TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

VOL. 18 NO. 2 SPRING 2013 PAGES 153 TO 264

ARTICLES

NOTES

A Journal Publication of The University of Texas School of Law and the Individual Rights and Responsibilities Section of the State Bar of Texas

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LETTER FROM THE EDITOR

Dear Reader,

The call remains strong in Spring 2013 for continued scholarship and activism in the civil liberties and civil rights arena. A major leak revealed practices by the National Security Agency that raise serious privacy questions for U.S. citizens and non-citizens alike. Public education and women's issues are seeing a renewed assault in some state legislatures. Furthermore, the U.S. Supreme Court ended its term with significant opinions affecting voting rights and marriage equality.

This issue begins with an Article by Tyson Herrold that explores the political process equal protection doctrine. Herrold begins with the precedential history underlying the doctrine, and then analyzes the two competing approaches in the context of initiatives that target affirmative action efforts. This important circuit split will likely be resolved soon, in light of a recent grant of certiorari by the U.S. Supreme Court.

The second Article, by a team of researchers and writers led by Brian Zeiger, identifies a specific, practical problem for litigating police brutality cases. The authors focus on three ways that circuit courts have applied Federal Rule of Civil Procedure 15's relation back provision, and then propose an amendment to Rule 15 aimed at resolving the issue in these specific situations.

The first Note, by Audrey Lynn, examines the methods of evaluating teacher performance through student test scores. Lynn provides a case study from Florida that illustrates the interplay between these practices and resulting litigation. Lynn also provides recommendations aimed at providing both effective teacher evaluation mechanisms and a likely reduction in litigation.

The second Note, by Casey Raymond, provides an important empirical study on filing trends in claims under Titles II and III of the Americans with Disabilities Act. This Note concludes that, despite a concentrated boom in private litigation under these statutes, the ADA remains under-enforced. As a solution, Raymond proposes that the Department of Justice assume a more active gatekeeping role.

Please visit our legal blog (tjclcr.blogspot.com) or our Facebook page for a varied discussion of civil liberties and civil rights issues. For more information on the Journal, please visit our main website: www.tjclcr.org. We hope you will join our dialogue!

Thank you,

Meredith Kincaid
Editor-in-Chief

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TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 18 Spring 2013 Number 2

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 18, Number 2, Spring 2013

ARTICLES

NOTES

Articles

Political Process Equal Protection and the Repeal of Affirmative Action in Higher Education: The Sixth Circuit Splits from the Ninth

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*I would like to thank my mother and father for encouraging me to pursue a legal career and to my sister Quincy for always competing with me and pushing me to succeed. I also want to thank Justin Kerner for encouraging me to write this journal article and his support throughout the process.

I. INTRODUCTION

Imagine that a state passes a constitutional amendment prohibiting affirmative action policies by all government entities, including public education.[1] State universities can no longer consider race as a factor in admissions but may still look at academic achievement, work experience, extracurricular activities, athletic ability, and family legacy. Consider the following scenario recently postulated by the Sixth Circuit:

> A student seeking to have her family's alumni connections considered in her application to [a university] could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally mandated permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the [state] [c]onstitution—a lengthy, expensive, and arduous process—to repeal the consequences of the [law].[2]

On November 15, 2012, the Sixth Circuit determined that such an incongruent political system violates political process equal protection (PPEP).[3] Just eight months prior to this decision, a Ninth Circuit panel reviewed a similar state constitutional amendment for the second time and found no constitutional problem.[4] This Article analyzes the recent split between the Sixth and Ninth Circuits concerning the intersection of PPEP and the repeal of affirmative action policies in higher education. Part II will define PPEP and explore how it differs from the Supreme Court's conventional equal protection jurisprudence. Part III will create a roadmap of the most recent Supreme Court guidance on the topic, specifically three cases known as the *Hunter* trilogy. Part IV will explore the similarities and differences between the Sixth and Ninth Circuit cases and the different ways those courts perceived the *Hunter* trilogy. Part V will argue that the Ninth Circuit departed from the *Hunter* trilogy and the Sixth Circuit faithfully adhered to Supreme Court precedent. Finally,

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[1] Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (en banc), *cert. granted*, Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

[2] *Id.* at 470.

[3] *See generally id.*

[4] *See generally* Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012).

Part VI will conclude by examining the *Hunter* trilogy's effect on state education policies and the possible ways states can address affirmative action policies without violating the Fourteenth Amendment.

While this Article examines affirmative action policies in light of the Equal Protection Clause of the Fourteenth Amendment, it will not delve into the merits or constitutionality of those policies. In the 2003 opinion, *Grutter v. Bollinger*,[5] the Supreme Court expressly permitted the consideration of race in university admissions.[6] This Article is not designed to be a rallying cry for or against affirmative action. Rather, it focuses on the constitutional concerns that accompany ongoing attempts to limit the role of affirmative action in higher education.

II. DEFINING POLITICAL PROCESS EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[7] A law offends the Constitution "under conventional equal protection analysis . . . if, on its face, it classifies on the basis of race."[8] Conventional equal protection, then, looks at laws to determine whether they classify individuals for different treatment on the basis of race. An example of a law that violates conventional analysis is one that "grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right."[9]

By contrast, PPEP forbids the government from restricting minority "right[s] to full participation in the political life of the community."[10] The Supreme Court succinctly defined PPEP in 1982:

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[5] 539 U.S. 306 (2003).

[6] *Id.* at 328, 334–35 (holding that universities may consider race and ethnicity as a "plus" factor in evaluating an applicant's file).

[7] U.S. CONST. amend. XIV, § 1.

[8] Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1022 (1996). Of course, the government has the opportunity to show that the law is narrowly tailored to serve a compelling government interest. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 658 (1993) (remanding to the district court to determine whether North Carolina's reapportionment scheme was narrowly tailored enough to serve a compelling government interest). This test, known as strict scrutiny, also applies to political process equal protection. *See, e.g.*, Crawford v. Bd. of Educ., 458 U.S. 527, 536 (1982) (applying strict scrutiny to political process equal protection case). However, this Article focuses on the first part of equal protection analysis—in other words, whether the law alters the political process along racial lines. Once such a determination has been made, a court then must determine whether the law survives strict scrutiny. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (holding that a law must pass strict scrutiny if it employs a racial classification).

[9] *Equal Protection: An Overview*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010), http://www.law.cornell.edu/wex/equal_protection.

[10] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982). *See* Amar & Caminker, *supra* note 8, at 1027 ("The central idea behind this line of cases is relatively straightforward: Just as minorities cannot be singled out for substantively inferior treatment—say, subjected to a unique sales tax—neither can they be singled out and relegated to inferior treatment in the political process—say, subjected to a race-based poll tax.").

> It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. But the Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.[11]

PPEP examines whether the law restricts, either on its face or in effect, a minority group's access to an egalitarian political system.[12] Such a restriction can manifest itself as an outright ban on political access, or it can take the form of a more subtle political distortion.[13] For instance, a state constitutional amendment forbidding affirmative action policies arguably violates PPEP if it makes it harder for minorities to achieve race-based legislation versus other groups proposing non-race-based legislation.[14]

III. THE *HUNTER* TRILOGY

A. *Hunter v. Erickson*

In 1969, the Supreme Court took its first comprehensive look at the intersection of equal protection and the political process.[15] In *Hunter v. Erickson*, Nellie Hunter, a black citizen of Akron, Ohio, filed a complaint with the Commission on Equal Opportunity in Housing alleging racial discrimination by city homeowners.[16] The complaint

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[11] *Id.* (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring), *superseded by statute*, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

[12] Keith E. Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 CAP. U. L. REV. 337, 337 (1999). Of course, a law that restricts everyone's access to the political process does not deny equal protection. *Seattle*, 458 U.S. at 469–70.

[13] *Seattle*, 458 U.S. at 467 (explaining that a law that subtly distorts the political process may present an equal protection violation).

[14] *See generally id.*; *see also* Hunter v. Erickson, 393 U.S. 385, 391 (1969) (forbidding laws that alter the political process along racial lines).

[15] *See* Sealing, *supra* note 12, at 345–47 (recounting the development of political structure equal protection). Professor Sealing suggests *Reitman v. Mulkey*, 387 U.S. 369 (1967), was the first case to explore political structure equal protection. *Id.* at 342. However, he says, "*Reitman* can either be described as the seminal case in the Political Structure Equal Protection line or as the predecessor to the *Hunter* line." *Id.* The *Reitman* Court, however, decided the case on state action grounds, speaking in passing about the possibility of extending equal protection scrutiny to discriminatory political processes. *Id.* at 343, 344. *Hunter* explicitly did not rely on *Reitman* despite the fact that it used an embryonic form of PPEP to decide that case. *Id.* at 342 n.52. Therefore, *Hunter* is more accurately considered the genesis of the Supreme Court's PPEP jurisprudence.

[16] *Hunter*, 393 U.S. at 387. The fair housing ordinance, which was repealed by the charter amendment, was created to "assure equal opportunity to all persons to live in decent housing

stated that her real estate agent had refused to show her several houses because of her race, in violation of a fair housing ordinance passed by the Akron city council.[17] The complaint was dismissed, however, because of a recent city charter amendment that effectively repealed the fair housing ordinance by requiring majority approval of the city electorate before any current or future ordinance regulating housing discrimination could take effect.[18] The amendment had no effect on other ordinances, which simply required a majority city council vote.[19] Therefore, the amendment bifurcated the political process for passing local housing regulations by making it structurally more difficult to pass antidiscrimination ordinances than other laws.[20] The Ohio Supreme Court found no constitutional violation, and Hunter appealed to the Supreme Court.[21]

The Supreme Court vacated the Ohio court's decision, holding that the amendment was an equal protection violation.[22] The Court explained that the amendment singled out race-related housing matters for special political treatment.[23] According to the Court, this explicit classification violated the Equal Protection Clause because it erected unequal political obstacles for minorities petitioning for antidiscrimination laws.[24] The Court seemed unfazed that the law did not discriminate against minorities on its face—determining that, in effect, it targeted minorities

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facilities regardless of race, color, religion . . . or national origin." *Id.* at 386. The Commission on Equal Opportunity was charged with enforcing the city's fair housing ordinance and had the power to resolve disputes through "conciliation or persuasion if possible," and through "such order as the facts warrant." *Id.*

[17] *Id.* at 387. The real estate agent had refused to show her certain houses because the owners "had specified they did not wish their houses shown to negroes." *Id.*

[18] The text of the charter amendment provided:

> Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Id. (quoting AKRON, OH., CITY CHARTER § 137 (1968)). The law applied retroactively, so all laws regulating the sale or lease of real estate property were void until passed under the new referendum process. *See id.*

[19] *Id.* at 390 ("Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition.").

[20] *See id.*

[21] *Id.* at 387–88 ("The trial court initially held the fair housing ordinance invalid under state law, but the Supreme Court of Ohio reversed. On remand, the trial court held that the fair housing ordinance was rendered ineffective by the charter amendment, and the Supreme Court of Ohio affirmed." (citation omitted)).

[22] *Id.* at 393.

[23] *See id.* at 390. The charter amendment actually covered laws regulating the sale or lease of real estate not just on the basis of race, but also religion, national origin, and ancestry. *See id.* at 387.

[24] *Id.* at 391.

for unfavorable treatment.[25] The Court indicated that "mere repeal" of the ordinance would have been constitutionally permissible;[26] certainly if the majority wished to repeal the law, it commanded the votes to do so.[27] Therefore, the Court determined the law violated the Equal Protection Clause by creating a disparate political process, the burden of which fell solely on the minority.[28]

B. *Washington v. Seattle School District No. 1*

The Court expanded on *Hunter*'s embryonic analysis in *Washington v. Seattle School District No. 1*.[29] In *Seattle*, the State of Washington passed a constitutional amendment called Initiative 350 by way of the state's referendum process.[30] The referendum was sponsored in an attempt to repeal the Seattle Plan,[31] a mandatory busing and school reassignment program designed to desegregate public schools.[32] Initiative 350 purported to prohibit school boards from reassigning students to schools other than the one closest or second closest to their

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[25] *Id.* at 390 ("It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end."). Despite this facial neutrality, "the reality is that the law's impact falls on the minority." *Id.* at 391.

[26] *Id.* at 390 n.5. ("Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.").

[27] *Id.* at 390 ("The majority needs no protection against discrimination, and if it did, a referendum might be bothersome but no more than that.").

[28] *See id.* at 392–93 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

[29] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

[30] *Id.* at 463–64 (explaining that Initiative 350 was passed by a substantial margin). Although Initiative 350 drew 66% of the vote statewide, it failed to attract majority support in two legislative districts, both in Seattle. *Id.*

[31] *Id.* at 463. The district court found that the initiative was directed solely at desegregative busing. Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1008 (W.D. Wash. 1979), *aff'd*, 633 F. 2d 1338 (1980), *aff'd*, 458 U.S. 457 (1982). It also found that Citizens for Voluntary Integration Committee (CiVIC), the organization sponsoring Initiative 350, was formed with the intent to dismantle the Seattle Plan. *Id.* at 1007. The district court concluded that the leadership of CiVIC acted "legally and responsibly" and did not address "its appeals to the racial biases of the voters." *Id.* at 1009.

[32] *Seattle*, 458 U.S. at 461. The State of Washington had, for some time, attempted to desegregate Seattle-area public schools before turning to the Seattle Plan. *Id.* at 460. Since 1963, the Seattle School District had *permitted* students to transfer from their neighborhood schools to remedy racial imbalance. *Id.* The school district implemented a "magnet" program and enacted a resolution defining racial imbalance as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." *Id.* After the district found that racial imbalance actually increased under the voluntary program, the district enacted the Seattle Plan, which required mandatory reassignment. *Id.* The Supreme Court noted that the district court found that mandatory reassignment "substantially reduced the number of racially imbalanced schools in the district and . . . the percentage of minority students in those schools which remain racially imbalanced." *Id.* at 461.

place of residence.[33] Despite its facially sweeping ban, Initiative 350 contained several broad exceptions. School districts could reassign students for special education purposes or because of physical barriers or other hazards.[34] They could also reassign students because of "overcrowding, unsafe conditions or lack of physical facilities."[35] Initiative 350 also prohibited "indirect" student assignments through the "redefinition of attendance zones, the pairing of schools, and the use of feeder schools," all tools of the Seattle Plan.[36] In sum, the district court found that Initiative 350 allowed busing for most, if not all, purposes other than racial integration.[37]

Justice Blackmun's majority opinion began by proclaiming that the Equal Protection Clause prohibits government from denying racial minorities the right to vote or the ability to participate in the political process in a meaningful way.[38] But, the Court continued, equal protection also forbids "'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[39] In comparing the permissible with the unconstitutional, the Court distinguished laws that allocate power according to neutral principles from laws that allocate power along racial lines.[40] Political devices such as the legislative veto and the requirements for amending state constitutions allocate political power neutrally.[41] Although they may hinder minority-interested legislation at times, they treat all groups equally in their pursuit of political goals.[42] These devices are permissible under the Equal Protection Clause, absent a discriminatory motive.[43] On the other hand, a "different analysis is

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[33] *Id.* at 462. Initiative 350 did, however, permit voluntary desegregation by allowing students to choose to attend a school outside the allowable range permitted under the Seattle Plan. *Id.* at 473 n.16. The amendment also permitted courts to adjudicate constitutional issues relating to public schools, allowing courts to order busing and other measures upon a finding of de jure segregation. *Id.* at 463.

[34] *Id.* at 462.

[35] *Id.*

[36] *Id.* at 462–63.

[37] *Id.*

[38] *Id.* at 467 ("It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.").

[39] *Id.* (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring), *superseded by statute*, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

[40] *Id.* at 469–70 (citing Justice Harlan's reasoning in *Hunter* that only allocation of power along racial lines is prohibited).

[41] *Id.* at 470 (noting that such neutral laws are not subject to attack on PPEP grounds).

[42] *Id.* ("Because [neutral laws] make it more difficult for *every* group in the community to enact comparable laws, 'they provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" (quoting *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (alteration in original))).

[43] *Id.* ("[L]aws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack . . . . Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.").

required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of the decision to determine the decisionmaking process."[44]

Turning to the facts of the case, the Court concluded that Initiative 350 fell in the impermissible category.[45] The State argued that the constitutional amendment allocated power neutrally because, on its face, it prohibited busing and reassignment for all purposes.[46] Despite the law's facially neutral language, the Court determined that it was "effectively drawn for racial purposes."[47] The Court pointed to the law's exemptions, noting that Initiative 350 allowed busing and reassignment for virtually all purposes but desegregation.[48] Therefore, the Court determined that Initiative 350 had a racial focus because it treated integrative busing differently than busing for other purposes.[49]

The State responded by arguing that Initiative 350 did not target minorities, given that minorities "may be counted among both the supporters and the opponents of [the law]."[50] Nevertheless, the Court explained that desegregation policies "at bottom inure[] primarily to the benefit of the minority."[51] According to the Court, it was sufficient that minorities could conceivably consider busing for integration to be in their interest.[52] It explained that "[e]ducation has come to be a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

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[44] *Id.* (emphasis in original).

[45] *See id.* ("In our view, Initiative 350 must fall because it does not attempt to allocate governmental power on the basis of any general principle. Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.").

[46] *See id.* at 471 (restating Washington's argument that Initiative 350 did not mention race and permitted busing for certain purposes, while prohibiting it for other purposes).

[47] *Id. Compare* Initiative 350 *with* the statute in *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *summarily aff'd*, 402 U.S. 935 (1971). In *Lee*, the State of New York passed a law that provided:

> Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins[.]

318 F. Supp. at 712. The New York statute expressly prohibited busing for desegregation purposes. In contrast, Initiative 350 prohibited all busing, but then limited its broad application severely with several exceptions; in practical effect, these exceptions allowed busing for most, if not all, purposes other than desegregation. *See Seattle*, 458 U.S. at 471.

[48] *Id.* at 471. *Compare* Initiative 350 (which contained so many exceptions that it effectively prohibited busing *only* for desegregation purposes) *with* Proposition I in Crawford v. Bd. of Educ., 458 U.S. 527 (1982) (which prohibited pupil assignment or transportation for *any* purpose absent a Fourteenth Amendment violation). *See infra* text accompanying notes 61–74. As such, the Court held that Initiative 350 was an equal protection violation, whereas Proposition I was not.

[49] *Seattle*, 458 U.S. at 474.

[50] *Id.* at 471–72.

[51] *Id.*

[52] *Id.* at 474.

environment."[53] Children can only be successful in society if they learn to function in society.[54] Therefore, the Court determined that Initiative 350 had a sufficient racial focus to trigger the application of *Hunter*.[55]

Upon holding that Initiative 350 contained a racial focus, the Court concluded that the amendment effectuated the kind of reallocation of power condemned in *Hunter*.[56] It stripped the school board of its authority over desegregative busing and rendered it to a remote level of government—the state constitution.[57] Minorities who wished to alter school district policy to allow busing or reassignment for desegregation purposes had only one option after Initiative 350: they had to amend the state constitution to repeal the busing ban.[58] Conversely, those seeking mandatory busing or student reassignment for *any* other purpose could simply petition the local school board.[59] Therefore, Initiative 350 stacked the deck against minorities seeking race-related legislation in violation of the Equal Protection Clause.[60]

C. *Crawford v. Board of Education*

Announced the same day as *Seattle*, *Crawford v. Board of Education*[61] presented the Supreme Court with a law similar to *Seattle*'s Initiative 350, but the Court reached a different outcome.[62] In *Crawford*, California voters passed a constitutional amendment called Proposition I, which prohibited mandatory student assignment or transportation unless ordered by a federal court as a remedy for an equal protection violation.[63]

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[53] *Id.* at 472 ("Education has come to be a 'principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))).

[54] *Id.* at 472–73 ("When [the child's] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community.").

[55] *Id.* at 474.

[56] *Id.*

[57] *Id.* ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests."). Before Initiative 350, "the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion." *Id.* at 479–80. After Initiative 350, "authority over all but [desegregation] remained in the hands of the local board." *Id.* at 480.

[58] *See id.* at 474 (laying out political process for desegregating schools after Initiative 350).

[59] *Id.*

[60] *See id.* ("Indeed, by specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action."). The Court therefore concluded, "the reality is that the law's impact falls on the minority." *Id.* at 475.

[61] 458 U.S. 527 (1982).

[62] *See id.* at 535–40 (relying on the mere repeal doctrine to hold that the law did not violate equal protection).

[63] *Id.* at 529. Proposition I provided:

On appeal to the Supreme Court, petitioners argued that Proposition I employed an "explicit racial classification," creating a dual court system that discriminated on the basis of race.[64] They contended that, ordinarily, state-created rights "may be vindicated by the state courts without limitation on remedies."[65] Conversely, under Proposition I, minorities could not petition state courts for the desegregation remedy of busing without first repealing the constitutional amendment.[66]

The Supreme Court rejected petitioners' argument, pointing out that Proposition I "neither says nor implies that persons are to be treated differently on account of their race."[67] Such a law would surely violate the Equal Protection Clause unless supported by a compelling government interest.[68] Conversely, the Court continued, a law that merely repeals existing legislation represents a neutral law, incapable of offending the Equal Protection Clause.[69] The Court distinguished *Hunter* by pointing out that the charter amendment in that case repealed an existing ordinance *and* required that future ordinances aimed at housing discrimination navigate a more demanding political process than ordinances passed for other purposes.[70] Therefore, that law altered the political process for those seeking to pass future antidiscrimination ordinances. In contrast, Proposition I amended the state constitution to prohibit desegregation, but did nothing to alter the amendment process itself.[71]

> [N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause[.]

Id. at 532 (alterations in original).

[64] *Id.* at 536. Petitioners who originally filed a class action in state court were minority students attending public schools in the Los Angeles Unified School District. *Id.* at 529.

[65] *Id.* at 536 (describing petitioners' argument that Proposition I created burdens on minorities because they cannot seek a mandatory busing remedy for any violation other than a Fourteenth Amendment equal protection violation).

[66] *Id.*

[67] *Id.* at 537.

[68] *Id.* at 536.

[69] *Id.* at 539 ("In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.").

[70] *Id.* at 540–41 ("In [*Hunter*], the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The amendment 'not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect.'" (quoting Hunter v. Erickson, 393 U.S. 385, 389–90 (1969))).

[71] *Id.* At first glance, the amendment in *Crawford* seems to erect the same kind of political hurdle as in *Seattle*, because minorities in California would have to amend the state constitution in order to obtain a busing remedy in any case except a federal equal protection violation (whereas individuals seeking other remedies needed only to sue on that violation and succeed on the merits).

Clarifying the mere repeal doctrine, the Court stated, "[w]ere we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problem of our heterogeneous population."[72] "States would be committed irrevocably to legislation that has proved unsuccessful or harmful," because they would be powerless to undo its effects.[73] Furthermore, states would be discouraged from experimenting with race-related legislation for fear that they could not undo what had already been done.[74]

D. A Consolidation of the *Hunter/Seattle* Doctrine

The *Hunter* trilogy cases, when read together, create a succinct two-part test to "differentiate between constitutional and impermissible" legislation under PPEP inquiry.[75] The first prong of the test asks whether the law in question has a racial focus.[76] This analysis turns on whether the law in question targets a policy or program that "at bottom inures primarily to the benefit of the minority, and is designed for that purpose."[77] Even if all races, including the majority, benefit from it, the policy or program inures primarily to the benefit of minorities if "minorities may consider . . . [it] to be 'legislation that is in their interest.'"[78]

The second prong seeks to determine whether the law reorders the political process in a way that places special burdens on racial minorities.[79] A law that makes it harder to pass race-related legislation,

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The difference between *Crawford* and *Seattle* was that the remedy was one provided under the state constitution as interpreted by the state supreme court, above and beyond that required under the Fourteenth Amendment. *See id.* at 530–31 (explaining that the state supreme court held that "state school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin."). The amendment in Crawford did not violate PPEP because it repealed additional rights for minorities previously available under state constitutional law, rather than altering processes or mechanisms for obtaining race-based legislation. *See Seattle*, 458 U.S. at 485–86.

[72] Crawford v. Bd. of Educ., 458 U.S. 527, 539 (1982).

[73] *Id.*

[74] *Id.*

[75] The Sixth Circuit succinctly stated the test in 2012. *See* Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (en banc), *cert. granted*, Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

[76] *See Seattle*, 458 U.S. at 474 ("Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.").

[77] *Id.* at 472.

[78] *Id.* at 474 (quoting Hunter v. Erickson, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)).

[79] *Id.* at 467 ("[T]he Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (citations omitted) (internal quotation marks omitted)); *see also Hunter*, 393 U.S. at 391 (holding that the charter amendment placed special burdens on racial minorities' ability to pass antidiscrimination

but not other legislation, violates the Equal Protection Clause, even if it is neutral on its face and treats all races equally.[80] As the *Hunter* Court noted, "the reality is that [such a law's] impact falls on the minority."[81] The majority needs no protection against discrimination, because the law, by definition, has majority support and can easily be repealed with that support.[82]

Finally, the *Hunter* trilogy expressly permits states to repeal race-related legislation, provided the state does nothing more.[83] Under *Crawford*, laws that merely repeal race-related legislation are safe from equal protection challenge.[84] The mere repeal doctrine warns that states must have flexibility to experiment without the fear of being irrevocably committed to ineffective or harmful legislation.[85]

IV. THE CIRCUIT SPLIT

A. The Ninth Circuit: *Coalition for Economic Equity v. Wilson* and *Coalition to Defend Affirmative Action v. Brown*

In November 1996, California adopted Proposition 209, a constitutional amendment that banned affirmative action policies in "public education, public employment, [and] public contracting."[86] Proposition 209, subsequently codified in Article 2, § 9 of the California constitution, provided:

> (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation

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laws in future). Of course, laws are not unconstitutional simply because they "make it more difficult for minorities to achieve favorable legislation." *Seattle*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 394). Laws placing political burdens on everyone make it "more difficult for *every* group in the community to enact comparable laws, [so] they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* (quoting *Hunter*, 393 U.S. at 393 (Harlan, J., concurring) (alteration in original)). On the other hand, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of the decision to determine the decisionmaking process." *Id.* at 470 (emphasis in original).

[80] *See Hunter*, 393 U.S. at 391 ("Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority.").

[81] *Id.*

[82] *Id.*

[83] *See* Crawford v. Bd. of Educ., 458 U.S. 527, 535 (1982) ("We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede.").

[84] *Id.*

[85] *Id.*

[86] Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 697, 701 (9th Cir. 1997). The same amendment was at issue in a later as-applied challenge. Coalition to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1132 (9th Cir. 2012).

> of public employment, public education, or public contracting.
>
> . . . .
>
> (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, . . . [the] public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.[87]

Several individuals immediately filed suit against the state in *Coalition for Economic Equity v. Wilson*, where the parties alleged that Proposition 209 violated the Equal Protection Clause under both conventional and PPEP analysis.[88] Although the Ninth Circuit later addressed Proposition 209's effect on university admissions in *Coalition to Defend Affirmative Action v. Brown*,[89] *Wilson* was determinative in the *Brown* decision.[90] In fact, the panel in *Brown* deferred entirely to *Wilson*'s ruling, providing only a superficial review of the facts.[91] Therefore, the focus of this discussion will be *Wilson*, the true battleground over Proposition 209's constitutionality.

The plaintiffs in *Wilson* argued that Proposition 209 created an unequal political structure "that denie[d] women and minorities a right to

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[87] *Brown*, 674 F.3d at 1132 (quoting CAL. CONST. art. 1, § 31(a)). Each California voter was provided a pamphlet at the polls which explained Proposition 209 as follows:

> A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A **NO** vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.
>
> . . . .
>
> **University of California and California State University**
>
> The measure would affect admissions and other programs at the state's public universities. For example, the California State University ("CSU") uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. . . .

Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493–94 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997).

[88] *Wilson*, 122 F.3d at 697, 701.

