. DION ET AL., *supra* note 15, at ix.

169. *See* PERGAMIT ET AL., *supra* note 157, at 6.

170. DION ET AL., *supra* note 15, at 7.

171. *Id.* The number of children in foster care increased from approximately 400,000 in 1990—the year the Foster Care Independence Act was enacted—to approximately 437,000 in 2016. *Foster Care*, CHILD TRENDS (Sept. 12, 2018), https://www.childtrends.org/indicators/foster-care.

172. Foster Care Independence Act, Pub. L. No. 106-169, § 477(a)(8)(5), 133 Stat. 1822 (1999).

pendent living stipends, as well as housing subsidies.[173] These additional related costs further limit the amount of funding that is actually spent on housing.

Additionally, the *Chafee* provision limiting the housing budget to thirty percent is a hindrance to states seeking to provide housing assistance to its foster youth. Amending this requirement to allow states to determine the best allocation of their *Chafee* funds will give states the flexibility to provide transitional housing assistance to the current and former foster youth who face precarious housing arrangements or homelessness.

CONCLUSION

Foster youth enter the foster care system through no fault of their own. Our legal system pledges to take responsibility for these children the moment a child is removed from his or her home. After removal, the state becomes responsible for that child until the child is returned home, adopted, or until the child reaches the age of majority. While providing transitional housing assistance is just one of many vital services foster youth need, housing is among the most fundamental. Access to adequate housing will promote positive outcomes across many domains including education, employment, and physical and mental health. It is time that we ensure that these children are prepared to become self-sufficient instead of seizing all responsibility at the age of majority. Further consideration must be given to the long-term well-being of current and former foster youth. These young adults deserve much better.

173. DION ET AL., *supra* note 15, at 9. This Comment does not attempt to determine the precise amount of funding needed to provide foster youth with housing assistance.