[89] *See Brown*, 674 F.3d at 1133.

[90] *Id.* at 1131–32, 1135–36.

[91] *Id.* at 1131–32. The plaintiffs in *Brown* brought an as-applied constitutional challenge to Proposition 209, whereas the plaintiffs in *Wilson* challenged the law on its face. *Id.* at 1135. Nevertheless, the court in *Brown* noted that *Wilson* considered the same scenario the plaintiffs were alleging. *Id.* Therefore, the *Brown* court determined that *Wilson* precluded the plaintiffs' as-applied challenge. *Id.*

seek preferential treatment from the lowest level of government."[92] They contended that the same issue was present in *Wilson* as in *Hunter* and *Seattle*: the amendment made the process for obtaining a program that benefits minorities more difficult than the process for obtaining other types of programs, removing that power from a lower echelon of government and lodging it into a remote level of government—the state constitution.

While Proposition 209 is arguably factually synonymous with the amendments in *Hunter* and *Seattle*, *Wilson* distinguished Proposition 209 on two grounds. First, the panel differentiated between laws creating a sweeping prohibition on all race-conscious government hiring and admissions policies, and a piecemeal approach. The court explained that Proposition 209 banned "all [state] instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender . . . ."[93] Conversely, the amendment in *Seattle* only addressed the issue in one context (student reassignment in public schools[94]) and the amendment in *Hunter* reached only one regulatory realm (housing discrimination[95]). The *Wilson* panel explained that a general ban on discrimination or preferences by all state entities represents a neutral law;[96] in contrast, a ban targeting a specific regulated area (such as the housing market) or a particular government entity (such as school boards) violates the Equal Protection Clause.[97]

The *Wilson* panel made this first distinction by relying solely on dicta in the *Seattle* case. The court cited a footnote in *Seattle* where Justice Blackman said, "We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally."[98] The *Wilson* court explained that

> [Proposition 209] does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.[99]

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[92] *Wilson*, 122 F.3d at 703.

[93] *Id.* at 707.

[94] *Id.* at 706.

[95] *Id.*

[96] *Id.* at 707.

[97] *Id.* ("By removing desegregative prerogatives from these general grants of powers [afforded to local governing bodies], the State, as in *Hunter*, differentiated the treatment of racial problems in education from that afforded . . . racial issues generally.").

[98] *Id.* at 715 (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 479 n.22 (1982)).

[99] *Id.*

The second distinction in *Wilson* focused on the difference between antidiscrimination laws and preferential treatment laws.[100] The court observed in a rather overgeneralized fashion, "[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment."[101] In *Wilson*, the panel pointed out that plaintiffs were challenging Proposition 209 because it erected an obstacle to preferential treatment.[102] Conversely, the plaintiffs in *Hunter* and *Seattle* challenged amendments that operated as impediments to equal treatment.[103] In *Hunter*, the charter amendment prevented Nellie Hunter from petitioning for antidiscrimination laws to prevent unequal treatment in the housing market.[104] In *Seattle*, Initiative 350 prevented local school districts from reassigning pupils to ensure all races received an equal education.[105] The Equal Protection Clause's controlling words, the court warned, are "equal" and "protection."[106] Even though the Equal Protection Clause permits race-based preferences, the panel stated that that "hardly implies that the state cannot ban them altogether."[107] Therefore, the *Wilson* court concluded that an obstacle to preferential treatment represents a neutral law and cannot, by definition, be the basis for an equal protection violation.[108]

In *Brown*, the Ninth Circuit relied heavily on *Wilson* by applying these distinctions to the specific setting of affirmative action in university admissions.[109] In *Brown*, high school and college students argued Proposition 209 created an "unequal political structure," which prevented racial minorities from using the democratic process to repeal the ban on affirmative action in higher education.[110] The court turned down the opportunity to reexamine Proposition 209 in this as-applied context, however, holding that *Wilson* acknowledged this scenario, and thus, foreclosed any further consideration.[111] As such, *Wilson* became the Ninth Circuit's position: no PPEP violation regarding prohibitions on affirmative action in higher education.

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[100] *Id.* at 707–08.

[101] *Id.* at 707.

[102] *Id.* at 708.

[103] *See id.* at 707–08 (characterizing the laws at issue in *Hunter* and *Seattle* as impediments to equal treatment).

[104] *Id.* at 707.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 708.

[108] *Id.* at 707, 709.

[109] Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1135 (9th Cir. 2012).

[110] *Id.*

[111] *Id.* Plaintiffs argued that *Wilson* was a facial challenge, in contrast to the *Brown* plaintiffs' as-applied challenge. *Id.* The *Brown* court responded, explaining that *Wilson* considered the very situation under which *Brown* was brought. *Id.* While the *Wilson* decision was a facial challenge, it considered Proposition 209's effects on higher education, and therefore, the Brown panel held that *Wilson* foreclosed a reexamination of Proposition 209's constitutionality. *Id.*

B. The Sixth Circuit: *Coalition to Defend Affirmative Action (BAMN) v. Regents of the University of Michigan*

In 2006, Michigan passed Proposal 2, a statewide ballot initiative prohibiting affirmative action in "public employment, public education, or public contracting."[112] Proposal 2 amended the Michigan constitution, eviscerating universities' discretion to consider race as a factor in admissions.[113] While it did not preclude universities from considering other factors, the amendment prohibited the consideration of race in admissions.[114] The amendment provided in part:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.[115]

Several individuals and interest groups[116] filed suit in the U.S. District Court for the Eastern District of Michigan challenging the

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[112] Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 471 (6th Cir. 2012) (en banc), *cert. granted*, Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013). Proposal 2 had a controversial history. The Sixth Circuit explained, "Proposal 2 found its way on the ballot through methods that undermine[d] the integrity and fairness" of the democratic process—the proponents of Proposal 2 had garnered the requisite number of signatures using "fraud and deception." Nevertheless, the court sua sponte rendered the challenge to the signatures moot, because the proposal had already passed Michigan's constitutional amendment process. Operation King's Dream v. Connerly, 501 F.3d 584, 591–92 (6th Cir. 2007).

[113] *BAMN*, 701 F.3d at 471–72.

[114] *Id.* at 471 (noting that Proposal 2 allowed universities to consider, for example, grades, athletic ability, geographic diversity, or family alumni connections).

[115] *Id.*

[116] The lead plaintiff challenging Proposal 2 in *BAMN*—Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary—was also the lead plaintiff challenging Proposition 209 in *Brown*.

constitutionality of Proposal 2 under the Equal Protection Clause.[117] The district court granted the state's motion for summary judgment, finding that Proposal 2 did not violate the Equal Protection Clause of the Fourteenth Amendment.[118] Plaintiffs appealed to the Sixth Circuit.[119]

On appeal, petitioners argued that Proposal 2 violated the Equal Protection Clause under both the political process and traditional theories.[120] The Sixth Circuit ultimately dismissed the conventional argument but struck down the amendment on political process grounds.[121] It explained:

> A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiative a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan [c]onstitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change.[122]

The court's political process analysis began with "[t]he first prong of the *Hunter/Seattle* test[,] . . . whether [the law] has a 'racial focus.'"[123] In particular, the court asked whether Proposal 2 targets a program that "inures primarily to the benefit of the minority."[124] The court answered with a resounding *yes*. Like in *Seattle*, Proposal 2 targeted policies

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[117] While Proposal 2 addressed racial preferences in public education, public employment, and public contracting, plaintiffs challenged Proposal 2 only as applied to public education and university admissions. *BAMN*, 701 F.3d at 472.

[118] *Id.* at 473.

[119] A panel of the Sixth Circuit initially reversed the district court's grant of summary judgment. Coal. to Defend Affirmative Action v. Univ. of Mich., 652 F.3d 607, 631–32 (6th Cir. 2011). The Attorney General then sought en banc review, which the Sixth Circuit granted, vacating the panel opinion. *BAMN*, 701 F.3d at 473.

[120] *BAMN*, 701 F.3d at 473.

[121] *Id.* at 485 (concluding "that Proposal 2 reorder[ed] the political process in Michigan to place special burdens on minority interests").

[122] *Id.* at 470.

[123] *Id.* at 478–79.

[124] *Id.* at 477 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 475 (1982).

designed to foster diversity in the classroom.[125] The court determined that school diversity is vital to ensuring that minority students "achieve their full measure of success."[126] Proposal 2, according to the court, targeted programs that "promote cross-racial understanding, help to break down racial stereotypes, and enable students to better understand persons of different races."[127] Therefore, the court determined that Proposal 2 targeted programs—here affirmative action and classroom diversity—that inure primarily to the benefit of minorities.[128]

As in *Seattle*, it made no difference to the court whether Proposal 2 benefitted non-minority students as well as minority students.[129] The court pointed to *Grutter* and admitted that classroom diversity undoubtedly benefits all races.[130] Nonetheless, the court affirmed the reasoning in *Seattle* and *Hunter* that the wider benefits associated with the policies targeted by Proposal 2 did not undermine their primary benefit to minorities.[131]

After holding that Proposal 2 had a racial focus, the Sixth Circuit proceeded to the second prong of the *Hunter/Seattle* test: whether the amendment reallocated political power in a way that placed burdens on minority groups.[132] The court also answered in the affirmative, holding that the amendment created a disparate political process.[133] Students seeking to alter admissions policy regarding affirmative action had only one avenue of change after Proposal 2: to amend the Michigan constitution.[134] Students seeking to change admissions policies on any ground other than race could lobby the admissions committee, petition higher administrative authorities, seek to affect board elections, or campaign for an amendment to the Michigan constitution.[135] The court emphasized that the cost and effort required to amend the state's

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[125] *Id.* at 478.

[126] *Id.* (quoting *Seattle*, 458 U.S. at 472–73). The court further explained, "Such programs do so through 'preparing minority children for citizenship in our pluralistic society, while . . . teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.'" *Id.* (alteration in original) (quoting *Seattle*, 458 U.S. at 473).

[127] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)) (internal quotations marks and alterations omitted).

[128] *Id.* at 479.

[129] *Id.* ("*Seattle* not only mandates our conclusion that Proposal 2 is racially focused, but it also dispels any notion that the benefit race-conscious admissions policies may confer on the majority undercuts its 'racial focus.'").

[130] *BAMN*, 701 F.3d at 479 (citing *Grutter*, 539 U.S. at 327–33). *See also id.* (citing *Seattle*, 458 U.S. at 472–73).

[131] *Id.*

[132] *See id.* at 483–85.

[133] *See id.* at 484 ("Because Proposal 2 entrenched the ban on all race-conscious admissions policies at the highest level, this last resort—the campaign for a constitutional amendment—is the *sole recourse* available to a Michigan citizen who supports enacting such policies.").

[134] *Id.* (comparing the political process minorities must navigate to change affirmative action policies with process to change other admissions policies).

[135] *Id.* at 484.

constitution made this option prohibitively expensive.[136] Only after surmounting this hurdle could the "now-exhausted [minority] reach the starting point of his neighbor who sought a legacy-related admissions policy change."[137] Therefore, Proposal 2 reordered the political process in a way that violated the Equal Protection Clause.

Upon concluding there was an equal protection violation, the court turned its attention to the discrimination/preferential treatment distinction—an argument that the Ninth Circuit found dispositive. Like in *Wilson*, the State of Michigan and the *BAMN* dissenters argued that *Hunter* and *Seattle* were inapplicable because Proposal 2 prohibited preferential treatment, while *Hunter* and *Seattle* only prohibited laws that "burden racial minorities' ability to obtain *protection from discrimination*."[138] The court dismissed this argument as an incorrect interpretation of *Seattle*.[139] In *Seattle*, the court explained, Washington's busing program was not implemented to correct for de jure segregation because there was no finding that the segregation was the result of intentional discrimination.[140] As such, Seattle's busing program could not be described as an antidiscrimination policy—rather, it was an ameliorative measure.[141] The court explained that it was "inaccurate to suggest that [the law in *Seattle*] affected antidiscrimination legislation by making it more difficult for minorities to obtain *protection from discrimination* through the political process."[142] Therefore, the Sixth Circuit read *Seattle* and *Hunter* as applying to laws placing burdens on the political process for minority interests, regardless of whether those interests are antidiscriminatory or ameliorative.

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[136] *Id.* (observing that placing an amendment on the ballot required either two-thirds support of both legislative houses or "the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election.").

[137] *Id.*

[138] *See id.* at 485 (emphasis in original). The court further elaborated on the dissenters' argument:

> At bottom, this is an argument that an enactment violates the Equal Protection Clause under *Hunter* and *Seattle* only if the political process is distorted to burden legislation providing constitutionally-mandated protections, such as antidiscrimination laws. Under this theory, a state may require racial minorities to endure a more burdensome process than all other citizens when seeking to enact policies that are in their favor if those policies are constitutionally *permissible* but not constitutionally *required*.

Id. (emphasis in original).

[139] *Id.* at 486.

[140] *Id.*

[141] *Id.*

[142] *Id.* (emphasis in original).

V. WHICH CIRCUIT WAS CORRECT?

The Sixth and Ninth Circuits faced similar amendments in *BAMN* and *Wilson/Brown*. Both prohibited affirmative action in all functions of government, including university admissions.[143] Both permitted public universities to continue using other, non-race-based admissions criteria such as grades, athletic ability, geographic diversity, and family legacy.[144] Both were implemented at the constitutional level, entrenching the ability to repeal them at the highest level of government. Yet the circuits came to opposing conclusions about the constitutionality of those laws under the Equal Protection Clause. While reaching opposite conclusions, both courts addressed the *Hunter* trilogy in their analyses and accurately identified or purported to use the same two-part test.[145] The reason for their discord can be boiled down to a disagreement about two issues: the scope of the law in question and the antidiscrimination/preferential treatment distinction.

A. The Scope of the Law

The Ninth Circuit distinguished the laws in *Hunter* and *Seattle* from Proposition 209 on the basis of Proposition 209's flat prohibition on all governmental discriminatory and preferential treatment.[146] It quoted the Supreme Court as recognizing an "explicit distinction 'between state action that discriminates on the basis of race and state action that addresses, in a neutral fashion, race-related matters.'"[147] The court explained that a general prohibition on all government discrimination or preferential treatment represents a neutral law that does not violate equal protection.[148] By the Ninth Circuit's reasoning, the laws in *Hunter* and *Seattle* violated equal protection because they targeted a specific government branch or race-related policy.[149]

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[143] *Compare* Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997) and Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1132 (9th Cir. 2012) (with an amendment that prohibits discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting), *with BAMN*, 701 F.3d at 471 (with an amendment that prohibits discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting).

[144] *Brown*, 674 F.3d at 1132; *BAMN*, 701 F.3d at 471.

[145] *See Brown*, 674 F.3d at 1135 (relying generally on *Wilson*); *Wilson*, 122 F.3d at 703 (applying *Hunter/Seattle* two-step test); *BAMN*, 701 F.3d at 477 (laying out the *Hunter/Seattle* test as the applicable precedent).

[146] *Wilson*, 122 F.3d at 707.

[147] *Id.* at 705 (quoting Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982)).

[148] *Id.* at 707.

[149] *See id.* ("It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender

Just like the amendment in *Wilson/Brown*, the Sixth Circuit faced a similarly broad prohibition of discrimination or preferential treatment.[150] Yet the court, nonetheless, found that it violated equal protection under the political process line of cases.[151] It made no reference to the amendment's breadth.[152] Rather, it focused on the amendment as a whole, whether broad or narrow, to see if it had a racial focus.[153]

By mischaracterizing a broad law as a neutral law, the Ninth Circuit misinterpreted Supreme Court precedent. The *Hunter* and *Seattle* decisions centered on the racial focus of the laws, not the scope of their prohibitions.[154] In *Hunter*, the Supreme Court explained that the ordinance rescinded the fair housing ordinance and created a different, more onerous political process to achieve race-based fair housing laws in the future.[155] Meanwhile, the *Hunter* Court pointed out, "[t]he automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes."[156] Therefore, the law altered the political process to pass antidiscrimination laws, but left unchanged the process for passing all other ordinances.[157] As such, the law contained an unconstitutional racial classification.[158]

In *Seattle*, the Supreme Court similarly focused on Initiative 350's creation of disparate political processes to obtain busing for a race-related purpose as opposed to virtually any other purpose.[159] The Court noted the district court's finding that Initiative 350 allowed schools to continue busing students for almost all nonintegrative purposes.[160] Meanwhile, Initiative 350 removed the power of local school districts to bus for desegregation and instead placed it at the state constitutional

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antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.").

[150] *See BAMN*, 701 F.3d at 471 (noting that the law prohibited race-based discrimination or preferential treatment in government hiring, public contracting, and university admissions).

[151] *Id.* at 485.

[152] *See id.* (analyzing only the amendment's racial focus and impact on political process).

[153] *Id.* at 478–79.

[154] *See* Hunter v. Erickson, 393 U.S. 385, 389 (concluding there was an equal protection violation because of the racial classification); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 471–74 (1982) ("Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.").

[155] *Hunter*, 393 U.S. at 389–90.

[156] *Id.* at 391.

[157] *Id.* at 390. *See Seattle*, 458 U.S. at 485 ("This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race."'" (citations removed)).

[158] *Hunter*, 393 U.S. at 390.

[159] *Seattle*, 458 U.S. at 470.

[160] *Id.* at 471.

level.[161] Therefore, the Court found that Initiative 350 altered the political process in an impermissible way.[162]

Notably absent is any reference to the breadth or scope of Initiative 350 or the charter amendment. The Court in *Seattle* did say in dicta, comprising less than a footnote, that the State did "not attempt[] to reserve to itself exclusive power to deal with racial issues generally."[163] The Ninth Circuit clung to this footnote in *Wilson* (and in turn, *Brown*), interpreting *Seattle* as saying that a general law outlawing all race-based discrimination or preferences at all levels of government is constitutionally permissible.[164] But this interpretation of *Seattle* ignores the key alternative hypothetical that the *Seattle* holding relies on: "[t]he State, of course could have reserved to state officials the right to make all decisions in the areas of education and student assignment."[165] Such an alternative amendment would be neutral because it would change the political process for an entire area of the law—education—rather than singling out race-related busing for unique treatment.

As a matter of policy, it does not make sense to immunize broad amendments like that in *Wilson/Brown* from equal protection challenge solely because they apply at all levels of government. The signature characteristic of a PPEP violation is the reorganization of the political process that makes it harder for minorities to obtain legislation or remedies that benefit them than for others to achieve legislation or remedies.[166] Both narrow and broad laws can create unequal political structures, but a broad law effects a more serious constitutional violation. A narrow discriminatory law may only affects minorities' ability to achieve legislation in one small governmental arena. A general one may instead impair the ability of minorities to achieve *any* legislation that benefits them over the majority. Both the broad and narrow discriminatory laws unconstitutionally alter the political process for minorities, but the broad one does it on a larger scale. Therefore, if

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[161] *Id.* at 480.

[162] *Id.* at 479.

[163] *Id.* at 479 n.22.

[164] *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 707 (9th Cir. 1997) ("When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters.").

[165] *Id.* (quoting *Seattle*, 458 U.S. at 487). *Wilson* quoted this language from *Seattle* and then promptly ignored it.

[166] *Seattle*, 458 U.S. at 470. The Court explained:

> [A] different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of the decision to determine the decisionmaking process. State action of this kind, the Court [in *Hunter*] said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest."

Id. (quoting *Hunter*, 393 U.S. at 391, 395 (alterations in original) (emphasis in original)).

anything, broad laws should be considered more serious infractions on minority rights.

B. The Antidiscrimination/Preferential Treatment Distinction

The Ninth Circuit also tried to distinguish *Hunter* and *Seattle* by suggesting that the laws in those cases repealed antidiscrimination laws, rather than preferential treatment policies.[167] The court explained, "[t]he controlling words, we must remember, are 'equal' and 'protection.' . . . [; i]mpediments to preferential treatment do not deny equal protection."[168] Accordingly, the Ninth Circuit concluded that the Fourteenth Amendment cannot be violated by a ban on preferential treatment programs.[169]

Essentially, the Ninth Circuit limited review under PPEP to laws prohibiting antidiscrimination laws, not preferential treatment policies. It completely overlooked the fact that the Supreme Court in *Seattle* extended PPEP jurisprudence to programs that were not constitutionally mandated.[170] In addition, Ninth Circuit's reaffirmation of *Wilson*'s holding in *Brown* did not give adequate attention to intervening Supreme Court precedent in *Grutter*.[171]

As the Sixth Circuit explained, the antidiscrimination/preferential treatment distinction "adopt[s] a strained reading [of *Seattle*] that ignores the preferential nature of the legislation at issue in [that case], and inaccurately recast[s] it as anti-discrimination legislation."[172] In *Seattle*, the school district implemented the desegregation plan to alleviate de facto segregation in public schools.[173] There was no finding of

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[167] *Wilson*, 122 F.3d at 707–08 (pointing out that the statute in *Hunter* made it more difficult for Nellie Hunter to obtain protection against unequal treatment, and similarly, the statute in *Seattle* made it more difficult for minority students to obtain protection against unequal treatment in education). *See id.* at 707 ("[A] state law that . . . restructure[s] the political process can only deny equal protection if it burdens an individual's right to equal treatment.")

[168] *Id.* at 708. The court later continued, "That the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Id.*

[169] *Id.* at 708.

[170] *See Seattle*, 458 U.S. at 485–86.

[171] Grutter v. Bollinger, 539 U.S. 306 (2003). While the Court in *Grutter* did not address whether its PPEP jurisprudence applied to preferential treatment programs, it held that these programs do not necessarily violate equal protection. *Id.* at 334 (holding that universities may consider race as "plus" factor in admissions). The court in *Wilson* may have implied the opposite when it said, "[i]mpediments to preferential treatment do not deny equal protection." *Wilson*, 122 F.3d at 708. On the other hand, *Wilson* could be construed as saying that, while the Equal Protection Clause does not forbid affirmative action, it also does not require it. Nonetheless, *Brown*'s failure to reexamine *Wilson* in light of *Grutter* ignored the fact that, because race can constitutionally be considered in admissions, it is a constitutionally legitimate political goal. Therefore, minorities have a constitutional right to promote affirmative action through the political process.

[172] *BAMN*, 701 F.3d at 486.

[173] *See Seattle*, 458 U.S. at 460–61. The Court also said, "In a very obvious sense, the initiative thus 'disadvantages those who would benefit from laws barring' *de facto* desegregation 'as against

government-sponsored discrimination, so the school district's policy was an ameliorative measure, not a response mandated by the Equal Protection Clause.[174] The State of Washington was under no obligation to adopt desegregation policies.[175] The Seattle Plan, therefore, could not be described as an antidiscrimination law or policy, even though that is how the Ninth Circuit characterized it. In fact, *Seattle* implicitly expanded PPEP review to preferential treatment programs.[176]

The Supreme Court never made a distinction between antidiscrimination laws and preferential treatment laws in *Hunter* or *Seattle*. *Hunter* analyzed the charter amendment's effect on antidiscrimination laws, but only because the law in question repealed a strictly antidiscrimination law. *Seattle*, far from distinguishing between discrimination and preferential treatment, extended the *Hunter* analysis to an amendment that can only be described as containing preferential treatment policies. Therefore, the Ninth Circuit was wrong to draw a distinction where none existed.

Furthermore, the Ninth Circuit's reaffirmation of *Wilson* in *Brown* demonstrates a misunderstanding of affirmative action policies by ignoring the fact that affirmative action is constitutionally permissible under *Grutter*.[177] As long as universities devise a method of considering race that is narrowly tailored, they may adopt preferential treatment programs.[178] Political process equal protection asks only whether a law has a racial focus and alters the political process in a way that places special burdens on minority interests.[179] Affirmative action policies are in the interest of minorities,[180] and they are constitutionally permissible in some settings. Therefore, they fit within the PPEP framework.

While the Ninth Circuit failed to properly interpret *Grutter* and *Seattle*, the Sixth Circuit adhered closely to Supreme Court guidance. When confronted with the antidiscrimination/preferential treatment distinction, the court in *BAMN* correctly interpreted the amendment in *Seattle* as one that was not constitutionally required, and hence, the

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those who . . . would otherwise regulate' student assignment decisions; 'the reality is that the law's impact falls on the minority.'" *Id.* at 474–75 (quoting *Hunter*, 393 U.S. at 391).

[174] *BAMN*, 701 F.3d at 486.

[175] *See Seattle*, 458 U.S. at 493 (Powell, J., dissenting). In his dissent, Justice Powell stated:

> The issue here arises only because the Seattle School District—in the absence of a then-established state policy—*chose* to adopt race-specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and canceled its integration program without violating the Federal Constitution.

Id. (emphasis added).

[176] *Id.* at 485 (majority opinion) (discussing how the amendment's race-conscious restructuring of its political decisionmaking process is an impermissible violation of the equal protection clause).

[177] Grutter v. Bollinger, 539 U.S. 306, 334–35 (2003).

[178] *Id.* at 333.

[179] *See supra* Part II.

[180] *See BAMN*, 701 F.3d at 478–79 ("[I]t is beyond question that Proposal 2 targets policies that 'minorities may consider . . . [to be] in their interest.'" (quoting *Seattle*, 458 U.S. at 474)).

distinction is one without a difference.[181] The court noted that Initiative 350, the amendment at issue in *Seattle*, repealed discretionary school board policies.[182] Desegregation was not constitutionally required because there was no finding of de jure segregation.[183] The Sixth Circuit determined, therefore, that Initiative 350 could only be viewed as a repeal of preferential treatment policies.[184] The court also explained that *Seattle* created no distinction between antidiscrimination policies and preferential treatment policies.[185] Thus, the court stated, "[i]t should be unsurprising, then, that the language of *Hunter* and *Seattle* encompasses any legislation in the interest of racial minorities."[186]

VI. CONCLUSION

Both the Ninth and the Sixth Circuits correctly identified the *Hunter* trilogy as the controlling precedent in their respective decisions.[187] One of the main reasons the Ninth Circuit ultimately reached a different conclusion was its concern that a strict reading of the *Hunter* trilogy would debilitate California's ability to allocate power among the different subdivisions of government.[188] In *Seattle*, Justice Powell made a similar argument in dissent when he vehemently argued that the majority opinion violated principles of state sovereignty.[189] In particular, he was convinced that the Court was infringing states' right to make decisions regarding the administrative structure of public

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[181] *BAMN*, 701 F.3d at 485–87.

[182] *Id.* at 486.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982), for the proposition that the Equal Protection Clause "protects against distortions of the political process that 'place special burdens on the ability of minority groups to achieve *beneficial legislation*'" (emphasis added in *BAMN*)).

[187] *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997) (applying the *Hunter/Seattle* test); Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1135 (9th Cir. 2012) (deferring to *Wilson*'s holding); *BAMN*, 701 F.3d at 476–86 (applying the *Hunter/Seattle* test).

[188] *Wilson*, 122 F.3d at 706 ("'States have extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them.' That a law resolves an issue at a higher level of state government says nothing in and of itself." (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978)). The Ninth Circuit also explained:

> The *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first. . . . Plaintiffs' counsel went even one step further at oral argument. He urged that "[t]he people of California are not entitled to make a judgment as to whether compelling state interests have been vindicated. That is for the courts." *Au Contraire!* That most certainly *is* for the people of California to decide, *not* the courts.

Id. at 707–09. It is clear by language like this that states' rights were of primary concern to the court.

[189] *Seattle*, 458 U.S. at 493 (Powell, J., dissenting) ("Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government.").

schools.[190] This sentiment was echoed by Justice Black in his *Hunter* dissent when he said, "The result of what the Court does is precisely as though it had commanded the State by mandamus or injunction to keep on its books and enforce what the Court favors as a fair housing law."[191] To him, the Court was infringing upon state prerogatives and committing states to legislation "when convinced by experience that a law is not serving a useful purpose."[192]

While it may be true that PPEP review limits the freedom of states to structure political decisionmaking, it does not leave states powerless to repeal affirmative action in the context of public universities. Many states may determine that affirmative action policies no longer represent an attractive way of furthering educational objectives and minority interests. *Grutter*, after all, allowed affirmative action but did not require it.[193] As the Ninth Circuit said in *Wilson*, "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."[194]

Political process equal protection only restricts the *method* states use to repeal affirmative action policies. It does not forbid states from repealing them in the first place. In the context of public universities, discretion over admissions policies often lies with the board of regents.[195] If the board is elected by popular vote[196] or appointed by the state executive,[197] voters can address affirmative action by campaigning

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[190] *Id.* at 493–95.

[191] Hunter v. Erickson, 393 U.S. 385, 396 (1969) (Black, J., dissenting).

[192] *Id.* at 397.

[193] Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (allowing universities to consider race as a plus factor in admissions).

[194] Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997).

[195] *E.g.*, Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 701 F.3d 466, 480–81 (6th Cir. 2012) (en banc), *cert. granted*, Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) (noting that the Michigan constitution gave plenary authority to governing boards of public universities, including authority to create bylaws governing admissions). The court determined that much of the authority was delegated to the associate vice provost and executive director of undergraduate admissions. *Id.* at 481. Nevertheless, the board retained ultimate authority to set policies because it appointed individuals to those positions. *Id.*

[196] Boards in Michigan are popularly elected. *Id.* at 483. The Sixth Circuit also alluded to affirmative action's often central role in board members' election campaigns:

> Telling evidence that board members can influence admissions policies—bringing such policies within the political process—is that these policies can, and do, shape the campaigns of candidates seeking election to one of the boards. As the boards are popularly elected, citizens concerned with race-conscious admissions policies may lobby for candidates who will act in accordance with their views—whatever they are. Board candidates have, and certainly will continue, to include their views on race-conscious admissions policies in their platforms. Indeed, nothing prevents Michigan citizens from electing a slate of regents who promise to review admissions policies based on their opposition to affirmative action.

Id.

[197] In California, the University of California's Board of Regents consists of the governor, the lieutenant governor, the speaker of the assembly, the superintendent of public instruction, the president and vice president of the alumni association, the acting president of the university serving

to elect school board members or governors who run on an anti-affirmative action platform. As such, everyone, whether members of the minority or the majority, would have the same opportunity to promote and elect candidates that reflect their views on the subject of university admissions.[198] This alternative approach allows a state to circumvent the second prong of the *Hunter* trilogy and avoid a reordering of the political process along racial lines.

Affirmative action will continue to remain a contentious issue, especially in higher education where admission to a prestigious university may have a direct effect on one's career aspirations. The PPEP issues that split the Sixth and Ninth Circuits, however, may soon be resolved because, as of March 25, 2013, the Supreme Court granted certiorari to *BAMN*.[199] If it squarely addresses the circuit split, the decision is sure to hold a significant place in Supreme Court jurisprudence, especially in light of what appears to be a growing interest on the part of the Supreme Court in examining affirmative action issues.[200]

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ex officio, and 18 other members appointed by the governor and approved by the state senate. CAL. CONST., art. 9, § 9, cl. 1(a).

[198] In *BAMN*, the Sixth Circuit found that Michigan voters could constitutionally influence the governance of universities by electing the board. *See supra* note 196.

[199] Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013)

[200] The Court decided *Fisher v. University of Texas at Austin* on June 24, 2013, one month after it granted certiorari in *Schuette v. Coal. to Defend Affirmative Action*. *See Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (addressing the affirmative action elements of the University of Texas's overall admissions policy).

A Change to Relation Back

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ABSTRACT

In civil rights actions involving excessive force, abuses stemming from official government policies, and other police brutality, plaintiffs often do not know the names of the accused police officers at the time they file their actions. Federal Rule of Civil Procedure 15 allows civil rights plaintiffs to relate back their claims by substituting the caption and naming the proper parties. However, a three-way circuit split exists regarding the timing of relating back the complaint in civil rights cases. Further, plaintiffs are often unsophisticated in civil rights actions. Consequently, the authors argue that if potential defendants receive proper notice, are not prejudiced, and the complaint meets the federal plausibility pleading standard, plaintiffs should be allowed to relate back their claim until the end of discovery. Moreover, Rule 15 should be amended to allow the plaintiff to substitute the caption until the end of discovery in civil rights cases alleging excessive force, Monell *cases, and other police brutality cases. In conclusion, the proposed amendment to Rule 15 would offer a just resolution to the current three-way circuit split of the relation back doctrine.*

*Thank you to the editors of the *Texas Journal on Civil Liberties & Civil Rights* for their extraordinary help in preparing this Article for publication. I especially want to thank all of my co-authors, my wife Beth A. Friel, my aunt Barbara C. Zeiger, and my good friends Gabriel Z. Levin and Steven A. Kushner, for their support and encouragement, and for listening to my stories.

I. INTRODUCTION

Although police power pervades our society, our citizens have recourse. Section 1 of the Civil Rights Act of 1871, as codified under 42 U.S.C. § 1983, allows citizens to bring suit against police officers who offend the Constitution.[1] State police departments, however, frequently allow officers to hide their identities behind badges by refusing to release the names of officers to the citizens they are serving. Without a name, a § 1983 action will fail. The Federal Rules of Civil Procedure provide the only remedy to this problem.

Under the current system, when the identity of the offender is unknown, the plaintiff has very limited time to learn his name and amend the complaint or substitute the caption (or both) before the federal system will dismiss the claim. The federal circuits are split on how to handle an action once the identity of the offending officer is discovered. Seemingly, if the elements of a § 1983 claim and all other elements of a well-pleaded complaint are satisfied, the plaintiff should get 120 days after the statute of limitations runs to amend the name of the defendant. This would be sensible, yet some circuits have sided entirely with state and local governments in arguing otherwise.

From Philadelphia, a city hardened by police brutality, the authors write to suggest an exception to Federal Rule of Civil Procedure 15 ("Rule 15") in excessive force cases only. If a complaint meets federal pleading standards[2] and alleges excessive force, the identity of the alleged bad actor is arguably not relevant. The same lawyer will defend the action regardless of which officer is the actual defendant. Because of indemnification, the same payer will pay damages regardless of which officer is found to have violated the plaintiff's civil rights. Assessing liability to a specific person has no connection to the alleged tort,

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[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (2006).

[2] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

because the suggestion that the actual individual holds potential liability is erroneous. Therefore, the authors suggest that, when both pleading standards are met and excessive force is properly pleaded, asserting a claim against "John Doe" is sufficient—the caption does not need to be substituted until the close of discovery, thereby eliminating the need to go through the process of relating back under Rule 15(c).

II. WHAT IS RELATION BACK? RULE 15 EXPLAINED

Rule 15 permits parties to amend their pleadings before and during a trial[3] in order to assert new claims or defenses,[4] correct technical errors,[5] or change the name of the party against whom a claim is made.[6] Courts treat amendments made by a plaintiff as new claims for relief or as refilings of the original pleading; therefore, amendments may be susceptible to the defense that they were filed after the applicable statute of limitations has run.[7] However, under certain circumstances, Rule 15(c) allows an amendment to be treated as though it were filed on the date of the original pleading, which presumably was within the applicable statute of limitations. In such cases, the amendment's filing date is said to "relate back" to that of the original complaint.[8]

Not only do the Federal Rules of Civil Procedure offer the option of relation back, but they also offer multiple liberal means of achieving it.

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[3] FED. R. CIV. P. 15(a)–(b).

[4] FED. R. CIV. P. 15(c)(1)(B) explicitly allows for amendments to assert a claim or defense. *See* Wood v. Worachek, 618 F.2d 1225, 1229 (7th Cir. 1980) (stating that plaintiffs may change the theory or statute under which recovery is sought or the capacity in which they sue).

[5] *See* Woods v. Ind. Univ.-Purdue Univ. at Indianapolis, 996 F.2d 880, 884 (7th Cir. 1993) (stating that Rule 15(c) has routinely been used to relate back amendments that cure defective statements of jurisdiction or venue).

[6] FED. R. CIV. P. 15(c)(1)(C) explicitly allows for amendments to change the party or the naming of the party against whom a claim is asserted.

[7] *See* Craig v. United States, 413 F.2d 854, 855–56 (9th Cir. 1969) (holding that an amended complaint filed after the statute of limitations fails unless it relates back to an original complaint filed within the statute of limitations); *see also* Urrutia v. Harrisburg Cnty. Police Dep't, 91 F.3d 451, 453 (3d Cir. 1996) (same); *Woods*, 996 F.2d at 885 (same); Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977) (same).

[8] Steven S. Sparling, *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 CARDOZO L. REV. 1235, 1243 (1997) ("Rule 15(c) preserves an amended pleading from a defendant's statute of limitation defense by treating the amendment as if it had been filed at the time of the original pleading."). *See* Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1015 (3d Cir. 1995) (noting that the relation-back rule ameliorates the effect of statutes of limitations); *Woods*, 996 F.2d at 884 (using Rule 15(c) for relation back); Carol M. Rice, *Meet John Doe: It Is Time For Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 888 (1996) ("Relation back is a fiction by which courts treat an amendment to a complaint as if it were part of the original timely complaint.").

Rule 15(c) provides three ways that relation back can preserve an amended pleading from a statute of limitations defense.[9] First, a party may take advantage of relation back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[10] In this instance, the subsection's language limits the option to modifying claims or defenses, and thus, may not be used for other types of amendments. Second, if a state law provides the statute of limitations with a relation-back provision more favorable than the provisions of the federal relation-back rule, the amending party benefits from the use of state law.[11] Thus, when an action involves a state law containing a statute of limitations with a relation-back provision (for example, § 1983 claims),[12] a federal court must compare state and federal law and apply the more forgiving standard.[13]

Third, Rule 15(c) allows the addition or change of a defendant's name in the pleading.[14] When a plaintiff files a complaint, he must designate all parties in the caption.[15] If a plaintiff does not know the name of a defendant, some jurisdictions allow him to use a "John Doe" pleading and later amend the complaint to replace the fictitious name with the proper name.[16] However, when a plaintiff seeks such an amendment after the statute of limitations has expired, the only way to defeat a statute of limitations defense is to relate the amendment back to the date of the original complaint. If a state's relation-back doctrine is

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[9] FED. R. CIV. P. 15(c)(1).

[10] *Id.* at 15(c)(1)(B).

[11] *Id.* at 15(c)(1)(A). *See Urrutia*, 91 F.3d at 457 (holding that the Pennsylvania's relation-back provision was not more lenient than Rule 15 and, therefore, could not be used by the plaintiff); *Nelson*, 60 F.3d at 1014 n.4 (citing FED. R. CIV. P. 15 advisory committee's note (1991 amendment), which stated that "the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law" and that "[g]enerally, the applicable limitations law will be state law"); Lundy v. Adamar of N.J., Inc., 34 F.3d 1173, 1184 (3d Cir. 1994) (comparing New Jersey's relation-back provision to Rule 15); Wilson v. City of Atlantic City, 142 F.R.D. 603 (D.N.J. 1992) (allowing relation back because New Jersey's fictitious name pleading would allow relation back).

[12] Wilson v. Garcia, 471 U.S. 261, 266–68 (1985) (noting that the state's statute of limitations for personal injury tort claims was the applicable statute for §1983 actions); ERWIN CHEMERINSKY, FEDERAL JURISDICTION (5th ed.) 602–03 (2007).

[13] FED. R. CIV. P. 15(c) advisory committee's note (1991 amendment). Rule 15(c) makes any relation back permissible under the applicable limitations law (usually state law) available to plaintiffs. *See Urrutia*, 91 F.3d at 457 (holding that the Pennsylvania's relation-back provision was not more lenient than Rule 15 and therefore could not be used by the plaintiff); *Lundy*, 34 F.3d at 1184 (comparing New Jersey's relation-back provision to Rule 15).

[14] FED. R. CIV. P. 15(c)(1)(C). This subsection should be used if state law does not provide for the addition or alteration of party names.

[15] FED. R. CIV. P. 10(a) ("The title of the complaint must name all the parties.").

[16] *E.g.*, Garrett v. Fleming, 362 F.3d 692, 694 (10th Cir. 2004) (naming six "John Does"); Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 191 (3d Cir. 2001) (naming "unknown corrections officers"); Wayne v. Jarvis, 197 F.3d 1098, 1101 (11th Cir. 1999) (naming "Seven Unknown Deputy Sheriffs"), *overruled on other grounds by* Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003); Jacobsen v. Osborne, 133 F.3d 315, 317 (5th Cir. 1998) (naming "Deputy John Doe"); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 467 (2d Cir. 1995) (naming ten "John Doe" officers); Worthington v. Wilson, 8 F.3d 1253, 1254 (7th Cir. 1993) (naming "three unknown named police officers").

unhelpful, a plaintiff seeking to change the name of the defendant must turn to Rule 15(c)(1)(C).[17] This provision is particularly helpful for the plaintiff who is initially unable to identify a tortfeasor, but who later identifies the assailant and must amend the complaint with the proper name after the statute of limitations has expired.

Rule 15(c)(1)(C)[18] stipulates four elements required for relation back of party name alterations.[19] These requirements are designed to equalize, on the one hand, the Federal Rules' purpose in securing a trial on the merits[20] with, on the other hand, the defendant's interest in the statute of limitations' protections[21] and the right to notice. First, the amendment must assert a claim or defense that arose out of the same transaction.[22] Second, the party to be added must have received some notice of the action[23] so as not to prejudice a defense on the merits.[24]

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[17] Wilson v. United States, 23 F.3d 559, 562 (1st Cir. 1994) ("When a plaintiff amends a complaint to add a defendant, but the plaintiff does so subsequent to the running of the relevant statute of limitations, then Rule 15(c)(3) controls whether the amended complaint may 'relate back' to the filing of the original complaint and thereby escape a timeliness objection."). *See also* Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996) ("[R]eplacing a 'John Doe' with a named party in effect constitutes a change in the party sued. Such an amendment may only be accomplished when all of the specifications of Fed. R. Civ. P. 15(c) are met.") (quoting Aslandis v. U.S. Lines, Inc., 7 F.3d 1067, 1075 (2d. Cir. 1993)); G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1501 (9th Cir. 1994) ("[Rule] 15(c) 'is the only vehicle through which a plaintiff may amend this complaint, after a statute of limitations period has run, to accurately name a defendant who was not correctly named in the pleading before the limitation period had run.'") (citing Korn v. Royal Caribbean Cruise Line, Inc., 724 F. 2d 1397, 1399 (9th Cir. 1984)).

[18] The current language of the "mistake" provision of relation back can be found in Rule 15(c)(1)(C). However, prior versions of the "mistake" provision were found in other subsections of Rule 15, particularly Rule 15(c)(3)(B). For simplicity, references to the "mistake" provision will be referred to that found in either Rule 15(c)(1)(C) or Rule 15(c).

[19] FED. R. CIV. P. 15(c)(1)(C). *See Barrow*, 66 F.3d at 468; Louisiana-Pacific Corporation v. ASARCO Inc., 5 F.3d 431, 434 (9th Cir. 1993) (citing Schiavone v. Fortune, 477 U.S. 21, 29 (1986) *superseded by statute on other grounds* FED. R. CIV. P. 15(c)). The *Schiavone* court's ruling on the time in which the added party must receive notice and should have known that but for a mistake, the action would have been brought against it, was statutorily changed from the applicable statute of limitations to the period provided by FED. R. CIV. P. 4(m) (120 days). However, there are still four elements. *Contra* Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977) (reducing four elements to three by incorporating the time requirement into other requirements).

[20] Conley v. Gibson, 355 U.S. 41, 48 (1957) (stating that the Federal Rules of Civil Procedure are designed to "facilitate a proper decision on the merits"); Goodman v. Praxair, Inc., 494 F.3d 458, 470 (4th Cir. 2007) (stating that the core requirements of relation back preserve the protections of a statute of limitations and assure adequate notice).

[21] Sparling, *supra* note 8, at 1248–49 (stating that the defendant's interest in a statute of limitations is to avoid trial based on stale evidence and lapsed memory, and to provide the defendant relief from perpetual fear of litigation). *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitations provide protection for defendants from stale and lost evidence).

[22] Rule 15(c)(1)(C) states that for an amendment to change or add a name to relate back, it must comply with Rule 15(c)(1)(B), which requires that "the amendment assert[] a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

[23] Craig v. United States, 413 F.2d 854, 858–59 (9th Cir. 1969) (stating that notice refers to notice of the suit rather than notice of the incident).

Courts have interpreted this element as consisting of two prongs: notice and the absence of prejudice.[25] Notice may be either actual or constructive.[26] Constructive notice can be achieved through sharing an attorney with the originally named defendant[27] or through a so-called "identity of interests."[28] Third, the party to be added must have "kn[own] or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."[29] Finally, the newly named defendant must receive proper service of process within 120 days of the filing of the original complaint.[30]

A significant circuit split exists as to what constitutes a "mistake" for the purpose of the third element.[31] Though this provision provides an invaluable resource for a plaintiff who might be unaware of the defendant's identity or who is mistaken as to the proper party to sue, the elements of Rule 15(c)(1)(C) often can be arduous to navigate—particularly the "mistake" provision.

III. MISTAKE DEFINED

The circuits have fallen into a three-way split over whether a "John Doe" pleading strategy can comport with the language of Rule 15(c)(1)(C), particularly the "mistake" provision. The First,[32] Second,

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[24] FED. R. CIV. P. 15(c)(1)(C)(i).

[25] Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 194 (3d Cir. 2001) (citing Urrutia v. Harrisburg Cnty. Police Dep't, 91 F.3d 451, 458 (3d Cir. 1996)) (noting that the Third Circuit has interpreted relation back to require notice and the absence of prejudice).

[26] *Id.* at 195.

[27] *Singletary*, 266 F.3d at 189 (noting that courts recognize actual notice as well as constructive notice via shared attorneys and identity of interests).

[28] Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998) ("Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.") (citing Kirk v. Cronvich, 629 F.2d 404, 408 n.4 (5th Cir. 1980)). "Identity of interest" has also been called "community of interest." *See* Korn v. Royal Caribbean Cruise Line, Inc., 724 F. 2d 1397, 1402 (9th Cir. 1984); G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1503 (9th Cir. 1994).

[29] FED. R. CIV. P. 15(c)(1)(C)(ii).

[30] FED. R. CIV. P. 15(c)(1)(C) advisory committee's note (1991 amendment) (referring to time limits imposed by Rule 4(m)).

[31] *Compare* Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993) (holding that lack of knowledge of identity is not a mistake) (citing Wood v. Worachek, 618 F.2d 1225, 1229–30 (7th Cir. 1980)), *with Singletary*, 266 F.3d at 200–01 (holding that amending a "John Doe" complaint can be a mistake).

[32] *See* Wilson v. United States, 23 F.3d 559 (1st Cir. 1994). *Wilson* involved a tort suit against a contractor of the United States government and, ultimately, the United States, not a "John Doe" § 1983 claim. *Id.* at 560. *Wilson* fits the patterns discussed in this Article, however, because its disposition turned on (1) an attempt by the plaintiff to use Rule 15(c) to amend the complaint to add the United States as a party and relate the amendment back to the original filing date to survive a statute of limitations defense, and (2) the court used the Seventh Circuit's opinions in *Wood v. Worachek* and *Worthington v. Wilson* as the basis for finding that the defendant's lack of knowledge as to the proper party (the United States) did not qualify as a Rule 15 "mistake." *Id.* at 562–63.

Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all held that a lack of knowledge resulting in a "John Doe" pleading is not a mistake, and therefore, an amendment to the caption cannot relate back to the date of the original complaint.[33] The Third Circuit, on the other hand, has held that the amendment of a John Doe complaint is a mistake for Rule 15 purposes and therefore can relate back.[34] The Fourth Circuit previously held that a lack of knowledge of a party's identity is not "mistake,"[35] but in two more recent cases, held that an amendment to the named defendants may relate back, as long as the notice to the added defendant is sufficient and prejudice to that defendant is avoided.[36]

A. The Majority

At least eight federal circuits have interpreted "mistake," within the meaning of Rule 15(c)(1)(C), to be limited to "error[s], misnomer[s], or . . . misidentification[s]."[37] These courts do not view a plaintiff's lack of knowledge of the identity of the proper party as a "mistake." As a result, these jurisdictions do not allow the fixing of a John Doe pleading to qualify for relation back. The most frequently cited sources for this narrow and limiting conclusion are a pair of Seventh Circuit holdings and the Notes of the Advisory Committee on the December 1991 Amendment to Rule 15.

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[33] *E.g.*, Barrow v. Wethersfield Police Dep't, 66 F.3d 466 (2d Cir. 1995); Jacobsen v. Osborne, 133 F.3d 315 (5th Cir. 1998); Cox v. Treadway, 75 F.3d 230 (6th Cir. 1996); Worthington v. Wilson, 8 F.3d 1253 (7th Cir. 1993); Wood v. Worachek, 618 F.2d 1225 (7th Cir. 1980); Schrader v. Royal Caribbean, 952 F.2d 1008 (8th Cir. 1991); Brown v. E.W. Bliss Co., 818 F.2d 1405 (8th Cir. 1987); Garrett v. Fleming, 362 F.3d 692 (10th Cir. 2004); Wayne v. Jarvis, 197 F.3d 1098, 1101 (11th Cir. 1999) *overruled on other grounds by* Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

[34] Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977).

[35] W. Contracting Corp. v. Bechtel Corp., 885 F.2d 1196 (4th Cir. 1989) (holding that a lack of knowledge of the proper party is not a "mistake" within the meaning of Rule 15).

[36] Robinson v. Clipse, 602 F.3d 605, 609 (4th Cir. 2010); Goodman v. Praxair, Inc., 494 F.3d 458, 468–73 (4th Cir. 2007).

[37] *Garrett*, 362 F.3d at 696–97 (quoting *Wayne*, 197 F.3d at 1103); *Wayne*, 197 F.3d at 1103; Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998) (quoting Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469 (2d Cir. 1995)); Cox v. Treadway, 75 F.3d 230, 239–40 (6th Cir. 1996); *Barrow*, 66 F.3d at 466; Wilson v. United States, 23 F.3d 559, 563 (1st Cir. 1994); Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993) (citing Wood v. Worachek, 618 F.2d 1225, 1230 (7th Cir. 1980)); *W. Contracting Corp.*, 885 F.2d at 1201; Brown v. E.W. Bliss Co., 818 F.2d 1405, 1409 (8th Cir. 1987).

1. Wood v. Woracheck

The vast majority of these circuits adopt, although some indirectly, the reasoning of the Seventh Circuit in *Worthington v. Wilson*,[38] which itself relied solely upon the Seventh Circuit's holding in *Wood v. Worachek*.[39] Thus, the decision and reasoning in *Woracheck* should be considered the precedential forbearer to the decisions of most jurisdictions. However, the lack of reasoning employed in *Woracheck* provides little guidance in determining why the term "mistake" has been so limited, therefore, courts should consider reevaluating their reliance upon the *Worachek* reasoning expressed in *Worthington*.

In *Worachek*, plaintiff James Wood filed a § 1983 action against various named individuals and unidentified John Doe police officers after allegedly suffering deprivations of his civil rights in the course of his arrest.[40] He was unable to obtain the names of officers in the course of sustaining a facial bone fracture during a police assault, so he resorted to referring to the officers as John Doe and Richard Roe in his original complaint.[41] Wood sought to amend his complaint to name the officers more than six years after the date of the incident.[42] Although the district court granted Wood leave to amend, it subsequently approved the newly named defendants' motion to dismiss, accepting their argument that the statute of limitations had expired.[43] Wood appealed and argued that his amendments should relate back to his original, timely complaint.[44] The Seventh Circuit ruled that the district court erred in originally permitting an amendment, pointing to Wood's failure to provide the notice necessary to prevent prejudice to the defendants and the lack of a mistake in his failure to name the appropriate defendant.[45]

The court based its conclusion regarding the mistake clause solely on the unsupported proposition that the term "mistake" refers only to "an error made concerning the identity of the proper party."[46] The *Worachek* court distinguished misidentification, which Rule 15(c) was purportedly designed to correct, from lack of knowledge of the proper party, which is

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[38] *See Wayne*, 197 F.3d at 1103–04 (citing *Worthington*, 8 F.3d at 1256; *Barrow*, 66 F.3d at 469–70; *Jacobsen*, 133 F.3d at 320-21); *Jacobsen*, 133 F.3d at 320–21 (citing *Worthington*, 8 F.3d at 1256; *Barrow*, 66 F.3d at 469–70; *Wilson*, 23 F.3d at 563); *Barrow*, 66 F.3d at 469–70 (citing *Worthington*, 8 F.3d at 1256; *Wilson*, 23 F.3d at 563; *W. Contracting Corp.*, 885 F.2d at 1201); *Wilson*, 23 F.3d at 563 (citing *Worthington*, 8 F.3d at 1256); *W. Contracting Corp.*, 885 F.2d at 1201 (citing *Worachek*, 618 F.2d at 1230).

[39] *Worthington*, 8 F.3d at 1256.

[40] *Worachek*, 618 F.2d at 1227–28.

[41] *Id.*

[42] *Id.*

[43] Wood v. Worachek, 427 F. Supp. 107, 108 (E.D. Wis. 1977).

[44] *Worachek*, 618 F.2d at 1228–29.

[45] *Id.* at 1230.

[46] *Id.*

what Wood attempted to use a "John Doe" pleading to temporarily remedy.[47]

In reaching its conclusion, the Seventh Circuit did not cite any legislative records, congressional reports, or Supreme Court rulings, nor did it consider the holdings or reasoning of other circuits.[48] Instead, the *Worachek* court cited only to a single, two-page holding,[49] which marginally implied that "mistakes" and lack of knowledge are distinguishable (but not necessarily incompatible).[50] Thus, the intricate web of case citations among eight circuit courts purporting to adequately support the premise that Rule 15 "mistake" is limited to misidentifications and misnomers masks a mere conclusory statement that offers no insight into why amending a "John Doe" pleading for initial lack of knowledge should not be eligible for relation back.

2. Advisory Committee's 1991 Amendment Comments

Some circuits, particularly the Second, Tenth, and Eleventh, also cite the comments made by the Advisory Committee at the time of the 1991 Amendment to Rule 15 to support the claim that "mistake" only applies to errors, misnomers, and misidentifications, and not to ignorance regarding the defendant's identity.[51] Of particular focus for the Second Circuit is the committee's language that defendants who have adequately received notice of a potential claim against them may not defeat the action on the basis of a "defect in the pleading with respect to the defendant's name."[52] This language, according to the Second Circuit, implied that the *only* way that an amendment changing the name of a party can relate back to the original filing date is if the change was the result of an "error," which the court limited to misnomers and

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[47] *Id.*

[48] *Id.*

[49] *Id.* (citing Sassi v. Breier, 584 F.2d 234, 236 (7th Cir. 1978)).

[50] *Sassi*, 584 F.2d at 235 ("[T]here is nothing in the record . . . to show that within the statute of limitations those defendants . . . knew or should have known that but for mistake or even lack of knowledge of their identities that the newly named defendants would have been named as original defendants.").

[51] Garrett v. Fleming, 362 F.3d 692, 696–97 (10th Cir. 2004) (citing Wayne v. Jarvis, 197 F.3d 1098, 1101, 1103 (11th Cir. 1999), *overruled on other grounds by* Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003)); *Wayne*, 197 F.3d at 1103 (citing *Barrow*, 66 F.3d at 469); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469 (2d Cir. 1995) (citing FED. R. CIV. P. 15(c) advisory committee's note (1991 amendment)).

[52] *Barrow*, 66 F.3d at 469 (citing FED. R. CIV. P. 15(c) advisory committee's note (1991 amendment)).

misidentifications.[53] It is arguable, however, that so limiting the scope of what can qualify as a "defect" in the pleading with respect to the defendant's name goes beyond—perhaps even contradicts—the Advisory Committee's comment.

The Tenth and Eleventh Circuits note the Advisory Committee's elaboration that Rule 15(c) can be used "to correct a formal defect such as a misnomer or misidentification" or an issue of a "misnamed defendant."[54] However, as the Second and Eleventh Circuits bluntly admit, the Committee's comments, at best, merely imply a limiting of "mistake" to errors.[55] Furthermore, the 1991 comments regarding Rule 15(c)(3),[56] taken as a whole, rather than as the individual words or phrases that the Second, Tenth, and Eleventh Circuits focus upon, makes clear that at the heart of the issue is the notice provided to the prospectively added party.[57] The Advisory Committee statement relied upon by the Second Circuit focuses not on an explanation of "mistakes" or "defects," but on the proposition that an intended defendant cannot defeat an action if notice was provided.[58] The statement cited by the Tenth and Eleventh Circuits also begins by stating that complaints can be amended if notice was provided.[59] For the Advisory Committee notes cited, any mention of "mistake" is supplementary exposition, operating to explain what may qualify as a Rule 15 "mistake," but in no way explicitly disqualifying a lack of knowledge of the defendant's identity.[60]

3. Woods v. Indiana University-Purdue University

In addition to not providing a cogent argument for why "mistake" should not include initial lack of knowledge regarding the assailant's

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[53] *Id.*

[54] *Garrett*, 362 F.3d at 696–97 (citing FED. R. CIV. P. 15(c) advisory committee's note (1991 amendment)); *Wayne*, 197 F.3d at 1103 (same).

[55] *Wayne*, 197 F.3d at 1103 (citing *Barrow*, 66 F.3d at 469).

[56] Rule 15(c) was reformatted in 2007, which eliminated Subsection 3; however the meaning and essential language of the current rule remain the same. FED. R. CIV. P. 15 advisory committee's note (2009 amendments) ("Former Rule 15(c)(3)(A) called for notice of the 'institution' of the action. Rule 15(c)(1)(C)(i) omits the reference to 'institution' as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its 'institution.'").

[57] FED. R. CIV. P. 15(c) advisory committee's note (1991 amendment).

[58] *See Barrow*, 66 F.3d at 469 (quoting the advisory committee's notes, but using them to support the conclusion that relation back was only available in the case of an error, such as a misnomer or misidentification, and not mentioning the emphasis that the Committee seemed to place on satisfaction of the notice requirement).

[59] *Wayne*, 197 F.3d at 1103 (relying on the Rule 15(c)(3) advisory committee's notes (1991 amendment)); *Garrett*, 362 F.3d at 696–97 (quoting FED. R. CIV. P. 15(c)(3) advisory committee's notes (1991 amendment)).

[60] FED. R. CIV. P. 15(c)(3) advisory committee's notes (1991 amendment).

identity, the various approaches that the majority circuits have taken when dealing with the Rule 15 mistake clause demonstrate the versatility of the word "mistake" and the unfairness that can arise by denying its flexible meaning. There are, in fact, three approaches to the mistake clause. Parties can make two types of mistakes in their pleadings: factual and legal.[61] Factual mistakes can be bifurcated into mistakes that are errors, misnomers, and misidentifications[62] and those that result from a lack of knowledge.[63] Although purporting to interpret "mistake" to mean only errors and misnomers,[64] the Seventh Circuit (the point of reference for most other circuits regarding "mistake") has held that amendments correcting mistakes of law can relate back.[65] Aside from blatantly contradicting its holding in *Worachek*, the Seventh Circuit's allowance of legal mistakes also can lead to inequitable results, perhaps best demonstrated by its holding in *Woods v. Indiana University-Purdue University*.

In *Woods*, Carl Woods was employed by the Indiana University Police Department, but was terminated after marijuana and drug paraphernalia were discovered in his home.[66] After his conviction was overturned, Woods brought suit against the university and police department, seemingly ignorant of the fact that the university enjoyed Eleventh Amendment protections as an arm of the state.[67] After his complaint was dismissed, a little more than two years after his firing, Woods filed an amended complaint naming numerous employees of the police department in their official and individual capacities.[68] The district court dismissed the claims against the employee officers in their official capacities and granted summary judgment on the individual claims as being time barred.[69] Seeking to relate back his amended complaint, Woods appealed to the Seventh Circuit.[70] The *Woods* court held that Woods' attorney's "legal blunder" satisfied the "mistake" clause.[71] In this scenario, the potential unjustness is evident: Woods might have been able to introduce new defendants who were never named in the original

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[61] Woods v. Ind. Univ.-Purdue Univ. at Indianapolis, 996 F.2d 880, 882 (7th Cir. 1993).

[62] *See* Wood v. Worachek, 618 F.2d 1225, 1227–28 (7th Cir. 1980) (discussing how individuals did not know the names of officers and, therefore, resorted to generic naming).

[63] *See infra* notes 72-91 and accompanying text.

[64] *Worachek*, 618 F.2d at 1230.

[65] *Woods*, 996 F.2d at 887.

[66] *Id.* at 883.

[67] *Id.*

[68] *Id.* at 883–84.

[69] *Id.*

[70] *Id.* at 882.

[71] *Id.* at 887.

complaint if they received notice in an adequate fashion, but a John Doe pleader would be barred.

B. The Minority

The Third Circuit, the lone jurisdiction adopting the wide latitude envisioned by the Rules Committee, focuses its analysis on the first component of the "mistake" provision ("knew or should have known that the action would have been brought against it"), rather than dwelling upon a single interpretation of the word "mistake."[72] In holding that "John Doe" pleadings can be amended and still relate back, the Third Circuit questions whether the potential defendant has received adequate notice.[73] *Varlack v. SWC Caribbean* clearly demonstrates this liberal analogical method. While *Varlack* is not a § 1983 case, the holding shows the Third Circuit's view of relation back generally. Accordingly, we can understand the Third Circuit's holding in later § 1983 cases involving relation-back issues.

In *Varlack*, the Third Circuit was asked to determine whether a complaint against an "unknown employee" tortfeasor could be amended to insert the defendant's true name.[74] Plaintiff Varlack was attempting to enter an Orange Julius restaurant via the service entrance, but was stopped by an unknown employee, who allegedly proceeded to batter Varlack.[75] After suffering severe injury, ultimately resulting in the amputation of his arm, Varlack brought suit against restaurant owner SWC Caribbean and an "Unknown Employee of Orange Julius Restaurant."[76] More than three years after the date of his injury, and after the two-year statute of limitations had expired, Varlack identified and sought to insert Bernette Cannings as the individual defendant.[77] The Third Circuit agreed with the district court that the proposed amendment related back to the original, timely filing. The court held that, because Cannings admittedly saw a copy of the complaint within the applicable time period and knew that "unknown employee" referred to him, the mistake provision of Rule 15 was satisfied.[78] In fact, the court seemingly felt no need to discuss the word "mistake," offering no analysis of its

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[72] Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175 (3d Cir. 1977).

[73] *See id.* at 175 (finding that the added defendant knew that "Unknown Employee" referred to him); Sparling, *supra* note 8, at 1254 ("The competing view asserts that the key to relation back is notice, and that the word 'mistake' should be broadly construed when the potential defendant knows his joinder with a named defendant is a 'distinct possibility.'").

[74] *Varlack*, 550 F.2d at 174.

[75] *Id.* at 173–74.

[76] *Id.* at 174.

[77] *Id.*

[78] *Id.* at 175.

meaning or any potential limiting effect it could have on a plaintiff's suit. Instead, the court treated the term as superfluous or dispensable, and focused on the notice component of the "mistake" provision.[79]

In a subsequent case involving relation back in a §1983 John Doe context, the Third Circuit acknowledged and addressed the contrary holdings and reasoning of the majority of circuit courts. In *Singletary v. Pennsylvania Department of Corrections*, Dorothy Singletary brought a § 1983 suit against a state correctional facility and named and unnamed defendant employees, alleging deliberate indifference and cruel and unusual punishment that resulted in the suicide of her son, a prisoner.[80] The lower court granted summary judgment for the named defendants and denied the plaintiff's motion for leave to amend her complaint to replace "unknown corrections officers" with the proper names of defendants.[81] Although the statute of limitations expired two years before she sought leave, Singletary argued before the Third Circuit that she should be permitted to amend her complaint because such an amendment would relate back to the date of the original complaint.[82]

The *Singletary* court's discussion of the "mistake" requirement begins by recognizing that the majority of other circuits have held that substituting "John Doe" with a defendant's real name does not constitute a mistake for the purpose of Rule 15.[83] However, the court then stated that, "generally speaking, the analysis in these other cases centers on the linguistic argument that a lack of knowledge of a defendant's identity is not a 'mistake' concerning identity."[84] The Third Circuit rejected the holdings of sister circuits, and the *Singletary* court recognized that their reasoning was entirely semantic in nature; their decisions rest on the proposition that the definition of "mistake" does not include a lack of knowledge.[85]

The Fourth Circuit has previously held that a lack of knowledge of a party's identity does not constitute a "mistake."[86] However, in two more recent cases the Fourth Circuit held that, as long as the notice to the added defendant is sufficient and prejudice to that defendant is avoided,

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[79] *Id.*

[80] Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 191 (3d Cir. 2001).

[81] *Id.* at 189.

[82] *Id.* at 193–94.

[83] *Id.* at 200.

[84] *Id.* at 201.

[85] *Id.* at 200.

[86] W. Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir. 1989) (stating that a complaint can only relate back when there is an error and holding that a lack of knowledge of the proper party is not a "mistake" within the meaning of Rule 15(c)(1)(C)(ii)).

an amendment regarding the named defendants may relate back.[87] These recent cases emphasized that a distinction between types of "mistakes" within the meaning of Rule 15 is unnecessary,[88] because it does nothing to advance the policies behind the Federal Rules of Civil Procedure or the statute of limitations.[89] Like the Third Circuit,[90] the Fourth Circuit reiterates that the essential language of Rule 15(c) centers on proper notice to the defendant, rather than defining the word "mistake."[91]

When a doctrine is created based on a party's theory as to what a word or phrase means, rather than on what the legislature intended the word to mean, that doctrine should not persist uncritically merely on the basis of *stare decisis*. The Third and Fourth Circuits ultimately chose one conceptualization of what may comprise a "mistake," but before doing so, these courts considered the possible negative effects of limiting the definition, and what it would mean in the context of the Federal Rules of Civil Procedure as a whole.

IV. IS MISTAKE DISINGENUOUS?

Although the vast majority of circuits remain firm that a lack of knowledge of a defendant is not a Rule 15 "mistake," the narrow focus on the word "mistake" and its literal meaning masks the overall purpose of both the provision and the Federal Rules of Civil Procedure.[92] The Third and Fourth Circuits have correctly realized that the mistake requirement in Rule 15 is disingenuous, because proper relation back only requires adequate notice to the defendant.

Rule 15(c)(1)(C) requires that an amendment to a complaint arises out of the same conduct, transaction, or occurrence as the original

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[87] Robinson v. Clipse, 602 F.3d 605, 609–10 (4th Cir. 2010); Goodman v. Praxair, Inc., 494 F.3d 458, 472–73 (4th Cir. 2007).

[88] *Goodman*, 494 F.3d at 469–70 ("The Rule does not concern itself with the amending party's particular state of mind except insofar as he made a mistake; it presumes that the amending party can make the amendment, although it does constrain substantially the type of amendment that may relate back . . . .").

[89] *Id.* ("The Rule's description of when such an amendment relates back to the original pleading focuses on the *notice to the new party* and *the effect on the new party* that the amendment will have. *See* FED. R. CIV. P. 15(c)(3)(A)–(B). These core requirements preserve for the new party the protections of a statute of limitations. They assure that the new party had adequate notice *within the limitations period* and was not prejudiced by being added to the litigation.") (emphasis in original).

[90] Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175 (3d Cir. 1977).

[91] *Goodman*, 494 F. 3d at 470 ("[T]he text of Rule 15(c)(3) does not support [the majority of Circuits'] parsing of the 'mistake' language.").

[92] *See* Conley v. Gibson, 355 U.S. 41, 48 (1957) (stating that the Federal Rules of Civil Procedure are designed to "facilitate a proper decision on the merits"); Goodman v. Praxair, Inc., 494 F.3d 458, 470 (4th Cir. 2007) (stating that the core requirements of relation back preserve the protections of a statute of limitations and assure adequate notice); FED. R. CIV. P. 15(c)(1)(C); Sparling, *supra* note 8, at 1248–49 ("[T]he history of Rule 15(c) chronicles an effort to balance the policies of the limitations period against the aim of getting meritorious claims to trial.").

complaint, and that the plaintiff satisfy the 120-day limit for service to the defendant. In addition, Rule 15(c)(1)(C) provides that a change to the party named in the complaint can relate back when the added party "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."[93] Taken together, subsections (i) and (ii) of Rule 15(c)(1)(C) make it clear that the primary limitation on relation back in the case of a name change is the concern for proper notice to the new defendant. Subsection (i) makes perfect sense—when the defendant has adequate notice he is a party to the action, he can properly prepare a defense and he will not be at a disadvantage in the litigation process.[94] The knowledge requirement of subsection (ii) serves as a way to ensure the defendant does, in fact, have that adequate notice.[95] This provision was written as an extra layer of protection for the defendant's right to notice.[96]

In a "John Doe" pleading situation, a mistake has not been made in the literal sense of the word, but rather, in a practical sense. It is not evident why a lack of knowledge should be distinguished from a misnomer or misidentification for the purposes of relation back. Both a complaint originally against "John Doe" that is later changed to name a specific defendant, and one that either fails to name a party or calls the intended party by the wrong name, involve changing the specific identity of the defendant. Consistent with the pleading standard set forth in the Federal Rules of Civil Procedure,[97] it is only necessary to ask whether the newly identified defendant will be prejudiced by his lack of notice. To require that the name change literally be a mistake seems to imply that a plaintiff who changes a name for any reason other than that it is a misnomer (like for lack of knowledge) is blameworthy or that his claim is less deserving of a judgment on the merits.

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[93] FED. R. CIV. P. 15(c)(1)(C)(i)–(ii).

[94] *Id.*

[95] *See Goodman*, 494 F.3d at 470 ("[R]eference to 'mistake' in [Rule 15(c)(1)(C)], while alluding by implication to a circumstance where the plaintiff makes a mistake in failing to name a party, in naming the wrong party, or in misnaming the party in order to prosecute his claim as originally alleged, explicitly describes the *type of notice or understanding* that the *new party* had.") (emphasis in original).

[96] *See* Woods v. Ind. Univ.-Purdue Univ. at Indianapolis, 996 F.2d 880, 888 (7th Cir. 1993); *See also Goodman*, 494 F.3d at 470 ("[C]onstruction [of the Rule] serves the policies of freely allowing amendment and at the same time preserving to new parties the protections afforded by the statutes of limitations.").

[97] Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 806–07 (2003).

In fact, in a "John Doe" pleading situation, the intended defendant is just as likely to be on notice of his role in the suit as he would be in Rule 15 mistake situations as interpreted by the majority of circuits.[98] For example, in a case such as *Woods v. Indiana University-Purdue University*, where the plaintiff "mistakenly" brings suit against a party with immunity, the plaintiff may add completely new defendants and still obtain relation-back privileges.[99] Because the inclusion of legally improper defendants qualifies as a "mistake" within the literal meaning of the word, this plaintiff is now free to add any defendant who knew of his relevance to the suit. By contrast, a "John Doe" defendant, who is certain he was intended to be the named defendant in the suit since the filing of the original complaint, may hide behind the statute of limitations defense[100] simply because the complaint did not name John Doe "mistakenly."

The mistake language of Rule 15, and the way the majority of circuits have interpreted it, is disingenuous because it has taken the relation-back question away from what it should be—a question of notice and fairness to the defendant[101]—and turned it into a meaningless inquiry into the semantics of the word "mistake."[102] However, whether the amendment to the caption is the result of a "mistake" is immaterial to whether the defendant has notice and whether he *knows or should have known* he may become a party to the suit. If subsection (ii) read: "knew or should have known that the action would have been brought against it, but for *the identity of the defendant being unknown to the plaintiff*," the meaning and intent behind Rule 15(c)(1)(C) would remain the same.[103] The "mistake" requirement in the literal sense of the word is totally unfounded.

V. AN EXCEPTION TO THE RULE

This Article proposes amending Rule 15(c)(1)(C) by adding the following subsection:

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[98] For example, where an incident of alleged police brutality occurred but was not followed by an arrest—based on the date, time, or location provided by the plaintiff in the complaint, the police department can easily identify which officers were present at the incident. Therefore, there is no doubt that the John Doe defendants have actual notice.

[99] *Woods*, 996 F.2d at 890 (providing that there is an exception to this rule when the newly named defendant received insufficient or untimely notice such that he would be prejudiced).

[100] *See* FED. R. CIV. P. 15 advisory committee's note (1991 amendment) ("The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.")

[101] *See supra* note 92 and accompanying text.

[102] Wood v. Worachek, 618 F.2d 1225, 1230 (7th Cir. 1980).

[103] *See* FED. R. CIV. P. 15 advisory committee's note (2007 amendment) ("What counts is that the party to be brought in have notice of the existence of the action.").

> 15(c)(1)(C)(iii): When a complaint properly pleads a 42 U.S.C. §1983 claim involving excessive force, *Monell*, or other police brutality, that complaint may be amended up until the close of discovery, only to substitute the caption from John Doe(s) to the name(s) of the actual defendant(s).

The ultimate goal of the Federal Rules of Civil Procedure is to secure a judgment on the merits of the case, as opposed to a judgment based on procedural technicalities.[104] This goal is achieved through pleading standards that are sufficient to adequately notify the defendant so as to enable him to prepare a defense on the merits.[105] When plaintiffs alleging excessive force are barred from reaching the discovery phase of litigation by the statute of limitations—as occurs when the statute tolls because the defendant's name is unknown—the goals of the Federal Rules of Civil Procedure are undermined. A plaintiff who, under *Iqbal* standards,[106] can plead excessive force against "John Doe" defendants, but who requires discovery to obtain the names of the actual defendants, is doomed under the majority interpretation of the mistake clause.[107] The result is a dismissal or bar based on procedural technicalities, and a plaintiff who was never given the chance to secure a judgment on the merits.[108]

Further, the notice requirement for defendants will be met because the John Doe defendant officers will be represented by the attorneys for the municipality or township for which they work.[109] Therefore, notice to the municipality will effectively put all potential defendants and their legal representatives on notice in a manner adequate to provide an answer to the complaint and begin discovery. The prevalent use of § 1983 in civil rights cases, such as those based on excessive force, did not begin until the mid-to-late twentieth century. Because the Federal Rules of Civil Procedure, first written in 1938, were not originally designed with this unique problem in mind,[110] it is time for an amendment to Rule 15.[111]

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[104] *See supra* note 20.

[105] Wasserman, *supra* note 97, at 806–07.

[106] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[107] *Supra* Part III.A.

[108] Wasserman, *supra* note 97, at 798.

[109] *Id.* at 827.

[110] *Id.* at 802.

[111] *See* Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 190–91 (3d Cir. 2001) ("However, because the position taken by the other Courts of Appeals on Rule 15(c)(3)(B)'s 'mistake'

As further proof that relation back does not create prejudice against defendants in the "John Doe" context, shortly after the complaint is filed, defendants have a duty to supply the plaintiff with the names of all of the individuals who were present at the time of the event as part of the defendants' initial disclosures, further reducing the likelihood of prejudice.[112] If the complaint does not satisfy *Iqbal*'s standards regarding the specificity of pleading the facts of the incident, the pleading should be dismissed.[113] If the pleading survives a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the defendants have enough information to know who was present at the alleged incident. The plaintiff then has the right to depose all the people mentioned in the initial disclosures and can properly obtain the true identity of the tortfeasor.

Even under the Third Circuit's current interpretation of Rule 15, if the plaintiff is unable to depose the people mentioned in the initial disclosures, the plaintiff would be forced to include every person named in the initial disclosures to prevent missing any potential party. This creates a situation where every officer on the job would be included in the complaint because the plaintiff has not had an opportunity to depose all of the witnesses, which would be necessary to determine the identity of the actual tortfeasor. Waiting until the close of discovery, to amend the caption only, would be the most efficient way to allow a John Doe pleading, while also ensuring that the proper party is sued and avoiding prejudice to the defendants.

Under the current Rule 15, the plaintiff is the party unfairly prejudiced in § 1983 excessive force cases. The defendant officers will be represented by the legal counsel of the municipality by which they are employed, and are likely to have any resulting damages covered by the municipality as well.[114] Represented by government lawyers with access to department information, the defendants will be the more sophisticated party, and the party that (prior to discovery) has complete control over the information on which, under the current rule, the success of the entire case rests—the identity of the intended defendant officers.[115] Under the current Rule 15, counsel for the municipality is motivated to conceal the identity of the John Doe officers until after the statute has run.

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requirement would seem to lead to seriously inequitable outcomes, we suggest to the Judicial Conference Advisory Committee on Civil Rules that it amend the language of Rule 15(c)(3)(B) so as to clearly provide that the requirements of that section of the Rule can be met in situations in which the plaintiff seeks to replace a 'John Doe' or 'Unknown Person' with the name of a real defendant. . . . [S]uch an amendment, which is supported by the weight of scholarly commentary, would make Rule 15(c)(3) fit more closely with the overall tenor and policy of the Federal Rules of Civil Procedure.").

[112] FED. R. CIV. P. 26(a)(1).

[113] Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009).

[114] Wasserman, *supra* note 97, at 827.

[115] *Id.* at 827–28.

A plaintiff, on the other hand, is likely to be an unsophisticated party who may have difficulty obtaining access to zealous legal representation. In the heat of the incident that gives rise to the excessive force allegations, obtaining the identification information of police officers is likely to be the farthest thing from the plaintiff's mind.[116] Even more difficult, in litigation arising from particularly severe excessive force incidents, the case may be brought by an administrator of a deceased victim's estate.[117] Furthermore, plaintiffs in excessive force cases against police officers face several other disadvantages in obtaining relief, such as a "law and order bias,"[118] and the influence of police unions on local elected officials involved in the litigation process.[119] Because of the specific nature of excessive force cases, Rule 15 as it stands today puts these plaintiffs at a much greater disadvantage than plaintiffs in most other types of cases.[120]

Additionally, the purposes of § 1983, which include compensating individuals for violation of their constitutional rights and deterring state or municipal officers from future violations of these rights,[121] are also undermined by the application of relation back under Rule 15.[122] When police officers, departments, and municipalities are not held accountable

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[116] *Singletary*, 266 F.3d at 190 (noting that "a person who was subjected to excessive force by police officers might not have seen the officers' name tags, and hence would likely need discovery to determine the names of his attackers, although he cannot get discovery until he files his § 1983 complaint").

[117] Wasserman, *supra* note 97, at 822–23.

[118] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548–49 (1993) (discussing how juror sensitivity to the role police play in protecting the public makes them more likely to believe police testimony in brutality cases and reach verdicts that support the officer).

[119] Political Considerations and Aggressive Policing, Part of Shielded from Justice: Police Brutality and Accountability in the United States, HUMAN RIGHTS WATCH (June 1998), http://hrw.org/legacy/reports98/police/uspo16.htm [*hereinafter* Aggressive Policing].

[120] *See Singletary*, 266 F.3d at 190 (discussing how a strict interpretation of Rule 15 relation back effectively creates a shorter statute of limitations for plaintiffs who do not know the identity of their assailants than plaintiffs who do know the identity). Cases preceded by a criminal arrest and conviction do not fall within our proposed amendment to Rule 15, because these plaintiffs will not face the same difficulty obtaining the identity of the defendant officer since criminal proceedings include discovery ostensibly providing the defendant's name.

[121] Wasserman, *supra* note 97, at 797–98.

[122] *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2002) ("The idea behind the 'private attorney general' can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. . . . It consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe . . . ."); *see also* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2189 (1989) (describing how the Supreme Court has made it difficult for § 1988 plaintiffs to vindicate their rights); Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 811 (Fall 1992) (explaining how the goal of the Civil Rights Act was to make suits easier for plaintiffs).

for their actions, violations of citizens' constitutional rights will continue and society as a whole will suffer.[123]

Furthermore, systematic patterns of police brutality, which continue without repercussions for the police departments and the municipalities that fund them, significantly hurt these institutions' credibility with the citizens they are meant to serve.[124] While the police should signify peace-keeping and protection in the minds of citizens, a police department known for brutality creates resentment of law enforcement and an "us versus them" mentality within the community.[125] This type of negative relationship with law enforcement is particularly dangerous in low-income communities that are more vulnerable to crime[126] and therefore more reliant on assistance from law enforcement to maintain a productive and safe environment.[127] When these vulnerable communities do not maintain a trusting relationship with law enforcement, they will be further marginalized and are likely to experience greater crime and poverty.[128] A distrust of municipal government in general will discourage citizens from taking pride in their communities and from working to maintain and advance them.[129] Additionally, municipality and police

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[123] *See* Aggressive Policing, *supra* note 119 (describing the role that police unions play in securing the passage of laws that make it harder to discipline officers accused of civil rights violations and the effect that "aggressive policing" can have on community relations).

[124] *See, e.g.*, Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71, 73–75 (2007) (reviewing findings in the empirical literature showing that direct, vicarious, and media exposure to negative contacts between minorities and police feed a perception that police target and negatively view minorities, leading in turn to negative perceptions of police among those groups and negative encounters between police and the communities).

[125] *Id.*

[126] *See generally* Gregory M. Zimmerman & Steven F. Messner, *Neighborhood Context and Nonlinear Peer Effects on Adolescent Violent Crime*, 49 CRIMINOLOGY 873 (2011) ("[E]xposure to violent peers increases along with neighborhood disadvantage, and the effect of peer violence exposure on violent crime is attenuated as neighborhood disadvantage increases."); John R. Hipp, *Spreading the Wealth: The Effect of the Distribution of Income and Race/Ethnicity Across Households and Neighborhoods on City Crime Trajectories*, 49 Criminology 631 (2011) (reporting empirical findings that cities with greater racial *or* economic segregation face higher crime rates); John R. Hipp, *A Dynamic View of Neighborhoods: The Reciprocal Relationship between Crime and Neighborhood Structural Characteristics*, 57 SOC. PROBS. 205 (2010) (reporting that, at the neighborhood Census tract level, crime is probably the causal origin of economic instability and disadvantage rather than the other way around) [*hereinafter A Dynamic View of Neighborhoods*].

[127] *See generally* Lonnie M. Schaible & Lorine A. Hughes, *Neighborhood Disadvantage and Reliance on the Police*, 58 CRIME & DELINQUENCY 245 (2012) ("Findings from spatial analyses indicate that residents of disadvantaged neighborhoods tend to rely on police for assistance as much as, if not more than, people elsewhere.").

[128] *See* Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 180 (2009) (reviewing literature linking community distrust of police to reduced crime reporting and successful investigation); *see generally A Dynamic View of Neighborhoods*, *supra* note 126 (placing crime as the cause of neighborhood poverty).

[129] *Cf.* Wendy M. Rahn & Thomas J. Rudolph, *A Tale of Political Trust in American Cities*, 69 PUB. OPINION Q. 530, 530–31 (2005) (discussing the literature connecting a lack of trust in local governments to a lack of participation and an unwillingness to compromise).

department liability incentivizes superior training of officers[130] and the implementation of policies that promote a balance between the protection of individual liberties and effective law enforcement.

An amendment to Rule 15 is especially crucial for excessive force § 1983 cases because racial and ethnic minorities are disproportionately the victims of excessive force violations[131] and, as groups that are underrepresented in the political and legal systems,[132] racial minorities are less empowered to right the wrongs against them by city officials. Barriers to recovery, such as the one imposed by the current relation-back rule, will further isolate minorities and support the presence of racism in law enforcement and in society as a whole.[133]

Finally, the confusing three-way circuit split over relation back for John Doe defendants[134] necessitates the creation of new bright-line rule via an amendment to Rule 15. The split creates uncertainty for litigants and, therefore, leads to lengthy and expensive litigation.

Because of the probable imbalance of power between plaintiffs and defendants in § 1983 excessive force cases, the proposed amendment to Rule 15 is proper because it will restore a balance of power between the parties. Municipal attorneys will no longer have an incentive to hide the identities of John Doe defendants or to argue that the plaintiff is simply "going on a fishing expedition." If the complaint can be amended up until the close of discovery, the defendant's municipal counsel will be forced to investigate the allegations and share the results with the plaintiff. This puts the burden of discovery where it should be—on the more sophisticated and financially capable party who has control over the necessary information.

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[130] *See generally* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (contending that damages in civil rights cases deter violations of constitutional rights). *But see generally* Joanna Schwart, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision Making*, 57 UCLA L. REV. 1023 (2010) (reporting that law enforcement officials do not connect civil rights lawsuits to specific police behavior).

[131] *See* Amnesty International, *USA: Race Rights and Police Brutality* (Sept. 1999), http://www.amnesty.org/en/library/asset/AMR51/147/1999/en/735f2b8c-e038-11dd-865a-d728958ca30a/amr511471999en.pdf (describing police mistreatment of minorities).

[132] Zoltan Hajnal & Jessica Troustine, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515 (2005) ("By focusing on city elections we find that lower turnout leads to substantial reductions in the representation of Latinos and Asian Americans on city councils and in the mayor's office.").

[133] Human Rights Watch, *Race as a Factor*, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), http://www.hrw.org/legacy/reports98/police/uspo17.htm.

[134] *See supra* notes 32–37.

Notes

Teacher Evaluations Based on Student Testing: Missing an Opportunity for True Education Reform

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* I would like to thank the editors of the *Texas Journal on Civil Liberties & Civil Rights* for their help in preparing this Note for publication. I especially want to thank Professor Norma Cantú for her guidance in developing this Note.

I. INTRODUCTION: TEACHER EVALUATION METHODS

In the national movement to improve educational results, and especially in the current focus on test scores, the way teachers are evaluated is suggested by some as another way to improve public education. Many argue that the most influential school-based factor affecting student achievement is teacher quality.[1] Some see teacher evaluations as an important part of measuring teacher quality and are unimpressed with the current teacher evaluation systems, especially since evaluations often neglect measures of instruction quality and student learning in a direct and serious way.[2] An Economic Policy Institute study argued that "in practice, American public schools generally do a poor job of systematically developing and evaluating teachers."[3] Evaluations often consist of checklists based on short classroom visits, with some items on the checklist not directly addressing quality of instruction.[4] In addition to checklist items often being unsatisfactory, evaluators often give the same ratings to most of the teachers they evaluate and fail to discuss the evaluation results at a later date with the teachers.[5]

While many problems exist with current teacher evaluations, education experts offer a variety of potential solutions. Choices include more detailed standards that focus on indicators of instruction and planning ability, evaluations based on teacher portfolios as well as observations, and multiple evaluations by multiple evaluators.[6] Some of these systems focus more on improving instruction, rather than eliminating ineffective teachers.[7]

One method of teacher evaluation uses student test scores to score teacher performance. There are three test-based accountability program approaches used in the United States: status models, cohort-to-cohort change models, and value-added models.[8] No Child Left Behind (NCLB) combines two of these approaches to test-based accountability programs.[9] NCLB measures student scores of one group at one time against the state's annual measurable objective (a type of status model), while also comparing the change in student scores over time and increasing the state's annual measurable objective each year (a type of

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[1] *E.g.*, JENNIFER KING RICE, TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES 1 (2003).

[2] Thomas Toch, *Fixing Teacher Evaluation*, 66 EDUC. LEADERSHIP 32, 32 (Oct. 2008).

[3] EVA L. BAKER ET AL., ECOC. POLICY INST., PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS 1 (2010), *available at* http://www.epi.org/publication/bp278/.

[4] Toch, *supra* note 2, at 32.

[5] *Id.*

[6] *Id.* at 32–35.

[7] *Id.* at 35.

[8] Daniel Koretz, *A Measured Approach*, 32 AM. EDUCATOR 2, 19 (2008), *available at* http://www.aft.org/pdfs/americaneducator/fall2008/koretz.pdf.

[9] *Id.*

cohort-to-cohort change model).[10] Some argue that tests are a "direct and simple" measurement tool.[11] Proponents of using student test scores as a part of measuring teacher performance assert that student test scores provide an effective measure of how well students are learning, especially when value-added data is used to help account for factors teachers cannot control.[12]

Using student test scores to evaluate teachers has recently taken the form of a value-added model, which attempts to "incorporate information on the value-added [sic] by individual teachers to the achievement of their students."[13] Value-added models generally compare a student's end-of-year test scores with test scores from the beginning of the school year and adjust the difference in scores by using other factors that may affect a student's score.[14] These factors are sometimes based on "student background or school-wide factors outside the teacher's control."[15] Value-added models are still being developed, and currently different formulations of these models are in use to measure the value a teacher adds each year.[16] Teachers and principals can gain valuable information about teachers' strengths and weaknesses from value-added measures of student test scores and can compare teacher performance with other teachers outside of their school.[17] Value-added models are generally believed to be a better way to measure performance than status models or cohort-to-cohort change models, but some argue that the information used by the model has limitations, making the model insufficient as a measure of teacher performance on its own.[18]

Some have suggested that student test scores should play a supporting role in evaluations, not a leading role.[19] However, many states have recently incorporated student test scores into a leading role in evaluations. These policy changes were partially triggered by Race to the Top. This Note proposes reduced reliance on student test scores when evaluating teachers, although student test scores—especially value-added models—could be used as a tool to improve teacher performance by highlighting areas that may need more work. First, this Note discusses recent policies in several U.S. states that have incorporated teacher evaluations of this kind; often, these policies result in conflicts in these

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[10] *Id.*

[11] *Id.* at 21.

[12] *E.g.*, NAT'L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES: TRENDS AND EARLY LESSONS ON TEACHER EVALUATION AND EFFECTIVENESS POLICIES 2–3 (2011), *available at* http://www.nctq.org/p/publications/docs/nctq_stateOfTheStates.pdf.

[13] STEVEN GLAZERMAN ET AL., BROOKINGS INST., BROWN CTR. ON EDUC. POLICY, EVALUATING TEACHERS: THE IMPORTANT ROLE OF VALUE-ADDED 2 (2010), *available at* http://www.brookings.edu/~/media/research/files/reports/2010/11/17%20evaluating%20teachers/1117_evaluating_teachers.

[14] *Id.*

[15] *Id.*

[16] Koretz, *supra* note 8, at 18.

[17] GLAZERMAN, *supra* note 13, at 4.

[18] Koretz, *supra* note 8, at 18–19.

[19] Toch, *supra* note 2, at 36.

states. Second, this Note focuses on Florida, a state that recently enacted such legislation as well as an agency rule; this section discusses the litigation and the rule it invalidated, and concludes that states should aim to avoid this kind of litigation. Third, this Note looks at ways to prevent the type of litigation that occurred in Florida from occurring in other states, including more collaboration with teacher groups in the policymaking process. Finally, this Note considers public policy reasons, including the existence of flaws in the value-added model system, to reduce reliance on student test scores when evaluating teachers.

II. TEACHER EVALUATION POLICY IN THE STATES

A. Race to the Top

In the past few years, more states are using teacher evaluations and teacher merit pay, both of which are at least partially based on student test scores. Race to the Top incorporates teacher evaluation reform into its selection criteria for determining which states will receive federal funds.[20] One criterion is the extent to which states "[d]esign and implement rigorous, transparent, and fair evaluation systems for teachers . . . that take into account data on student growth . . . as a significant factor . . . ."[21] Another criterion is whether states use these evaluations to "inform decisions" about teacher compensation, promotion, and retention.[22]

States are using this federal funding incentive to consider and sometimes implement merit pay and teacher evaluations based on student test scores.[23] Some teachers are reluctant to support the Race to the Top application, even though it would provide grants to their districts, because receipt of a grant will likely result in teacher evaluations based on student test scores.[24] For example, San Francisco teachers did not participate in the city's Race to the Top application process.[25] By contrast, politicians appear more likely to support participation in the Race to the Top program. For instance, Florida politicians embraced teacher evaluations based on test scores as a way of gaining Race to the

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[20] U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 9 (2009), *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

[21] *Id.*

[22] *Id.*

[23] *E.g.*, Jeff Bishop, *There's Talk of Merit Pay for Teachers Through Race to the Top Program*, THE NEWNAN TIMES-HERALD (Georgia), Jan. 27, 2011, www.times-herald.com/Local/There-s-talk-of-merit-pay-for-teachers-through-Race-to-the-Top-program-1499986.

[24] John Fensterwald, *Skeptical Unions Pose Challenge to Districts' Race to the Top*, EDSOURCE (Sept. 20, 2012), www.edsource.org/today/2012/skeptical-unions-pose-challenge-to-districts-race-to-the-top/20320#.UJiBs4asTKd.

[25] *Id.*

Top funds. They introduced a bill basing teacher evaluations and compensation in part on student test scores.[26] The politicians described the bill's purpose as aligning with the state's Race to the Top application.[27] Former Florida Governor Jeb Bush supported merit pay, and current Governor Rick Scott signed a law bringing a merit pay system to Florida in March 2012.[28] Florida received a federal grant from Race to the Top to create a statewide teacher evaluation system.[29]

B. Controversy in the States about Teacher Evaluation Methods

The current focus on teacher evaluation and pay systems based on student test scores has gained traction as a way to improve education, but it has also received pushback in the form of litigation and political strife from affected parties, including teachers. Several states enacted evaluation systems based on student test scores or merit pay systems rewarding or penalizing teachers based on their students' scores, and these reform efforts have often met resistance.

For example, in California, a lawsuit was filed to enforce a California law requiring student progress to be included in evaluating teachers.[30] The judge in that case ordered both parties to create a new teacher evaluation system with a student progress measure as a part of the evaluation.[31] Teachers recently backed a proposed bill that would rewrite state rules about teacher evaluations, but the bill died in August 2012.[32] Some education advocates were pleased that the teachers' proposed bill failed, because a change in state rules could have weakened attempts to improve teacher quality with evaluations based upon student scores.[33] Of course, teachers took a different view.[34] The bill they supported provided for "a statewide uniform teacher evaluation system featuring more performance reviews, classroom observations, training of

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[26] FLA. SENATE COMM. ON EDUC. PRE-K - 12, 2011 SUMMARY OF LEGISLATION PASSED 1, *available at* www.flsenate.gov/PublishedContent/Session/2011/Publications/BillSummary/PDF/ED0736.pdf.

[27] *Id.*

[28] Leslie Postal, *Gov. Scott Signs Teacher Merit-Pay Bill*, ORLANDO SENTINEL, March 24, 2011, http://articles.orlandosentinel.com/2011-03-24/news/os-florida-merit-pay-20110324_1_teacher-merit-pay-bill-judge-teacher-quality-national-teachers-union.

[29] *Id.*

[30] Stephen Sawchuk, *Critics Ask Calif. Courts to Change Teacher Policies*, EDUC. WEEK, June 6, 2012, at 21.

[31] Hillel Aron, *Concerns About Teacher Talks*, L.A. SCHOOL REPORT (Sept. 18, 2012), http://laschoolreport.com/how-far-away-are-utla-and-lausd-on-teacher-evaluations/.

[32] Teresa Watanabe & Michael J. Mishak, *California Teacher Evaluation Bill Abandoned by Lawmakers*, L.A. TIMES, Sept. 1, 2012, http://articles.latimes.com/2012/sep/01/local/la-me-teacher-eval-bill-20120901.

[33] *Id.*

[34] *Id.*

evaluators and public input into the review process."[35] Teachers stated that the features of their proposed evaluation system would have given clear guidelines to help teachers improve their instruction.[36] Implicit in the two sides' arguments was a difference in how teacher evaluations should be used. Teachers viewed evaluations as a tool for improvement, while school reform advocates and some parents viewed evaluations as a way to dismiss teachers who were not performing well enough.

In addition, a Louisiana teachers' association filed a lawsuit challenging a law that changes the teacher tenure system.[37] The law bases teacher tenure on student performance, puts teacher tenure further out of reach to teachers, and "link[s] job security [for superintendents] to student achievement and teacher evaluations."[38] A similar proposal recently passed in Michigan—the amendment to the Teacher Tenure Act sparked controversy because it "barred school districts from using seniority as the determining factor when making layoff decisions."[39] The purpose of the amendment, according to one legislator, was to raise the quality of education and to give younger teachers with promising potential a better chance of avoiding layoffs due solely to their lack of experience.[40]

Finally, as discussed below, a recently passed Florida law that ties teacher evaluations to student standardized test scores generated controversy and a lawsuit from teacher unions and individual teachers. Teachers narrowed in on the legal problems with Florida State Board of Education rulemaking procedures and substance. While the law was invalidated by an administrative law judge, there is much room for appeals and further rulemaking.

III. CASE STUDY: FLORIDA

For a number of reasons, Florida's recently passed law is an appropriate one to study in order to understand how this method of teacher evaluation may affect education systems and create ongoing litigation and conflict. The law enacted a value-added model of teacher evaluations based on student test scores and used its new teacher evaluation model as a way to apply for Race to the Top funds.[41] This

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[35] *Id.*

[36] *Id.*

[37] Bill Barrow, *Teachers File State Lawsuits Challenging Gov. Jindal's Voucher, Tenure Laws*, TIMES-PICAYUNE, June 7, 2012, http://www.nola.com/politics/index.ssf/2012/06/teachers_file_state_lawsuits_c.html.

[38] *Id.*

[39] Lori Higgins, *Teacher Union Files Lawsuit over Michigan Teacher Tenure Act*, DETROIT FREE PRESS, Mar. 8, 2012, www.freep.com/article/20120308/NEWS05/203080731/Teachers-union-files-lawsuit-over-Michigan-Teacher-Tenure-Act.

[40] *Id.*

[41] Postal, *supra* note 28.

legislation also invited controversy and led to a litigation battle.[42] As this section will detail, the litigation created conflict between teachers and the education reform movement, invalidated a rule, and caused uncertainty about future law and policy.

A. The Florida Statute

In 2011, the Florida legislature passed Senate Bill 736, codified in § 1012.34 of the Florida Statutes.[43] Entitled the "Student Success Act," the law provoked a legal challenge from the teachers' union, the Florida Education Association.[44] The statute changes teacher evaluation requirements.[45] Also, "[t]he bill reinforces Race to the Top, which requires 50[%] of the evaluation for classroom teachers and other instructional personnel to be based on student performance for students assigned to them over a [three]-year period."[46] If less than three years of data is available, this part of the evaluation still must account for not less than 40% of the evaluation.[47] The law states that the "Commissioner of Education would establish a learning growth model . . . to measure the effectiveness of a classroom teacher . . . based on what a student learns."[48] This model would be used for the state assessments.[49] The portion of the teacher evaluation measures that are not based on test scores are based on instructional practice.[50] Four evaluation levels are required under the law: "highly effective; effective; needs improvement or, for instructional personnel in the first [three] years of employment who need improvement, developing; and unsatisfactory."[51] The Commissioner of Education is required to consult with experts, instructional personnel, school administrators, and education stakeholders in developing criteria for these levels.[52]

Teachers evaluated as "highly effective" or "effective" will receive a pay raise under the system.[53] A school district will not renew a teacher's annual contract if the teacher receives any of the following: two unsatisfactory annual ratings in a row, two unsatisfactory ratings in a

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[42] Peek v. State Bd. of Educ., No. 12-1111RP, 2012 WL 3645094 (Fla. Div. Admin. Hearings Aug. 22, 2012)

[43] FLA. STAT. § 1012.34 (2012); Gina Jordan, *Challenge to Teacher Merit Pay Rule Underway in Tallahassee*, STATEIMPACT (May 30, 2012, 12:36 PM), http://stateimpact.npr.org/florida/2012/05/30/challenge-to-teacher-merit-pay-rule-underway-in-tallahassee/.

[44] Jordan, *supra* note 43.

[45] *Id.*

[46] FLA. SENATE COMM. ON EDUC. PRE-K - 12, *supra* note 26, at 1.

[47] FLA. STAT. § 1012.34(3)(a)1a (2012).

[48] *Id.*

[49] *Id.*

[50] *Id.* § 1012.34(3)(a)2.

[51] *Id.* § 1012.34(2)(e).

[52] *Id.*

[53] *Id.* § 1012.22(1)(c)5b.

three-year period, three needs improvement ratings in a row, or a combination of unsatisfactory and needs improvement evaluations in a three-year period.[54] In addition, these performance evaluation ratings can subject a teacher to dismissal for cause.[55] The law also requires superintendent recommendations for promotions or transfers to be primarily based on the employee's effectiveness according to the standards of § 1012.34.[56]

Many Florida teachers reacted negatively to the new law and its requirements that they would have to follow, believing that some measures would not help further educational goals; some who agreed with its basic tenets thought it was implemented too quickly.[57] The research organization that worked to create the policy also mentioned concerns that some districts implemented the plan too quickly.[58] Teachers unions challenged the most controversial part of the law in court—that which uses student test scores as part of the measure of teacher performance.[59]

Another part of the Florida law that generated controversy is the nature of the formula that helps determine teacher pay.[60] The formula predicts what a student should score on the state standardized test (the Florida Comprehensive Assessment Test ("FCAT")), and compares the actual score with the predicted score to evaluate teacher performance.[61] While factors such as "class size, attendance, and the [students'] previous [FCAT] scores" are included, poverty is not included in the formula, despite a known link between poverty and success in school.[62] Other objections to the formula are its complexity and its reliance on variables that may not produce accurate results.[63] As one teacher commented, it is "only as good as the variables that you're actually looking out for as well as the test that you're using to measure."[64] This implicitly raises concerns about the reliability of test scores in general to measure student success.

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[54] *Id.* § 1012.33(3)(b).

[55] *Id.* § 1012.33(1)(a).

[56] *Id.* § 1012.22(1)(e).

[57] Leslie Postal, *Teachers: New Evaluation System 'Artificial,' 'Frustrating,' 'Humiliating'*, ORLANDO SENTINEL, July 13, 2012, http://articles.orlandosentinel.com/2012-07-13/features/os-florida-teacher-evaluations-20120713_1_new-teacher-evaluations-evaluation-plan-teacher-merit-pay-law.

[58] *Id.*

[59] *Id.*

[60] Laura Isensee & Sarah Gonzalez, *Why Poverty Is Not Included in the Mathematical Equation for Teacher Merit Pay*, STATEIMPACT (Feb. 17, 2012, 11:40 AM), http://stateimpact.npr.org/florida/2012/02/17/why-poverty-is-not-included-in-the-mathematical-equation-for-teacher-merit-pay/.

[61] *Id.*

[62] *Id.*

[63] Sarah Gonzalez, *Inside the Mathematical Equal for Teacher Merit Pay*, STATEIMPACT (Feb. 16, 2012, 2:02 PM), http://stateimpact.npr.org/florida/2012/02/16/inside-the-mathematical-equation-for-teacher-merit-pay/.

[64] *Id.*

B. Delegation to Agencies for Rulemaking and History of Petition

According to § 1012.34, at least half of a teacher's performance evaluation "must be based upon data and indicators of student learning growth assessed annually by the statewide assessments . . . ."[65] The other portion of the evaluation "must include indicators based upon each of the Florida Educator Accomplished Practices ("FEAP") adopted by the State Board of Education" and would come from classroom observations by administrators.[66] The FEAPs are found in Rule 6A-5.065.[67] The Review and Approval Checklist for Instructional Personnel and School Administrator Evaluation Systems ("Checklist") provides elements that must be part of the evaluation systems used; the Checklist is required by § (2)(a) of the proposed rule, but the contents of the Checklist are not spelled out within it.[68]

The Florida legislature delegated responsibility for devising some of the new evaluation procedures to the State Board of Education ("SBE"), the Department of Education ("DOE"), and the Commissioner of Education.[69] The legislature declared that the SBE must adopt rules that "establish uniform procedures for the submission, review, and approval of district evaluation systems and reporting requirements for the annual evaluation of instructional personnel."[70] The legislature also charged the SBE with ensuring that standards for instructor performance levels are specific and discrete.[71] The SBE must also adopt rules that provide for student learning growth measurement[72] and rules tying student growth standards to instructor evaluation ratings.[73] Finally, the SBE is tasked with creating a "process for monitoring school district implementation of evaluation systems in accordance with this section."[74]

The DOE plays a role by receiving instructors' evaluation results from the school district superintendents,[75] approving each individual school district's instructional personnel evaluation systems,[76] and then monitoring the implementation of evaluation systems.[77] The Commissioner of Education "shall consult with experts, instructional

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[65] FLA. STAT. § 1012.34(3)(a)1 (2012).

[66] *Id.* § 1012.34(3)(a)1c2.

[67] FLA. ADMIN. CODE ANN. r. 6A-5.065 (2012).

[68] 38 Fla. Admin. Weekly 804 (Feb. 24, 2012) [hereinafter Checklist].

[69] *See generally* FLA. STAT. § 1012.34 (2012).

[70] *Id.* § 1012.34(8).

[71] *Id.*

[72] *Id.* § 1012.34(7)(a). The Board must adopt rules implementing the formula to measure student learning growth that the Commissioner of Education. *Id.*

[73] *Id.* § 1012.34(8).

[74] *Id.*

[75] *Id.* § 1012.34(1)(a).

[76] *Id.* § 1012.34(1)(b).

[77] *Id.*

personnel, school administrators, and education stakeholders in developing the criteria for the performance levels."[78] The Commissioner of Education also must "approve a formula to measure individual student learning growth on the [FCAT]" considering certain factors, including an individual student's prior academic performance.[79]

In *Peek v. State Board of Education*, two individual teachers and the Florida Education Association petitioned for a declaration that proposed Rule 6A-5.030 overreached the power delegated to the DOE by the legislature.[80] In addition, petitioners argued that the Rule was vague, arbitrary, and contained technical jargon that, by law, was too complex.[81] Respondents were the DOE and the SBE.[82] SBE members are appointed by the governor, and the DOE administers and implements education policy under the direction and control of the SBE.[83]

The SBE developed its new evaluation system, proposed Rule 6A-5.030, on September 30, 2011.[84] On February 24, 2012, the respondents gave notice that proposed Rule 6A-5.030 would be adopted at a SBE meeting on March 27, 2012.[85] The petitioners learned that the DOE made changes to the proposed Rule without publishing those changes in the Florida Administrative Weekly (FAW), and then adopted the revised Rule during the March 27 meeting.[86] As of the date of the petition, the SBE had not adopted a rule for a value-added formula or started another rulemaking process to adopt such a formula, despite the newly adopted Rule's requirement to use a value-added formula to find student learning growth, which accounts for half of teacher evaluation scores.[87]

By statute, the formula to measure individual student learning growth must measure a student's growth on the FCAT and should include consideration of individual students' prior academic performance, attendance, disability status, and English language learner status.[88] The law also requires that teachers are "fully informed of the criteria and procedures" of the evaluation before the evaluation occurs.[89]

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[78] *Id.* § 1012.34(2)(e).

[79] *Id.* § 1012.34(7)(a).

[80] Amended Petition at 1, 6–8, Peek v. State Bd. of Educ., No. 12-1111RP, 2012 WL 3645094 (Fla. Div. Admin. Hearings Aug. 22, 2012).

[81] *Id.*

[82] *Peek*, 2012 WL 3645094, at *2.

[83] *Id.*

[84] Amended Petition, *supra* note 80, at 5.

[85] *Id.*

[86] *Id.* at 5–6.

[87] *Id.* at 6.

[88] FLA. STAT. § 1012.34(7)(a) (2012).

[89] *Id.* § 1012.34(3)(b).

C. Rule and Petition Arguments

The purpose of Rule 6A-5.030 was "to implement changes to Section 1012.34, Florida Statutes, as prescribed in the Student Success Act (SB 736) of 2011," and it was intended "to establish procedures for Department of Education review, approval and monitoring of school district systems of personnel evaluation under Section 1012.34, Florida Statutes."[90] Petitioners alleged that Rule 6A-5.030 contained, in addition to rule text, a thirteen-page checklist that included a two-page glossary of terms for school districts to use when they provide rule compliance evidence to the DOE for approval of districts' personnel evaluation systems.[91] Petitioners also alleged that Rule 6A-5.030 did not include any guidance about "the form, content, quantity, or scope of the documents the DOE [would] accept."[92] In addition, petitioners alleged that the Rule incorporated a document, not included in the proposed rule, called "High Effect Size Indicators (2012)." Furthermore, the Rule did not assign a page or form number to the document and did not specifically or clearly reference the document.[93] Petitioners alleged that the incorporation of those documents created a substantive change to the Rule, and that Section 1 of the Rule did not specify the date that districts must turn in evaluation systems to the DOE for approval.[94] Petitioners further argued that Section 2 of the Rule was not specific about how districts could comply, "allow[ing] total discretion to the DOE regarding what compliance with the APR means."[95]

Petitioners also argued that the Rule required teachers to produce documents about more indicators than those codified in another rule and that the Checklist requirements exceeded the Rule's enabling statute.[96] In addition, they argued that the requirements of the evaluation system included some provisions that were difficult to understand, mandated "feedback processes," and required some teacher proficiency monitoring that was not authorized by law.[97] Petitioners claimed that Section 3 of the Rule lacked guidance about how the DOE would decide whether evaluation systems were complete and acceptable.[98] They also argued that Section 4 of the Rule, while making clear the DOE's potential responses to districts' evaluation systems (approval, conditional approval, denial, and approval rescinded), did not give guidance about

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[90] Checklist, *supra* note 68, at 804.
[91] Amended Petition, *supra* note 80, at 8.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 8–9.
[95] *Id.* at 9.
[96] *Id.*
[97] *Id.* at 10.
[98] *Id.*

the nature of the documentation that would lead to any of these responses.[99]

Petitioners claimed that Section 5 of the Rule, which addressed later modifications to an approved evaluation system and required DOE approval for a district's modifications, was not authorized by law.[100] They contended that mandates from the DOE in Section 6 of the Rule were not authorized by § 1012.34(1)(a) because the DOE required ten mandatory elements of district evaluation system monitoring, including how teachers would be evaluated and evaluation data to be compiled by districts.[101] Petitioners argued that § 1012.34(1)(a) only required that districts report the resulting category of each teacher's evaluation.[102] They also argued that the mandatory Five Year Continuous Improvement Cycle evaluation system review in Section 6 of the Rule was not authorized by law.[103]

Regarding the Checklist, petitioners contended that the Rule did not give directions for satisfactory documentation regarding the approximately fifty goals or indicators about which each school district must send evidence, leaving too much discretion to those working for the DOE.[104] Petitioners stated that the Checklist also mentioned that compliance guidance would be available on the DOE website, but that guidance could be subject to unexamined changes by the DOE without transparent and consistent rulemaking.[105] Petitioners claimed that the Checklist required districts to train employees about the evaluation system without providing any guidelines.[106] They also argued that school districts must provide compliance documentation that will be subjectively found acceptable or unacceptable by the DOE under the Checklist.[107]

In general, petitioners claimed that the proposed Rule 6A-5.030 violated § 120.52(8) and was "an invalid exercise of delegated legislative authority."[108] Petitioners also claimed that the Rule required school districts to rely on policy regarding the learning growth model and value-added formula provided by the DOE that the Commissioner approved but has not been adopted by the SBE, thus unlawfully requiring districts to rely on policy that had not been adopted as a rule.[109]

In the petitioners' argument about failing to follow rulemaking procedures, they argued that respondents did not follow § 120.54(2)(b)

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 11.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 11–12.
[106] *Id.* at 12–13.
[107] *Id.* at 13.
[108] *Id.*
[109] *Id.*

when they failed to draft the Checklist and High Effect Size Indicator attachment in readable language, instead using technical jargon and cross-referencing in a confusing way.[110] Respondents also violated the requirements of § 120.54(l)(i) when adding the "High Effect Size Indicators (2012)" document without reference to it in the proposed rule and without page numbers "at the last minute."[111] The petitioners also contended that respondents did not follow § 120.54(l)(i) when they did not incorporate additional materials that the DOE would put on its website by reference into the Rule.[112] Many of the rulemaking procedure arguments were addressed by an administrative decision about the Rule, but the more substantive arguments were not addressed.

D. Administrative Law Decision about Procedural Arguments

The administrative law judge ("ALJ") reviewing the Rule discussed how the Florida Administrative Procedure Act deals with incorporative references in rulemaking.[113] The ALJ explained that incorporative references occur when material outside of the legislation is referenced inside the legislation, and the legislation implies or states that the outside material should be treated as part of it.[114] The Florida Administrative Procedure Act, the ALJ noted, allows incorporative references with some restrictions.[115]

The ALJ found the contested rule to be "an invalid exercise of delegated legislative authority, in its entirety."[116] The ALJ concluded that the Rule was invalid because the respondents materially did not follow the proper rulemaking procedures.[117] The ALJ did not decide on the additional substantive matters brought by the petitioners, because doing so would be an improper advisory opinion.[118]

Even though the ALJ did not decide on some of the issues brought by the petitioners, it would be a useful exercise to examine their other legal arguments in light of Florida law, since they may arise in future rulemaking. The Florida statute that deals with whether an exercise of delegated legislative authority is valid is § 120.52(8) of the Florida Administrative Procedure Act.[119]

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[110] *Id.*

[111] *Id.*

[112] *Id.* at 14.

[113] Peek v. State Bd. of Educ., No. 12-1111RP, 2012 WL 3645094, at *8 (Fla. Div. Admin. Hearings Aug. 22, 2012).

[114] *Id.*

[115] *Id.*

[116] *Id.* at *24.

[117] *Id.* at *23.

[118] *Id.* at *23–24.

[119] FLA. STAT. § 120.52(8) (2012).

E. Substantive Arguments

The petitioners argued that the Rule exceeded the grant of delegated legislative authority under § 120.52(8)(a).[120] Section 120.52(8)(a) provides that:

> Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a) 1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or

[120] Amended Petition, *supra* note 80, at 14.

> generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.[121]

The petitioners argued that the Rule should be struck down based on this statute for three primary reasons: (1) the Rule exceeded its grant of authority and enlarged, modified, or contravened the statute; (2) the Rule is vague and lacks adequate standards; and (3) the Rule is arbitrary and capricious. This Note will now examine each of these arguments in turn.

1. The Rule Exceeded Grant of Rulemaking Authority and Enlarged, Modified, or Contravened the Statute

Because arguments challenging an agency's rulemaking actions under § 120.52(8)(b) and § 120.52(8)(c) often overlap, these two sections of the statute will be discussed together.

Under Florida law, an agency that promulgates rules is delegated power to make rules, but that power is limited by the statute providing for the authority.[122] In a case about establishing high water marks by the Board of Surveyors ("Board"), Florida's First District Court of Appeal found that the only authority granted to the Board by statute was to create rules with technical standards so that high water mark surveys are accurately measured for real property boundaries.[123] The legislative grant of authority did not give the Board the authority to define a fixed high water line that would create new legal consequences.[124] The court held that an executive agency is constrained by the legislative grant of authority, even though it may "properly restate or interpret pertinent case[ ]law."[125]

Amendments to Florida's Administrative Procedure Act in the 1990s clarified the limitations imposed on a rulemaking agency. As one court put it:

> Under the 1996 and 1999 amendments to the [Administrative Procedure Act], it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that

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[121] FLA. STAT. § 120.52(8) (2012).

[122] Bd. of Trs. of Internal Improvement Trust Fund v. Bd. of Prof'l Land Surveyors, 566 So. 2d 1358, 1360 (Fla. 1st Dist. Ct. App. 1990).

[123] *Id.* at 1361.

[124] *Id.*

[125] *Id.*

> can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.[126]

The 1999 amendments came as a response to the court's interpretation of the 1996 amendments in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,[127] which interpreted the 1996 amendments to mean that a proposed rule need only be within the range of statutorily granted powers or in the class of powers and duties named in the statute.[128] After the 1999 amendments, a rule created by an agency must be "within the class of powers and duties delegated to the agency," but that alone is not sufficient for a valid exercise of legislative power.[129] An administrative agency's authority when promulgating rules must come from "an explicit power or duty" granted in the statute by the Florida legislature.[130] While a rule will likely be more detailed and specific than the statute giving the authority for the rule, the issue is "whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*."[131]

The First District Court of Appeal used this reasoning to find that a rule prohibiting the use of submerged lands for gambling vessels was invalid because, despite being framed as authorized by statute to regulate anchoring or mooring, it was truly a rule about a commerce-related transport, which the Board was explicitly not allowed to regulate according to a statute.[132] The Court stated that the test under § 120.52(8)(c) "is whether a (proposed) rule gives effect to a 'specific law to be implemented,' and whether the (proposed) rule implements or interprets 'specific powers and duties.'"[133] Without specific powers or duties allowing regulations, the proposed rule is an invalid exercise of delegated legislative authority.[134]

Because an agency's rulemaking authority is delegated from the legislature, an agency may not "enlarge, modify or contravene the provisions of a statute" when creating an administrative rule; otherwise the rule is an invalid exercise of delegated legislative authority.[135] For example, in a case about the Division of Alcoholic Beverages and Tobacco's authority to license restaurants to sell alcohol, the First District Court of Appeal found that the agency "enlarged upon the

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[126] State v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st Dist. Ct. App. 2001) (citation omitted).

[127] 717 So. 2d 72, 80 (Fla. 1st Dist. Ct. App. 1998).

[128] *Day Cruise Ass'n*, 794 So. 2d. at 699–701.

[129] Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, 773 So. 2d 594, 599 (Fla. 1st Dist. Ct. App. 2000) (quoting FLA. STAT. § 120.52(8) (1999)).

[130] *Id.*

[131] *Id.*

[132] *Day Cruise Ass'n*, 794 So. 2d at 702.

[133] *Id.* at 704 (quoting FLA. STAT. § 120.52(8) (1999)).

[134] *Id.*

[135] State v. Salvation Ltd., 452 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1984).

statutory criteria."[136] The legislature had provided for specific criteria to obtain a special restaurant beverage license, including requirements that the business be a restaurant, requirements about size of service area and the number of people that could be served, and percentage of revenue from non-alcoholic products.[137] However, the agency enlarged these requirements by adding that food must be prepared and cooked on the premises.[138]

Another example of a court overturning a regulation because a rulemaking body overstepped its authority is *Department of Health and Rehabilitative Services v. Florida Psychiatric Society*.[139] In this case, the court had to decide whether the Department of Health and Rehabilitative Services had the authority from the legislature to create rules to establish, regulate, and license "crisis stabilization" and "intensive residential treatment" care centers under the Florida Mental Health Act.[140] The court held that the statute that gives the department the authority to protect public health in Florida was explicit in the department's lack of authority to require a license, absent any license requirement specifically provided for by law.[141] In addition to lack of authorization, the court found that the rule created by the department attempted to amend the statute "by diverting persons eligible for services and treatment under the Act into an entirely different evaluation and treatment program."[142] In invalidating the rule, the First District Court of Appeal reiterated that "[a]dministrative regulations must be consistent with the statutes under which they are promulgated, and they may not amend, add to, or repeal the statute."[143]

In a case involving the SBE, however, the court found that a rule promulgated by the agency regulating the revocation of teachers' certificates for community college instruction was valid.[144] The enabling statute provided that instructor employment at community colleges would occur "upon recommendation of the president, subject to rejection for cause by the board of trustees and Subject [sic] to the rules and regulations of the state board relative to certification, tenure . . . and such other conditions of employment as the Division of Community Colleges deems necessary and proper . . . ."[145] The hearing officer found that the SBE only had power to issue certificates, not revoke them, based on the lack of express language about revocation.[146] The court disagreed with

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] 382 So. 2d 1280 (Fla. 1st Dist. Ct. App. 1980).
[140] *Id.* at 1282.
[141] *Id.* at 1283.
[142] *Id.* at 1284.
[143] *Id.* at 1285.
[144] State Bd. of Educ. v. Nelson, 372 So. 2d 114, 115–16 (Fla. 1st Dist. Ct. App. 1979).
[145] *Id.* at 114 (quoting a 1979 Florida statute now codified at FLA. STAT. § 240.335 (2012)).
[146] *Id.*

the hearing officer, instead finding that the SBE did not exceed its authority because its "power to issue certificates in this instance carries with it the power to specify the terms and conditions of their issuance, as well as the terms and conditions upon which the same may be held by the employee, or revoked by the board."[147]

By contrast, the same court found that an agency rule improperly expanded a statute in a chiropractic licensing case.[148] The Department of Professional Regulation (Board of Chiropractic) amended a rule to require a showing of professional accreditation, in addition to regional accreditation, for the chiropractic college from which a licensing applicant graduated.[149] The court found, however, that the statute only required that an applicant for licensure be a graduate of a chiropractic college accredited by an agency approved by the U.S. Department of Education and the Council on Postsecondary Accreditation.[150] The rule's additional requirements of regional and professional accreditation improperly expanded the statute.[151]

An agency also may not contravene the provisions of a statute when creating a rule.[152] For example, the First District Court of Appeal held that the Agency for Persons with Disabilities contravened the plain language of the statute by creating age requirements for certain Medicaid waiver benefits.[153] The statute at issue said only that clients eligible for those benefits "shall include, but is not limited to, clients requiring residential placements, clients in independent or supported living situations, and clients who live in their family home."[154] The court held that by adding age restrictions, the agency contravened the statute, despite the ALJ's finding that the rule was justified by the agency and was therefore valid.[155] The court emphasized that despite the agency's policy justification of its rule, a rule that contravenes a statute is nonetheless invalid.[156] The agency also contravened the statute by creating a rule that would assign a client's level of benefits based only on whether they previously received benefits, when the statute required assignment based on an individual assessment.[157] The court held that this requirement contravened the express language in the statute by replacing requirements, whereas the age requirement contravened the statute by

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[147] *Id.* at 114–15.

[148] Dep't of Prof'l Regulation v. Sherman Coll. of Straight Chiropractic, 682 So. 2d 559 (Fla. 1st Dist. Ct. App. 1995).

[149] *Id.* at 559–60.

[150] *Id.* at 561.

[151] *Id.*

[152] FLA. STAT. § 120.52(8)(c) (2012).

[153] Moreland *ex rel.* Moreland v. Agency for Pers. with Disabilities, 19 So. 3d 1009, 1010–12 (Fla. 1st Dist. Ct. App. 2009) (quoting FLA. STAT. 393.0661(3)(c) (2007)).

[154] *Id.*

[155] *Id.* at 1012.

[156] *Id.*

[157] *Id.*

adding a factor to the statute about whether an individual could receive a certain level of benefits.[158]

Even when it is possible that the legislature mistakenly neglected to give authority to an agency, as evidenced by overall legislative policy, or when an administrative rule attempts to reach an admirable goal beyond its authority, the courts cannot rewrite statutes by allowing agencies to enlarge or contravene statutory authority.[159] Similarly, rulemaking authority cannot be accorded to an agency, even though the public might benefit, if the legislature has not given the agency that authority.[160]

In *Peek*, petitioners argued that some parts of the Rule proposed by the DOE went beyond what the Florida legislature authorized the agency to do, thus exceeding its grant of authority in violation of § 120.52(8)(b) and enlarging, modifying or contravening the agency's enabling statute in violation of § 120.52(8)(c).[161] For example, petitioners argued that documentation requirements regarding evaluation systems went beyond the FEAP indicators required by statute.[162] Part of the Rule provided that evaluation systems must "[c]ontain evidence of each of the elements as described in the Review and Approval Checklist for Instructional Personnel and School Administrator Evaluation Systems, Form No. EQEVAL-2012."[163]

Other examples of requirements where petitioners claimed that the agency went beyond what the legislature authorized were the Five Year Continuation Improvement Cycle and the DOE evaluation system quality control monitoring process.[164] Petitioners alleged that the Five Year Cycle would require DOE review of district evaluation systems every five years. while the enabling statute only required that district school boards monitor their own evaluation systems annually and authorized DOE assistance only at the district's request.[165] In addition, petitioners argued that the DOE had taken too much authority in the Rule by requiring evaluation system modifications to go through the agency for approval before implementation.[166]

According to the court's interpretation, the DOE can create rules that are more specific than the enabling statute, but it should not create rules with new legal consequences that are not part of an explicit duty given to them through the statute. The rule's validity requires specific grants of authority, not merely the DOE acting within a general class of powers. Because this was made clear from the 1999 amendments that

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[158] *Id.*

[159] Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st Dist. Ct. App. 1986).

[160] Witmer v. Dep't of Bus. & Prof'l Regulation, 662 So. 2d 1299, 1302 (Fla. 1st Dist. Ct. App. 1995).

[161] Amended Petition, *supra* note 80, at 14–15.

[162] *Id.* at 16.

[163] Checklist, *supra* note 68, at 805.

[164] Amended Petition, *supra* note 80, at 15.

[165] *Id.* at 16–17.

[166] *Id.* at 10.

reacted to the court's interpretation of previous amendments, the petitioners in *Peek* have a strong argument that parts of the DOE's Rule are invalid. The statute does not mention what would happen if districts modified their evaluation systems, but the Rule provides for submittal to the DOE when a system has been modified substantially. Adding a section of a rule not provided for by the statute is arguably invalid under both § 120.52(8)(b) and under *State v. Day Cruise Association*.[167] The *Day Cruise Association* court reasoned in a straightforward example that if an agency's rule utilizes a power specifically denied to that agency, then the rule is invalid.[168]

Even in less straightforward examples, Florida courts have found that an agency cannot expand its powers. Specifically, in *State v. Salvation Limited*, the court found enlarged statutory criteria when an agency added requirements that food must be prepared on the premises of restaurants.[169] While there was nothing that prohibited this requirement in the statute, the court held that the agency could not expand its power to require restaurants to comply with a rule unauthorized by statute.[170] A similar enlargement of specific provisions of law arguably occurred in § 3(a)(2) of the teacher evaluation statute, which required use of FEAPs as indicators for teacher observations. The Rule added the Checklist with additional indicators; this addition could arguably be found by a court as enlarging an agency's authority beyond the statute.

Florida courts have also looked to the effects of regulations. For example, a court held in *Department of Health v. Florida Psychiatric Society*, not only that creation of new care centers by the agency had been done without statutory authority, but that the regulations, in effect, amended the statute by diverting clients from authorized treatment centers into different treatment programs.[171] Similarly, in *Department of Professional Regulation v. Sherman College of Straight Chiropractic*, the agency was not authorized to add regional and professional accreditation requirements when the statute only called for accreditation generally.[172] The issues in these cases look similar to those posed by the Rule's Five Year Continuous Improvement Cycle; while review of evaluation systems was provided for in the statute, a five-year cycle was not included. The inclusion of the five-year cycle provision arguably has the effect of rewriting the enabling statute, which would be prohibited under *Florida Psychiatric Society* and *Sherman College*.

One example of a case in which an agency rule was upheld is *State Board of Education v. Nelson*, which allowed the SBE the power to

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[167] 794 So. 2d 696 (Fla. 1st Dist. Ct. App. 2001).
[168] *Id.* at 697.
[169] 452 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1984).
[170] *Id.* at 66–67.
[171] 382 So. 2d 1280, 1285 (Fla. 1st Dist. Ct. App. 1980).
[172] 682 So. 2d 559 (Fla. 1st Dist. Ct. App. 1995).

revoke community college certificates as a part of the statute allowing the agency to issue certificates.[173] While this case also involved the DOE—the same agency that promulgated the Rule—*Nelson* was decided before the 1999 amendments, which restricted the rules agencies could create to those pursuant to specific delegated powers. Because the *Nelson* holding was premised on a since-amended state statute, it is unlikely that a court would draw on *Nelson* to uphold the Rule.

In summary, Florida case law supports many of the petitioners' arguments about the invalidity of the Rule pursuant to § 120.52(8)(b) and § 120.52(8)(c). While it is not known how a court would rule on these arguments, a court considering them in subsequent litigation may find them compelling. If new rules are promulgated that include the parts of the Rule that were not explicitly invalidated by the ALJ for procedural reasons in the earlier proceeding, it is possible that the above substantive arguments might render a new rule invalid as well.

2. Vague and Lacks Adequate Standards

The Florida Administrative Procedure Act defines invalid exercises of legislative authority to include rules that are vague, fail to establish adequate standards for agency decision-making, or vest unbridled discretion in the agency.[174] Florida courts have held that a regulation is vague "if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[175] When terms are used in a rule that is not defined, the "common ordinary meaning" applies.[176] In *Cole Vision Corporation*, the First District Court of Appeal addressed whether the terms "'implies or suggests,' 'clearly and sufficiently indicate,' and 'associated or affiliated with'" were so vague as to render the regulation in which they were used invalid.[177] The court held that these terms were easily understood by an ordinary person, especially if the terms were read in conjunction with the other parts of the rule.[178]

In addition to challenging the regulations on vagueness grounds, the *Cole Vision Corporation* appellants questioned whether the rule created "adequate standards to assist optometrists in determining whether they [we]re engaged in a business relationship with a commercial

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[173] 372 So. 2d 114 (Fla. 1st Dist. Ct. App. 1979).

[174] FLA. STAT. § 120.52(8)(d) (2012).

[175] Cole Vision Corp. v. Dep't of Bus. & Prof'l Regulation, 688 So. 2d 404, 410 (Fla. 1st Dist. Ct. App. 1997) (quoting Witmer v. Dep't of Bus. & Prof'l Regulation, 662 So. 2d 1299, 1300 (Fla. 1st Dist. Ct. App. 1995)).

[176] *Id.*

[177] *Id.*

[178] *Id.*

establishment in violation of [the statute]."[179] The court also rejected this challenge on the basis that "excruciating detail" in the rule was not necessary to determine all contingencies about how the business relationship might occur in optometry, and that the rule established adequate standards.[180]

Florida case law contains other examples of rules challenged on grounds of vagueness, inadequate standards, or unfettered discretion. In *Witmer v. Department of Business and Professional Regulation*, the Fourth District Court of Appeal held that an agency's rule prohibiting corrupt or fraudulent practices in horse and dog racing was so vague that it was invalid.[181] The rule, the court noted, "punishe[d] corrupt or fraudulent practices without ever defining them or referring to a standard by which a practice may be judged to be corrupt or fraudulent."[182] By contrast, in *Humhosco v. Department of Health and Rehabilitative Services*, the court found that the terms "normally" and "substantially" were terms that are "commonly used and understood" and were within the agency's discretion to interpret and use on a case-by-case basis, thereby upholding the regulations against a challenge that the regulations violated the state constitution by giving the agency unbridled discretion.[183]

In *Cortes v. State Board of Regents*, the challenged rule gave new "unguided discretion" to agencies.[184] The court held that if rules create discretion that is not contained in the statute giving rulemaking authority, the rule must provide a basis for the discretion.[185] Without a basis for the discretion, the rule lacks sufficient standards, and is thus deemed invalid.[186]

Petitioners claimed that the Rule violated § 120.52(8)(d) because it was vague, lacked adequate standards, and gave too much discretion to the DOE.[187] The Rule required that evaluation systems submitted to the DOE demonstrate promotion of "continuous improvement of student learning growth and faculty and leadership development through feedback processes."[188] It stated several procedures that must be included, such as "procedures to ensure rater accuracy and reliability, training of employees on proficiency expectations, and monitoring of

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[179] *Id.*

[180] *Id.*

[181] Witmer v. Dep't of Bus. and Prof'l Regulation, 662 So. 2d 1299, 1300 (Fla. 1st Dist. Ct. App. 1995).

[182] *Id.* at 1302.

[183] Humhosco, Inc. v. Dep't of Health & Rehab. Servs., 476 So. 2d 258, 261 (Fla. 1st Dist. Ct. App. 1985).

[184] Cortes v. State Bd. of Regents, 655 So. 2d 132, 138 (Fla. 1st Dist. Ct. App. 1995).

[185] *Id.*

[186] *Id.*

[187] Amended Petition, *supra* note 80, at 17.

[188] Instructional Personnel and School Administrator Evaluation Systems, *supra* note 163, at 805.

improvement results in student learning growth and instructional personnel and school leader proficiency on evaluation indicators."[189]

Petitioners argued that the Rule gave the DOE too much discretion to approve or reject evaluation systems that have high-stakes evaluation outcomes for teachers in Florida.[190] Petitioners also argued that the fifty indicators that help determine whether evaluation systems comply with the agency's rules were not accompanied by information about what quantity or quality of documentation is required for approval or how a system that is not approved can be remedied.[191] In addition, petitioners alleged that the DOE intended to modify the Rule with materials on its website, but failed to incorporate them by reference into the Rule and failed to ensure that the website could not be changed at the discretion of the DOE over time.[192] These issues, petitioners alleged, showed that the Rule was vague, lacked adequate standards, and gave unbridled discretion to the DOE.[193]

A court would likely be less receptive to these arguments about vagueness and lack of standards as compared to the enlarging, modifying, and contravening argument above. In *Peek*, petitioners argued that the terms "procedures to ensure," "training employees," and "monitoring of improvement results" were too vague.[194] But Florida courts seem to require an utter lack of standards to find that terminology is too vague for a common person to understand. Terms such as "normally," "substantially," "clearly and sufficiently indicate" have been approved by the courts, and complete details are not required. In turn, courts are less likely to invalidate a rule on vagueness grounds and are more likely to be persuaded that a rule lacks ascertainable standards. Petitioners' argument that the Rule does not specify which indicators are required to be documented may be more persuasive to a Florida court, because districts will not know how much or what kind of information they need to provide to comply.

In summary, while petitioners' arguments about the invalidity of the Rule on vagueness and inadequate standards grounds are not as strong as their arguments that the Rule is outside the legislative grant of authority (as discussed in the previous section), they are still potential arguments that could lead to further litigation if a new rule were promulgated in the future.

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[189] *Id.*
[190] Amended Petition, *supra* note 80, at 17.
[191] *Id.* at 18.
[192] *Id.*
[193] *Id.* at 17–18.
[194] *Id.* at 9–10.

3. Arbitrary and Capricious

An agency cannot promulgate a rule that is arbitrary or capricious, under § 120.52(8)(e).[195] Under that provision, "a rule is arbitrary if it is not supported by logic or the necessary facts."[196] It "is capricious if it is adopted without thought or reason or is irrational."[197]

Florida courts' analysis of whether a rule is arbitrary and capricious is similar to rational-basis review of legislation under the Equal Protection Clause of the U.S. Constitution.[198] An agency may interpret the authority-granting statute within a range of possible interpretations and does not have to pick the most desirable interpretation.[199] The court in *Florida League of Cities* stated that "if an enabling statute . . . simply states that an agency may 'make such rules and regulations as may be necessary to carry out the provision of this act,' the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious."[200] Under this standard, rules must not be irrational or illogical.[201] The court reasoned that the rule in question, which would make "a wastewater treatment facility liable for proper disposal of its domestic wastewater residuals" with a few stated exceptions, was authorized by statutes that gave the Department of Environmental Regulation the power to create rules regarding control and prohibition of air and water pollution.[202] The court found that the rule's requirements appropriately helped reach the goals as put into the statute since residuals pollute air and water.[203]

F. Summary of Substantive Argument Analysis

Petitioners in the teacher evaluation case claimed that the Rule is arbitrary and capricious, and thus an invalid exercise of delegated legislative authority under § 120.52(8)(c), because it does not include "defined standards for initial evaluation system approval" or standards for its Five Year Continuous Improvement Cycle Monitoring.[204]

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[195] FLA. STAT. § 120.52(8)(e) (2012).

[196] *Id.*

[197] *Id.*

[198] Fla. League of Cities, Inc. v. Dep't of Envtl. Regulation, 603 So. 2d 1363, 1369 (Fla. 1st Dist. Ct. App. 1992).

[199] *Id.*

[200] *Id.* (citing Fla. Waterworks Ass'n v. Fla. Pub. Serv. Comm'n, 473 So. 2d 237, 239–40 (Fla. 1st Dist. Ct. App. 1985)).

[201] *Id.* at 1367.

[202] *Id.* at 1370.

[203] *Id.*

[204] Amended Petition, *supra* note 80, at 18–19.

Petitioners also claimed that the Rule created a very broad evaluation system review by the DOE and created a process for monitoring that lacks logic and reason.[205]

Even though petitioners argued that the Rule about teacher evaluations is arbitrary and capricious, since the Rule is reasonably related to the goal of the statute, a court may not be convinced by this argument. Rational basis review does not require the best policy to be chosen, and the arbitrary and capricious standard is a low one for an agency to meet. This argument is the weakest of the petitioners' three legal arguments discussed in this Note, but since the ALJ did not rule on it previously, it could be raised again if a similar rule were promulgated.

IV. PREVENTING LITIGATION

Although the Rule was invalidated on procedural rather than substantive grounds, the ALJ pointed out that subsequent rulemaking may occur.[206] While the ALJ did not rule on the substantive issues in the petition, he mentioned that these arguments are not foreclosed if further rulemaking is attempted.[207] Further rulemaking could lead to another challenge by teachers unions, unless they are brought into the discussion to find a common solution. Since at least some of the substantive arguments raised by petitioners (especially those claiming that the DOE and SBE exceeded their rulemaking authority under the statute) would likely prevail, the rulemaking process could lead to further litigation and ultimately prolong the process for a long period of time, if the agencies continue to promulgate rules without teacher input or support.

Other states have included teachers in the discussion about teacher evaluation, even sometimes after strife between policymakers and teachers unions. For example, Massachusetts recently passed a law to change teacher evaluation processes. The Massachusetts Teachers Association, Massachusetts's largest teachers union, and Stand for Children, an education advocacy organization, compromised on the issue of teacher seniority.[208] The Massachusetts Teachers Association gave up some seniority rights while Stand for Children opted not to put forward a broader ballot initiative, which included "a more expansive plan to change the way teachers are hired, transferred, and laid off."[209]

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[205] *Id.* at 19.

[206] Peek v. State Bd. of Educ., No. 12-1111RP, 2012 WL 3645094, at *23–24 (Fla. Div. Admin. Hearings Aug. 22, 2012).

[207] *Id.*

[208] Frank Phillips, *Massachusetts Teachers Union Agrees to Give up Key Rights on Seniority*, BOSTON GLOBE, June 8, 2012, http://www.bostonglobe.com/metro/2012/06/08/massachusetts-teachers-union-agrees-give-many-seniority-rights/GB6B5YhIcriROeDLtULLRI/story.html.

[209] *Id.*

Legislators were brought in and agreed to pass the compromise.[210] The ballot initiative would have based teacher retention and promotion entirely on test scores and performance reviews.[211]

Two of the three stated purposes of the Massachusetts bill were: "to assure the effective implementation of the education evaluation system adopted by the board of elementary and secondary education by providing training for teachers and administrators in evaluation and supervision" and "to assure that indicators of job performance as evidenced by evaluation and other factors are the primary factors in school staffing decisions."[212] The third purpose is about data collection for the evaluation system.[213] The bill provides for evaluation training and funds for training to make the evaluation process effective.[214]

In the bill's provision on how teachers will be evaluated, factors are listed that explain how teachers will be evaluated in various situations.[215] Section 3 of the bill provided that teachers with "professional teacher status" could not be laid off due to "a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified or if there is a less qualified teacher with such status holding the same or similar position for which the covered employee is currently certified."[216] While this provision benefitted the teachers with seniority, other parts of the bill provided that collective bargaining agreements could not displace professional status teachers with more senior teachers "unless the more senior teacher is currently certified pursuant to section 38G and is at least as qualified for the position as the junior teacher holding the position."[217] The bill states that the criteria for whether a teacher is qualified must include as primary factors: "indicators of job performance, including overall ratings resulting from comprehensive evaluations conducted consistent with section 38 and the best interests of the students in the school or district."[218] Collective bargaining can only be used in negotiations for seniority or length of service when the teachers involved have the same level of qualifications as specified in the statute.[219]

Another example begins with the Chicago teacher strike at the beginning of the 2012–2013 school year, which included seven days of missed classes, but ultimately ended in a compromise over the issue of

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[210] *Id.*

[211] Mass. Initaitive Petition, *An Act Prompting Excellence in Public Schools*, No. 11-20 (Aug. 3, 2011), *available at* http://www.mass.gov/ago/docs/government/2011-petitions/11-20.pdf.

[212] S.B. 2315, 187th Gen. Ct. (Mass. 2012), *available at* http://www.malegislature.gov/Bills/187/Senate/S02315/History.

[213] *Id.*

[214] *Id.* at 5.

[215] *Id.* at 3

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

the teacher evaluation system.[220] Teacher evaluations will be partly based on student test scores, but not to the degree originally proposed.[221] After the strike ended, Randi Weingarten, president of the American Federation of Teachers, stressed the need for public education reform to include teacher and parent input, in order to attain the common goal of improved education for students.[222] The Chicago teacher strike showed a negative consequence similar to those that litigation may bring to education. More significant attempts at compromise and greater inclusion of teachers and education experts before such an episode erupts may be able to decrease the probability that students will suddenly miss several days of school. Chicago teachers were only involved in compromise discussions after the strike, demonstrating that it may be preferable to bring teachers into the conversation earlier in the conflict.

The National Governors Association issued recommendations for how states can implement merit pay policies.[223] According to the recommendations, teacher evaluation systems should be fair and based partly on teacher input, but tests should not be the sole basis of teacher evaluations.[224] The recommendations especially stressed the importance of including teachers in the policymaking process.[225]

In addition to the concerns about increased litigation in response to new merit pay measures in the states, another concern is that pay, evaluations, and hiring decisions based on student test scores may not create incentives for teachers to improve their performance. The purpose of Florida's § 1012.34, which created a teacher evaluation system based on student test scores, is to "increas[e] student learning growth by improving the quality of instructional, administrative, and supervisory services in the public schools of the state."[226] But as discussed below, it is unclear whether having teacher evaluations based on student scores would actually improve quality of instruction.

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[220] John Byrne & Hal Dardick, *Emanuel Lauds End of Strike*, CHI. TRIBUNE, Sept. 19, 2012, http://articles.chicagotribune.com/2012-09-19/news/ct-met-teachers-strike-rahm-emanuel-0919-20120919_1_new-teacher-evaluation-system-laid-off-teachers-rate-teachers.

[221] *Id.*

[222] Lyndsey Layton, *After Chicago Success, Teachers Unions Spread Their Message*, WASH. POST, Sept. 21, 2012, www.washingtonpost.com/local/education/after-chicago-success-union-leaders-spread-their-message/2012/09/21/cad16290-0424-11e2-9b24-ff730c7f6312_story.html?hpid=z2.

[223] Jason Koebler, *Governors Association Examines Teacher Merit Pay*, U.S. NEWS, Jan. 9, 2012, www.usnews.com/education/blogs/high-school-notes/2012/01/09/governors-association-examines-teacher-merit-pay.

[224] *Id.*

[225] *Id.*

[226] FLA. STAT. § 1012.34(1)(a) (2012).

V. PUBLIC POLICY

A. Efficacy of Tying Teacher Evaluations or Pay to Student Scores

Various studies and policy articles have identified several problems with using student test scores to measure teacher performance, even with a value-added model. First, value-added models have measurement problems to work out, and until researchers do more work, this method of accountability should not be used on its own. Second, standardized tests emphasize low-level skills rather than critical thinking; relying on tests to evaluate teachers will not highlight those educators who teach critical thinking skills well. Third, teachers who have been scored based on their students' testing performance often receive fluctuating evaluation results from year to year, calling into question the tying of teacher performance to student standardized test scores. Finally, student achievement did not appear to increase after a teacher merit pay system was introduced in the New York area, and similar results appeared in a Vanderbilt study about merit pay, questioning the notion that high-stakes consequences for teachers based on student test scores will increase student achievement.[227]

Value-added models of test-based accountability programs still need further development; at this point, the information they provide is "error-prone and has a number of other important limitations."[228] The value-added model is sometimes used to represent a student's "total growth" over the school year rather than how much the teacher's efforts contributed to the student's growth over the year, a distinction that should make a difference when using student scores for teacher accountability.[229] Furthermore, the value-added model may not show student growth when a higher curriculum is used at a particular school. For example, in a seventh-grade math class where one class focuses mostly on algebraic concepts and another focuses on arithmetic, the state test may show more growth from the students focusing on arithmetic if the test does not focus on algebra.[230] Additionally, if student test scores will be used to make employment decisions about individual teachers, sampling error is a concern because of the small sample size of a teacher's limited number of students.[231] In addition, "[t]here has been very little research on the practical effects of using [value-added models.]"[232]

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[227] *Infra*, notes 240–43.
[228] Koretz, *supra* note 8, at 18.
[229] *Id.* at 19.
[230] *Id.* at 21.
[231] *Id.* at 26.
[232] *Id.* at 39.

Another problem with using student test scores as a way to measure teacher quality is that many standardized tests measure mostly low-level skills, instead of a student's critical analysis skills.[233] Basing teacher evaluations on student test scores may not recognize teachers who excel at teaching these higher-level analysis skills.[234] As such, even though some argue that teacher evaluation systems should be reformed, "there are also good reasons to be concerned about claims that measuring teachers' effectiveness largely by student test scores will lead to improved student achievement."[235]

There are several studies that question the ability of student test scores, even in a value-added model, to adequately measure teacher effectiveness.[236] In a study from the Economic Policy Institute, researchers cautioned against using student test scores as a large percentage of teacher evaluations, citing plans that give 50% evaluation weight to student test scores as too much.[237] The study also noted that "there is broad agreement among statisticians, psychometricians, and economists that student test scores alone are not sufficiently reliable and valid indicators of teacher effectiveness to be used in high-stakes personnel decisions."[238] Especially worrisome is the fluctuation among teachers' ratings from year to year; for example, in one study, one-third of teachers ranked in the top 20% of effectiveness in one year moved to the bottom 40% in effectiveness the following year.[239] Research organizations such as the Board on Testing and Assessment of the National Research Council of the National Academy of Sciences, the Educational Testing Service's Policy Information Center, and the RAND Corporation have cautioned that even value-added models of evaluation are unstable, imprecise, and should not be considered fair or reliable.[240]

In a study conducted by Vanderbilt University in Nashville public schools, offering teachers up to $15,000 in return for improved student test scores did not change academic performance in a discernible way.[241] The professor who led the study advocated developing "more thoughtful and comprehensive ways of thinking about compensation."[242] In a study conducted by Harvard economist Roland Fryer, it was found that New York City's merit pay system did not increase student achievement, and

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[233] Toch, *supra* note 2, at 35.

[234] *Id.*

[235] Baker, *supra* note 3, at 1.

[236] *Id.* at 2.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 2–3.

[241] Nick Anderson, *Teacher Bonuses Not Linked to Better Student Performance, Study Finds*, WASH. POST, Sept. 21, 2010, www.washingtonpost.com/wpdyn/content/article/2010/09/21/AR2010092103413.html.

[242] *Id.*

achievement seemed to decline at the middle school level.[243] The experiment in merit pay targeted high-need schools and gave teacher bonuses based on the schools' performance as measured by the city's progress report cards.[244]

For policy efficacy reasons, merit pay and value-added models should be more carefully examined before tying much federal education funding to these models. As this Note has shown, education experts (not only teachers unions) are calling for a closer look, if not a complete reversal, of these policies.

B. Work Environment for Teachers

Another potential negative consequence of relying on student test scores for teacher evaluations is that teaching to the test policies may lead the most effective teachers to seek employment in another field. A study found that testing in schools takes away from opportunities for teachers to be creative, and that was what most new elementary school teachers felt was a major drawback of teaching.[245] It was the third most popular reason for new secondary school teachers leaving, behind discipline or behavioral issues and lack of student motivation.[246] High-stakes testing tied to teacher evaluations might create another reason for education systems to focus on teaching to the test, and might negatively affect teacher autonomy and creativity, which could potentially drive away teachers who enjoy teaching higher-level analysis skills from the profession.

VI. RECOMMENDATIONS

Florida's experience in enacting a statute and regulation that require at least 50% of teacher evaluations to be based on student test scores can help inform other states thinking of implementing these policies. However, since at least a 50% reliance on student test scores is required to receive Race to the Top funds, a change in national policy may be required, since state policymakers may feel that they have no choice but to compete for Race to the Top funds. The Florida experience involved

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[243] Elizabeth Green, *Study: $75M Teacher Pay Initiative Did Not Improve Achievement*, GOTHAM SCHOOLS, Mar. 7, 2011, http://gothamschools.org/2011/03/07/study-75m-teacher-pay-initiative-did-not-improve-achievement/.

[244] *Id.*

[245] JONATHAN ROCHKIND ET AL., NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY AND PUB. AGENDA, LESSONS LEARNED: NEW TEACHERS TALK ABOUT THEIR JOBS, CHALLENGES, AND LONG-RANGE PLANS 13 (2007), *available at* http://www.publicagenda.org/files/pdf/lessons_learned_1.pdf.

[246] *Id.*

much conflict between the parties in public education and education policymaking. This conflict led to litigation invalidating the Rule necessary to implement the new law. Not only will the invalidated Rule likely necessitate new rulemaking, the administrative law judge who invalidated the Rule left many substantive legal questions unresolved. Because these questions remain unresolved, it is possible that a new rule will be invalidated based on some of these legal issues, and it is also possible that decisions will be appealed, creating uncertainty for months and years to come.

Florida's experience and difficulty with creating a new teacher evaluation system may counsel other states to approach policymaking by including teachers in the lawmaking process. Massachusetts is an example where teachers and policymakers who disagreed on policy came together in a compromise, allowing both sides to make a step toward improving the education system in a way that comported with their viewpoints. Such compromise may reduce the amount that states rely on student test scores in evaluating teachers.

While concerns about ongoing conflict and litigation were key to the problems that occurred in Florida, student test scores are likely not the best solution for formal teacher evaluations, even when using value-added models. Using student test scores may help principals and teachers improve their schools by providing information on student performance in certain subjects, but these scores only present one aspect of the educational process and only test certain skills. As discussed above, value-added models examined further before using them in a high-stakes way; determining which variables to include in the value-added model and taking time to examine sampling error and differences in curricula that may affect the model should take place before requiring the models for teacher evaluations. Many education researchers raised, and continue to raise, questions about placing too much value on testing in education and whether emphasizing testing motivates teachers to perform better at work. With such conflicting evidence and studies about the efficacy of using student test scores (even value-added models) to formally evaluate teachers, at the very least, more research should be conducted and considered before enacting these policies. In the education policy community, there simply has not been enough discussion about the strengths and weaknesses of value-added models to begin implementing them in teacher evaluations.[247]

The recommendations from this Note are twofold. Policymakers at the national and state levels should be involved, since much of the recent reliance on student test scores for teacher evaluation has occurred based on Race to the Top. First, policymakers should consider the research about the efficacy of value-added models, since many studies have found that they still have many problems to resolve before using them in a

[247] Koretz, *supra* note 8, at 18–19.

high-stakes way. Second, whether policymakers decide to use value-added models of student test scores or not, they should attempt to include teachers' groups in a meaningful way when creating new systems of teacher evaluation. Litigation and conflict have left Florida uncertain about what rules might be used to implement the evaluation system, and teacher opposition to a method for improving student performance negatively affects implementation of a new system. To reduce this conflict, a genuine inclusion of teacher views, coupled with further research on proposed evaluation systems, will be necessary to improve public education overall. As the case study in Florida has shown, a reliance on student test scores as the primary method of evaluating teachers is neither workable nor beneficial. Other options must be developed.

A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III

Casey L. Raymond*

ABSTRACT

Mass plaintiff filings under the Americans with Disabilities Act (ADA) have received frequent, and negative, press coverage over the past several years in California newspapers, The New York Times, *and even the radio show* This American Life. *Each press report has catalogued a rising number of lawyers and plaintiffs who file hundreds of ADA claims per year and profit from attorney's fees and additional state remedies. Little empirical research, however, has been done to identify whether this popular coverage reflects actual trends and, if true, what possible solutions are available to prevent abuse of the ADA and protect the law's reputation.*

This Note seeks to fill that void, using an original, nationwide data set of Title II and III ADA claims. The data set identifies the rapid increase of Title II and III filings and their concentration in California, New York, and Florida district courts. The data shows that a small set of private litigants files tens or even hundreds of claims per year in a concentrated number of judicial districts. Unfavorable judicial decisions and negative press reveal the threat to the ADA from this new trend.

Although the ADA is under-enforced, this Note concludes that the unchecked rise of private enforcement is neither the best deterrent

* Thank you to the editors of the *Texas Journal on Civil Liberties & Civil Rights* for their great work preparing this Note for publication. I especially want to thank the lead editor, Hannah Vahl, for her help and patience. Finally, thank you to Professor David Freeman Engstrom who guided me throughout the writing and publishing process.

to ADA violations nor helpful to ADA advocates. Rather, this Note recommends that the DOJ play a more active gatekeeper role in private suits through strategic enforcement in high litigation districts and harsh penalties on flagrant violators.

This Note ultimately sheds light on the unintended consequences of Congress shifting enforcement of the ADA—or any statutory regime—to the private sector and the potential benefits of introducing a rigorous administrative gatekeeper.

I. INTRODUCTION

In a 2010 episode of *This American Life*, Ira Glass focused on crybabies, specifically "very, very effective ones."[1] "Being outraged works. Playing the victim works, for that matter," Glass comments in his introduction. "And today on our radio show we see that not just in politics, but in sports, on Wall Street, on the streets of California."[2] In

[1] *This American Life*: *Crybabies*, WBEZ, (Sept. 24, 2010), http://www.thisamericanlife.org/radio-archives/episode/415/transcript.
[2] *Id.*

Acts 1 and 2, Glass highlights entitled classes—bankers and NBA players—that have increased their chances for financial or professional success through "mock outrage[,] . . . mock outrage that turns into real outrage [and] . . . real outrage that's bigger than maybe it should be."[3] In Act 3, Glass turns to his final crybaby, Tom Mundy, a disabled person and disability lawyer who files hundreds of lawsuits under the Americans with Disabilities Act (ADA) each year.[4]

The labeling of disabled persons and disability advocates who sue under the ADA as "crybabies" is startling. It is also increasingly common. Mass plaintiff filings under the ADA have received frequent negative press coverage over the past several years.[5] This negative press coverage has even translated into legislation, including California's recently passed law protecting small businesses from predatory ADA lawsuits.[6]

Little empirical research, however, has been done to identify whether the popular coverage of ADA lawsuits reflects actual trends and, if so, what solutions are available to create the optimal level of enforcement in a system currently reliant on private enforcers.

This Note begins to fill that void. Using an original, nationwide database of ADA Title II and III claims, Section II affirms the rapid rise in filings, reveals where the filings occur, and identifies which lawyers are bringing these claims. Section III argues that although the ADA is under-enforced, the filing trend does not effectively deter ADA Title II and III violations, and therefore threatens the reputation of the ADA within courtrooms and public opinion. Last, Section IV examines the role of the Department of Justice (DOJ) in enforcing the ADA, and proposes a more active gatekeeper function for the DOJ by utilizing both its existing powers and the increased intervener powers suggested by this Note.

In so doing, this Note sheds light on the unintended consequences of Congress shifting enforcement of the ADA—or any statutory regime—to the private sector, as well as the potential benefits of introducing a rigorous administrative gatekeeper to private enforcement

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[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, *Feinstein Wants to Stop "Drive-By" Lawsuits Against Businesses*, CAL. LAWYER, Apr. 30, 2012, http://www.callawyer.com/clstory.cfm?eid=919801; Andrea Koskey, *ADA Complaints in San Francisco Cause Legal Headaches for Businesses*, S.F. EXAMINER, May 20, 2012, http://www.sfexaminer.com/local/2012/05/ada-complaints-san-francisco-cause-legal-headaches-businesses; Tom McNichol, *Targeting ADA Violators*, CAL. LAWYER, Jan. 2012, http://www.callawyer.com/clstory.cfm?eid=919801; Nannette Miranda, *Lawmakers Try to Stop ADA 'Nuisance Lawsuits'*, ABC NEWS, May 8, 2012, http://abclocal.go.com/kfsn/story?section=news/state&id=8654115; Andrew Ross, *Legislation Would Curb Abusive ADA Lawsuits*, S.F. CHRON., May 31, 2012, http://www.sfgate.com/business/article/Legislation-would-curb-abusive-ADA-lawsuits-3596877.php; Mosi Secret, *Disabilities Act Prompts Flood of Suits Some Cite as Unfair*, N.Y. TIMES, Apr. 16, 2012, http://www.nytimes.com/2012/04/17/nyregion/lawyers-find-obstacles-to-the-disabled-then-find-plaintiffs.html.

[6] *Law Bans Predatory ADA Lawsuits Against Businesses*, SAN JOSE MERCURY NEWS, Sept. 19, 2012, http://www.mercurynews.com/news/ci_21586288/law-bans-predatory-ada-lawsuits-against-businesses.

regimes.

II. EMPIRICAL ANALYSIS OF PRIVATE FILINGS

Section II details the empirical findings for private filings under Title II and III of the ADA. The data reveals that not only have the number of Title II and III filings grown over the past five years, but also that the growth far outpaces that of other civil actions. The growth is concentrated within ten of the nation's ninety-four federal judicial districts. Sharp increases also occur from year to year in other "Hot Spot" districts throughout the country. Lawyers who are new to these districts often drive this growth.[7]

A. Background

Originally enacted in 1990 and amended in 2008, the ADA focuses on three major areas: employment discrimination (Title I), public services (Title II), and public accommodations (Title III).[8] Under the ADA, government institutions and businesses are required to make affirmative, reasonable accommodations in order to combat persistent discrimination against persons with disabilities.[9]

Until several years ago, Title I garnered most of the attention, both in terms of scholarly debate and empirical studies.[10] This attention

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[7] This Note deals with ADA claims filed in federal court, although these claims can also be filed in state court. Current scholarship on disability law in state court focuses on separate state disability regimes or states' varying interpretations of the ADA (especially before the 2008 federal amendments). *See, e.g.*, Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065 (2004) (discussing differences in state and federal disability law); Alex B. Long, *"If the Train Should Jump Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469 (2006) (highlighting differing state and federal court interpretations of the ADA). Although my assumption is that many ADA claims are removed to federal court, the impact of rising ADA claims on state courts merits further research.

[8] Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1809 (2005).

[9] Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), *amended by* Pub. L. No. 110-325, 2008 Stat. 3406 (2008) (codified in scattered sections of Title 42 of the United States Code).

[10] Waterstone, *supra* note 8, at 1809–10; Jaime A. Eagan, The Americans with Disabilities Act: An Empirical Look at U.S. District Court Litigation Involving Government Services and Public Accommodations Claims 7 n.30 (June 23, 2011) (unpublished manuscript) (on file with SSRN Elec. Library), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1870601). *See also* Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 172 (1999) (analyzing the effect of the Supreme Court's interpretation of "disability" in relation to employment under Title I of the ADA); Ruth Colker, *Winning and Losing Under the Americans With Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (finding low appellate victory rates for ADA cases); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA work?*, 59 ALA. L. REV. 305, 343–44 (2008) (using EEOC merit resolutions, settlement statistics, and reports to conclude that Title I of the ADA has been effective); Melanie Winegar, Note, *Big Talk, Broken Promises: How the Americans With Disabilities Act Failed Disabled Workers*, 34 HOFSTRA

resulted from Supreme Court decisions narrowing Title I throughout the 1990s and 2000s,[11] and Congress's rebuff of those decisions with the 2008 Amendments.[12]

In light of complaints over mass filings, a few scholars turned their attention to Titles II and III. Two studies stand out. In 2005, Michael Waterstone found that Title II and III cases have a higher success rate than Title I cases in trial and appellate proceedings.[13] Waterstone's conclusion thus disrupted the traditional narrative, based on Title I cases, that the ADA had been a disappointment because of low win rates.[14] However, his research methodology, which relied on Westlaw searches for appellate decisions, had its limits.[15] Westlaw searches did not capture all decisions—whether from searching error or unpublished decisions—and abstracting from appellate opinions to trial data risked distorting the sample.[16]

Jamie Eagan built on Waterstone's work with a more rigorous analysis of 100 random Title II and III cases from 2007.[17] Eagan used the Nature of Suit (NOS) Code[18] 446 to identify Title II and III ADA cases and compared the win-loss percentages of advocacy groups and plaintiffs that brought the claims. While the study showed that "over 70% of cases were filed with the assistance of a cause lawyer or advocacy organization," "it dispute[d] the notion that these organizations are bringing meritless claims."[19] Indeed, Eagan found that nearly all plaintiffs who file multiple ADA suits are successful, judging "by an inferred settlement measure of plaintiff success."[20]

This Note builds on Eagan's methodology, but takes a nationwide perspective. To gather a data set from across the country, I

L. REV. 1267, 1318 (arguing that judicial narrowing of Title I had made it ineffective).

[11] *See, e.g.*, Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187 (2002) (defining disability as substantially limiting a major life activity); Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999) (holding that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment").

[12] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.").

[13] Waterstone, *supra* note 8, at 1830 ("My parallel research shows that, at both the trial and appellate levels, the results under Titles II and III are less pro-defendant and more pro-plaintiff than under Title I, with the exception of pro-defendant Title III appellate outcomes.").

[14] *See id.* at 1809–10.

[15] *See id.* at 1826 n.101; *see also* Eagan, *supra* note 10, at 8 ("While certainly valuable, a study only of appellate decisions, and moreover only appellate decisions available on Westlaw, . . . is significantly limit[ed] in being used as representative of overall ADA litigation." (internal quotation marks omitted)).

[16] *See* Eagan, *supra* note 10, at 8. Waterstone himself acknowledges some of these limitations of his data: he notes that many cases are not appealed, and that circuit courts vary in their policies on whether they allow their unpublished opinions to appear on Westlaw. Waterstone, *supra* note 8, at 1827 n.104.

[17] Eagan, *supra* note 10, at 6.

[18] As Eagan explains, Nature of Suit codes classify the legal subject matter of every case: "This information is provided by plaintiff's counsel, who select a nature of suit code at the time of filing a lawsuit with the district court." *Id.* at 4 n.21.

[19] *Id.* at 35.

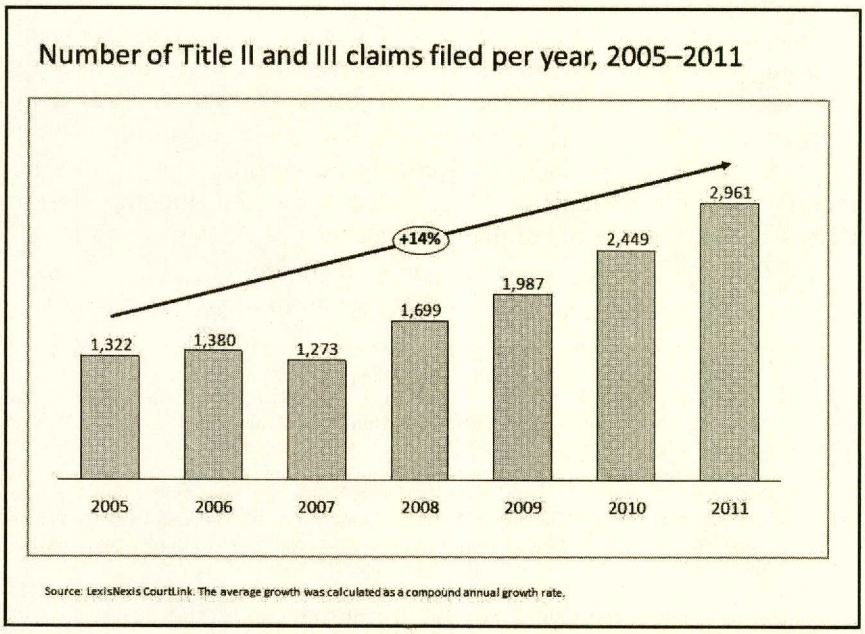
[20] *Id.*

ran a search of all federal district courts for non-employment ADA cases from 2005 to 2011 on LexisNexis Courtlink. Like Eagan, I used NOS Code 446 as the basis of the search.[21] Given the concentration of these suits, as discussed below, this nationwide data set provides a basis for policymakers to evaluate their options and create targeted solutions where attention is most needed.

B. Findings

1. The Rapid Growth of ADA Claims

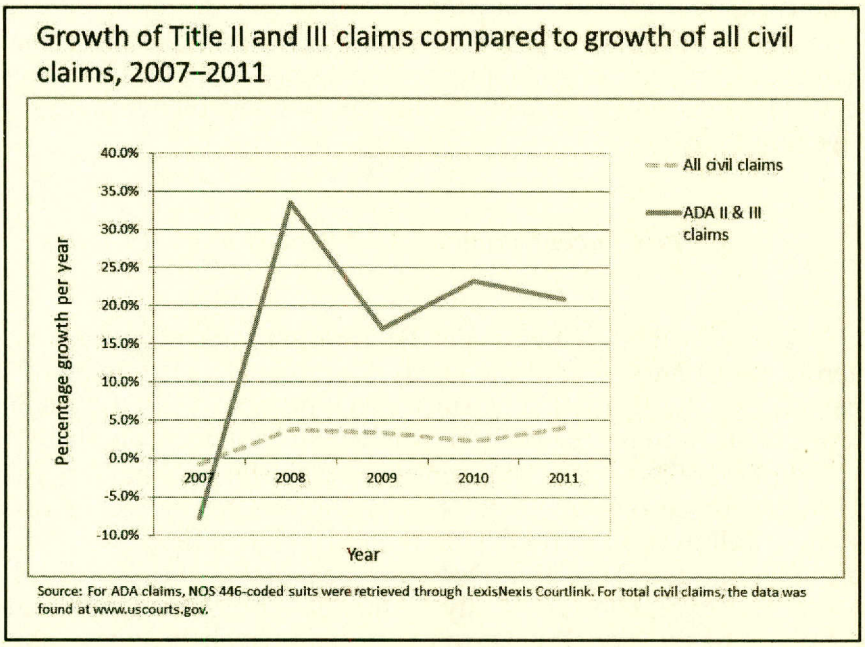
Figure 1: The number of Title II and III claims filed has grown by an average of 14% per year.[22]



[21] The data is roughly comparable to the PACER data that Eagan used in her study. For one basis of comparison: while Eagan's 2007 data set contained 1,249 cases, the CourtLink set had 1,273. *See id.* at 4.

[22] The CourtLink data in this figure and subsequent figures came from CourtLink searches performed in June 2012.

Figure 2: The growth of Title II and III claims has far outpaced the growth of all civil claims.[23]



Since 2005, Title II and III claims have increased at a combined annual growth rate of 14% per year. Figure 1 lays out the overall rise in claims from slightly over 1,322 claims in 2005 to 2,961 in 2011. Each bar represents the annual number of these claims filed in all federal district courts around the country. The growth from 2007 onward is striking.[24] The increase from 1,273 claims in 2007 to 1,699 in 2008 represents a 33% increase. From 2008 to 2009, claims grew another 17%. The following year, from 2009 to 2010, saw a 23% increase. From 2010 to 2011, the increase was 21%.

This rapid growth of Title II and III filings comes against a backdrop of slower growth for all civil suits in federal district courts. Figure 2 points out the contrast. Although many authors have focused on a "litigation explosion" in the past decade,[25]

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[23] For Figure 2, the rate of change in each year is the percent change between that year and the past year. For example, 2007 is the percent growth from 2006 to 2007. The graph does not start at 2005 or 2006 because the data available from uscourts.gov for general civil claims only had yearly data starting in 2006.

[24] One possible reason for the reason for the increase from 2007 to 2008 could be the debate over the amendments to the ADA, which brought the law into the spotlight.

[25] *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984, 986 (2003) (lamenting the outcry over the "loudly trumpeted (but as yet

claims in federal district courts have been remarkably steady over the past several years at approximately 3–4% growth.[26] From 2007 to 2008, for example, the rate of growth of civil claims hovered at 4% growth. During the same period, by contrast, Title II and III claims expanded rapidly, showing over 30% growth.

The data from Figures 1 and 2 confirms the anecdotal evidence from the popular press. Non-employment ADA claims have far outpaced the growth of other civil suits, growing at around five times the rate.

2. The Concentration of ADA Title II and III Claims

The growth in Title II and III filings is not evenly spread across the country. Out of the ninety-four districts where plaintiffs have filed Title II or III suits since 2005, the Top Ten Districts in terms of such filings regularly constitute a disproportionate share.

In Figure 3, I traced the number of cases filed in the Top Ten Districts (based on 2009 data[27]) from 2005 to 2011. As Figure 3 shows, well over 50% of all Title II and III claims filed every year are filed in the Top Ten Districts—peaking at 71% in 2011. Moreover, except for 2009, my methodology may underestimate the share of the Top Ten Districts. Because I relied on the 2009 data to identify the Top Ten Districts, each year's actual Top Ten Districts may have differed slightly from those in 2009, which would result in the actual Top Ten Districts constituting an even larger share of the overall filings in those years.

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unproven) 'litigation explosion'" and noting that it is "unprecedented in its decibel level and sense of urgency").

[26] To calculate all civil claims, I relied on uscourts.gov data, which is collected by the administrative arm of the federal judiciary. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2010 tbl.4.1 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2010.aspx (collecting data from 2007 to 2010); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 16 tbl.3 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (collecting data from 2011). The 2007 to 2010 and 2011 data for all civil claims is based on slightly different timescales. The yearly data from 2007 to 2010 is based on twelve-month periods ending on June 30th, while the 2011 data begins and ends on September 30. Unlike the total civil claims data, the Title II and III data from CourtLink is based on a calendar year.

[27] To measure this phenomenon, I used 2009 data as the baseline. I chose 2009 to be consistent throughout the Note. The data analysis relies on a comparison of 2009 and 2010 for both civil suits and DOJ filings, with 2009 serving as a baseline. I did not compare 2010 and 2011 because of the danger that not all data from 2011 is currently in CourtLink and because the ADA Status Reports from the DOJ do not yet include all of 2011.

Figure 3: ADA Title II and III filings are concentrated in certain federal judicial districts.

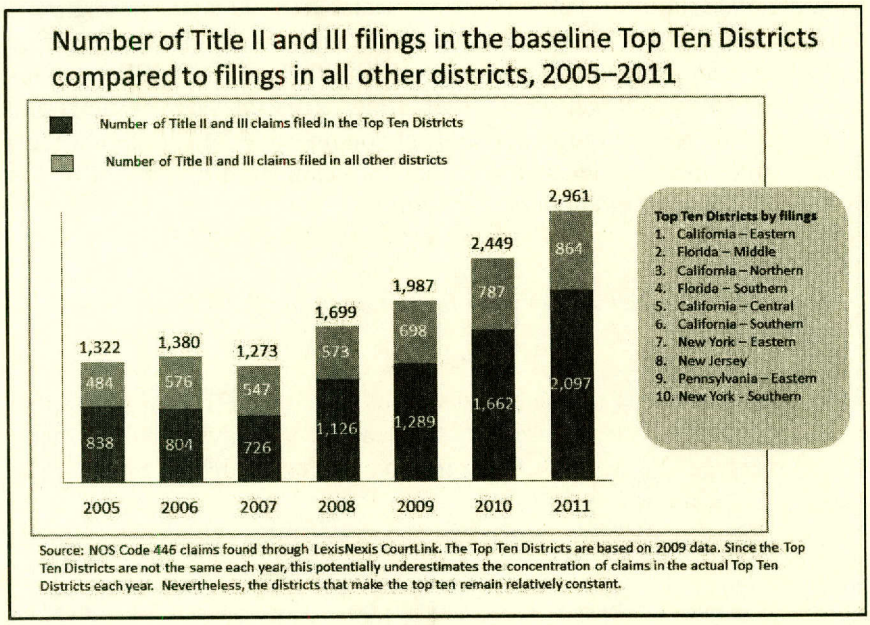
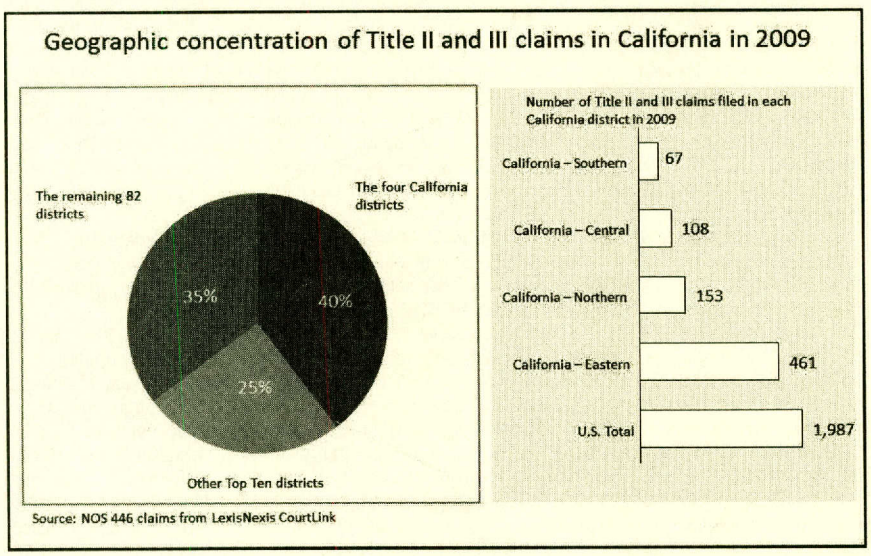


Figure 4: California had the highest number of Title II and III claims filed in 2009.



This level of concentration reveals two insights about Title II and III suits. First, certain districts and district courts feel the effects of increased litigation more than other parts of the country. California, for example, had four of the top six districts in 2009 and, as Figure 4 illustrates, California claims totaled 40% of nationwide claims, dwarfing any other state. Second, the concentration suggests that policymakers have clear areas to target when combatting excessive ADA Title II and III filings.[28] A federal enforcer could rely on micro-level deterrent effects in particular areas, rather than on a national campaign that might be too dispersed to change employers' behavior.

3. The Repeat Lawyers Responsible for the Trend

The main focus of the news articles has not been the geographic location where the claims are filed, but rather, the lawyers filing them. The January 2012 cover of *California Lawyer* featured Tom Frankovich,

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[28] One unanswered question for policymakers is the cause of this concentration. Although not the subject of this paper, several factors could be at work.

First, the districts with the most filings might have generous state remedies under Title III (as the federal remedy only provides attorney's fees and injunctive relief). For example, California provides treble damages per occurrence of discrimination, meaning that a disabled person can receive $4,000 for each time he/she is denied access. Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2012); McNichol, *supra* note 5, at 2. Ruth Colker, however, identified twenty-one states that had some compensatory damages as of 2000, not all of which had a high number of claims; Alaska was one such example. Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 407 (2000).

Second, the number or percentage of people with a disability could drive the filings. The data here cuts in opposite directions. Based on the 2010 American Community Survey, California, New York, and Florida were the states with the first, third, and fourth largest populations of persons with a disability (with Texas second). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES tbl. DP02. On the other hand, in term of the states where the highest percentage of the total population is disabled, Florida ranks twenty-first; New York is forty-second; and California is fiftieth out of the fifty states, Puerto Rico, and Washington D.C. *Id.* This data also has limitations as a way of explaining concentration of claims in certain judicial district. The American Community Survey measures population statewide rather than by judicial district.

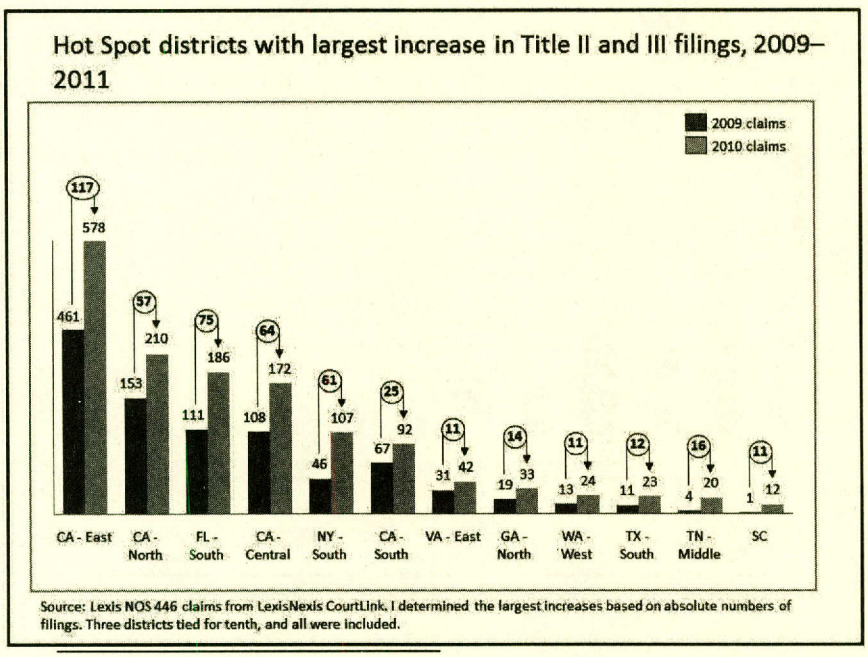
Third, the district or state could have a more litigious culture or more available lawyers—although lawyers do not necessarily litigate in only one state. As shown below in Figure 6, for example, Stephan Nitz is the Top Lawyer in terms of Title II and III filings in both the Middle District of Tennessee and the Western District of Washington

Last, some of these districts could just have a higher population than others. The Central District of California, for example, serves around 18.5 million people, over half the population of California. Press Release, U.S. Dist. Court for the C.D. of Cal., Magistrate Judge Suzanne H. Segal Appointed Chief Magistrate Judge (2011), http://www.cacd.uscourts.gov/news/magistrate-judge-suzanne-h-segal-appointed-chief-magistrate-judge. As Figure 5 shows below, however, the Central District of California, still had fewer claims than the Eastern District of California in 2009—108 to 461, respectively—a fact which suggests that population itself is not determinative. To test this variable, future research would have to construct a table of population by judicial district. From my research, the last comprehensive study to do so was a 1998 Government Accountability Office report that used population levels from 1990. GOV'T ACCOUNTABILITY OFFICE, FEDERAL JUDICIARY: INFORMATION ON THE POPULATION AND CASE FILINGS PER JUDGESHIP FOR US DISTRICT COURTS (1998), *available at* http://www.gao.gov/ assets/90/87379.pdf.

a repeat ADA plaintiff attorney, pointing a crutch like a gun.[29] *The New York Times* focused on Ben-Zion Bradley Weitz, a Florida based attorney, who used repeat plaintiffs to file as many as nine suits per day against businesses in Manhattan.[30] This subsection addresses whether these repeat lawyers drive the increased number of filings.

To answer this question, I identified the fastest growing districts ("Hot Spots") based on the increase in claims filed between 2009 and 2010, as seen in Figure 5. Using the Hot Spots to determine whether repeat lawyers are driving this increase provides several advantages. First, it gives a broader geographic diversity than the Top Ten Districts by absolute number of filings—while California, New York, and Florida still lead the way, the sample also includes Tennessee, Texas, and Washington. Second, it provides a better answer to the question: a random sample, like that used in Eagan's study, gives a snapshot of the types of lawyers bringing most suits,[31] but it cannot reveal whether lawyers are increasing their filings from year to year.

Figure 5: The districts with the biggest absolute jumps in Title II and III filings included traditional centers of ADA litigation, such as California, as well as less traditional centers, such as Tennessee and South Carolina.



[29] McNichol, *supra* note 5.

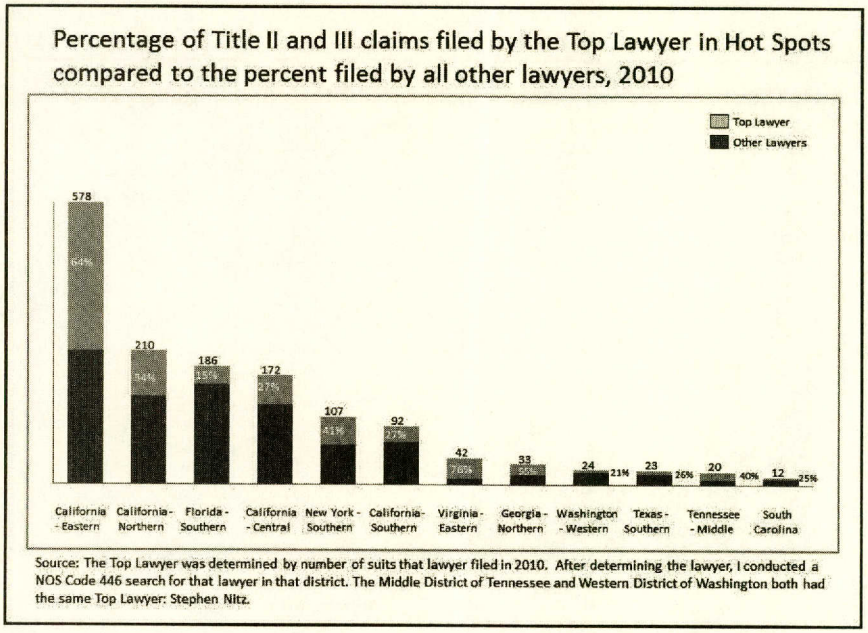
[30] Secret, *supra* note 5.

[31] *See* Eagan, *supra* note 10, at 3–4 (finding that "the majority of suits were filed with the assistance of advocacy organizations or attorneys specializing in disability suits"). Admittedly, my methodology potentially overlooks districts with a high turnover in lawyers and a steady number of suits.

The results in Figure 5 suggest a split of Hot Spot districts into three loose categories. The first category—with more established patterns of ADA filings—includes the first six Hot Spot districts in California, Florida, and New York. Traditionally, these districts have been hubs for the plaintiffs' bar,[32] and Figure 5 suggests they continue to grow. The second category—including Virginia, Georgia, Washington, and Texas—represents the potential rising areas in ADA litigation. All had Title II and III filings in 2009 and almost doubled the number of filings in 2010. The last category—including Tennessee and South Carolina—represents areas with only a few filings in 2009, but where those numbers more than doubled in 2010.

I next investigated the reason for the findings in Figure 5. My initial hypothesis was that repeat lawyers more likely drove the results in the second and third categories because of less competition in these districts. I also assumed that an individual repeat lawyer could not play as significant a role in the first category of Hot Spots because of the sheer number of cases a lawyer would have to file to affect results.

Figure 6: The same lawyers litigate in a large percentage of these Title II and III filings.



[32] *See, e.g.*, THE AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 3, 4 (2011), *available at* http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12 _04.pdf (naming California and New York City to their list—and putting South Florida on their watch list—of the most plaintiff-friendly jurisdictions).

Figure 6 disproves these hypotheses. In eleven out of the twelve Hot Spot districts, the Top Lawyer who filed the most Title II and III claims in 2010 accounted for over 20% of all filings; in six districts, the Top Lawyer accounted for over 40% of all filings; and in four districts, the Top Lawyer accounted for over half of all filings. The Eastern District of California, a district in the first category, actually had the highest producing lawyer—Scott Johnson—who filed 368 Title II and III claims in 2010 alone.[33] To put that number in perspective, lawyers filed 2,449 Title II and III suits total in 2010, making Johnson responsible for 15% of all Title II and III filings in the entire country. In the Eastern District of Virginia, Joel Zuckerman filed thirty-two out of the forty-two cases, or 76%, and in the Middle District of Tennessee, Stephen Nitz filed twelve of the twenty total cases, or 60%.

One interesting place for further research could be South Florida, where the Top Lawyer only filed 15% of the suits. While some of the lawyers, such as Stephen Nitz (the Top Lawyer in the Middle District of Tennessee and the Western District of Washington) and Ben-Zion Bradley Weitz are based in South Florida,[34] they choose to file suits in other districts. As discussed below, this could be a result of judicial hostility in Florida districts.[35]

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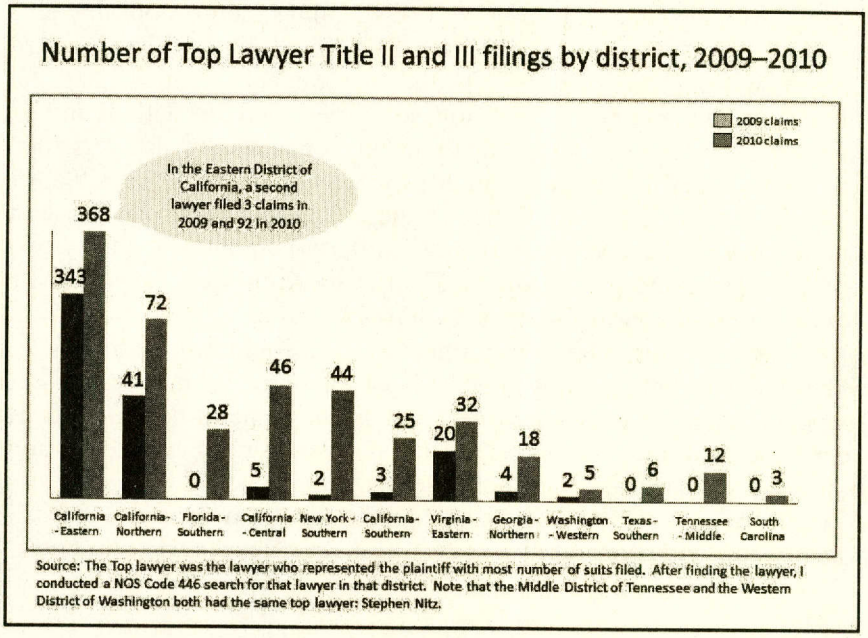
[33] Scott Johnson is himself disabled and "routinely drives around town in his hand-controlled van, filing complaints on his own behalf when he encounters access issues." In one fifteen day period in 2010, he filed 51 complaints. McNichol, *supra* note 5.

[34] *See Stephen M. Nitz*, SCHWARTZ ZWEBEN LLP, http://www.personalinjuryattorneynow.com /lawyers/ stephen-nitz.html (describing Nitz); *B. Bradley Weitz, Esq.*, EBERT & ASSOCS., http://www.ejlaw.net/attorneystaffprofiles/bbradleyweitz.html (describing Weitz).

[35] *See infra* Part III.B.2.

Figure 7: Many of the Top Lawyers could be new to the game (or, at least, new to the district).



The more surprising aspect might be that many of these lawyers could be new to the district in which they are filing. Figure 7 details the number of Title II and III suits the Top Lawyer filed in 2009 and 2010. In all but the Eastern and Northern Districts of California and the Eastern District of Virginia, the Top Lawyer at least doubled his or her output from 2009 to 2010. In the Southern District of Florida, the Southern District of Texas, the Middle District of Tennessee, and the District of South Carolina, the Top Lawyer had not filed any Title II or III claims in the previous year. Even in the Eastern District of California, where Scott Johnson filed over 300 cases in 2009 and 2010, a new lawyer to the scene filed three cases in 2009 and 92 in 2010—thirty times the previous year's filings. In other words, the Top Lawyers in 2010 could be new to the game or their districts because their footprint increased exponentially from 2009 to 2010.[36]

Another surprising finding is that a single lawyer, Stephen Nitz, was responsible for the increase in cases in both the Western District of Washington and the Middle District of Tennessee. His client base also extends to Texas and Oklahoma.[37] Nitz's work, as well as that of the

[36] Admittedly, the Top Lawyer might have filed numerous cases in 2008, fewer in 2009, and then expanded again rapidly in 2010. More research would need to be done on each individual lawyer to understand his or her filing patterns. Given the rapid rise in ADA claims, however, this seems unlikely to have been the pattern.

[37] Brett Shipp, *Questions raised about lawsuits filed by local handicapped activist*, WFAA, Apr. 28, 2011, http://www.wfaa.com/news/local/Handicapped-activist-accused-of-going-too-far-120905159.html.

above-mentioned Weitz, signals a nationalization of Title II and III claims. While the ADA has a limited incentive structure of attorney's fees and injunctive relief[38] which might have been designed to keep work local (due, in part, to costs of finding clients and trying cases thousands of miles away), the same sophisticated lawyers are now taking clients from the East and West Coasts.

C. Conclusions from the Data: the ADA Litigation Boom

The press accounts are accurate. Compared to the slow growth of all civil claims, Title II and III filings more than doubled in the last six years. It is truly a litigation boom. And this boom is not evenly spread. Over two-thirds of all filings occurred in the Top Ten Districts. Rising Hot Spots also reveal a growing geographic spread of these suits, as well as the nationalization of the plaintiffs' bar. The data suggests that new lawyers moved into the space given its profitability.[39]

The results imply that targeted deterrence could be effective. Although the plaintiffs' bar for ADA suits is nationalizing, most suits are concentrated in the same districts and are brought by the same lawyers. In other words, there are identifiable repeat players in identifiable repeat districts that could be the focus of an effort to curb this type of litigation. Before looking to solutions, however, I will consider whether these private litigants should be curbed at all.

III. EVALUATING THE STATUS QUO

This Section analyzes whether the status quo with Title II and III suits represents a successful example of private attorneys general enforcing the law or ineffective deterrence sparked by reliance on private enforcers. This Section first addresses how the structure of the ADA requires private enforcement and then examines the compelling argument that increased suits are a positive trend. However, this Section ultimately concludes that the suboptimal deterrence resulting from the rise in private litigation, combined with backlash from the judiciary and the public, outweighs any positive effects.

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[38] *Infra* Part III.A.

[39] The inference is that plaintiff lawyers would only come into the space if they believed the space was profitable. *See infra* note 59. This potential influx of new lawyers into the space is notable because it could exacerbate the already rapid growth of Title II and III claims.

A. The Need for Private Enforcement

The expansive coverage of the ADA, combined with a weak public enforcement mechanism, epitomizes the structure of many U.S. civil rights laws. As Robert Kagan explains in *Adversarial Legalism*:

> [The American legal system] . . . can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* . . . that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.[40]

The ADA tracks Kagan's logic. With the ADA, Congress established a new civil rights policy for the disabled that not only rejected discrimination but also demanded affirmative accommodation by private business. Both in funding and enforcement, the ADA looks to private businesses to pay and private litigants to enforce.

Under this system of limited government enforcement, the ADA could not be effective without private litigants. Reaching almost every business or government service, "the ADA regulates more than 600,000 businesses, 5 million places of public accommodation, and 80,000 units of state and local government."[41] The pace of government litigation cannot keep up with this broad reach.[42] For Title II and III of the ADA in particular, the DOJ plays the major gatekeeping role.[43] For example, the DOJ brought forty-five cases or formal settlements under Titles II and III in 2009 and sixty-five in 2010.[44] This is not like the DOJ's gatekeeper role enforcing in the False Claims Act, where the government has the capacity to make a determination on each suit.[45]

This need for private enforcement, however, has been coupled with surprisingly weak damage remedies for private litigants. Under Title II, a

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[40] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 15 (2003).

[41] Eagan, *supra* note 10, at 1 (quoting Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Laws on the Book to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 499–500 (2006)).

[42] *See* Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 9–10 (2006) (noting that government enforcement resources are limited and the DOJ disability rights enforcement unit is understaffed).

[43] Unlike Title I of the ADA, the Equal Employment Opportunity Commission does not play a major role in enforcing Titles II and III because many of the Title II cases and all of the Title III cases are not employment discrimination claims.

[44] *See infra* Part IV.A for methodology.

[45] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 NW. U. L. REV. (forthcoming 2013) (manuscript at 4) (explaining the process and options for DOJ to intervene, take control, or dismiss *qui tam* suits brought by private plaintiffs under the False Claims Act).

private litigant generally can sue for compensatory damages.[46] To receive compensatory damages, however, circuit courts have required that the plaintiff prove discriminatory intent.[47] Moreover, if the suit for compensatory damages is against a state actor, the state may be able to assert Eleventh Amendment immunity unless the Title II violation burdens some fundamental right such as access to courts or voting.[48]

Under Title III, private litigants cannot sue for compensatory damages[49] and can only receive injunctive relief and attorney's fees.[50] Even the attorney's fees awards for these claims have been restricted. At one point, nearly all circuit courts embraced the "catalyst fee" theory, under which a plaintiff would be entitled to an award of attorney's fees even if no judgment or consent decree resulted from the suit, so long as the suit prompted the defendant correct an ADA violation.[51] The Supreme Court, however, has since rejected the theory, holding that plaintiffs causing defendants to change their behavior but not obtaining a favorable judgment or consent decree do not qualify as a prevailing party entitled to be awarded attorney's fees.[52]

The restrictions on a plaintiff's ability to recover money for both Title II and III claims have led to three effects. First, plaintiffs may seek to sue in states such as California with additional state remedies.[53] Second, as seen in Figure 6, a specialized group of ADA plaintiff lawyers has developed that can file enough suits such that attorney's fees and low additional remedies can be profitable. Finally, private litigants have no incentive to give pre-suit notice.[54] Post-*Buckhannon*, in order to

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[46] Waterstone, *supra* note 8, at 1861. The ADA incorporates by reference the same remedies as those available under Section 505 of the Rehabilitation Act. 42 U.S.C. § 12133 (2006). Section 505, in turn, incorporates by reference the same remedies as are available under Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a(a)(1) (2006). Most courts interpreting Title VI have held that it allows plaintiffs to recover compensatory damages for violations, and hence also allows compensatory damages under Title II of the ADA. Waterstone, *supra* note 8, at 1861 n.299.

[47] Matthew D. Taggart, Comment, *Title II of the Americans with Disabilities Act After Garrett: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 CALIF. L. REV. 827, 865 n.216 (2003) (collecting cases in which courts have held that intention discrimination is required for collecting compensatory damages under Title II).

[48] *See* Tennessee v. Lane, 541 U.S. 509, 533 (2004) (holding that Congress validly abrogated the Eleventh Amendment to allow suits for money damages under Title II where the violation implicated the fundamental right of access to courts).

[49] The statute only authorizes damages and civil penalties for lawsuits brought by the U.S. Attorney General. 42 U.S.C. §§ 12188(b)(2)(B)–(C) (2006); *see also* James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 REV. LITIG. 435, 441 (2000) (noting that damages are unavailable in a private suit brought under Title III).

[50] 42 U.S.C. § 12188 (2006).

[51] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001) (collecting circuit court cases recognizing the "catalyst fee" theory).

[52] *Id.* at 610 (holding that the catalyst theory is an impermissible basis for awarding attorney's fees)

[53] *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 195–96 (2005). Colker lists twenty-one states with their own laws prohibiting disability discrimination in places of public accommodation that provide some form of compensatory relief; California has the strongest relief provisions, she notes. *Id.*

[54] Bagenstos, *supra* note 42, at 14. This phenomenon has also occurred in other fields. *See, e.g.*, Nora Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (examining the effect of high-volume personal injury firms on auto-accident insurance).

collect the attorney's fees or injunctive relief, private litigants have incentives to settle quickly or sue widely without warning.[55]

On its face, this is not necessarily a bad outcome given how many businesses remain noncompliant with the ADA, especially Title III. The ADA passed in 1990, and businesses have had over twenty years to comply. Yet, many have not done so voluntarily.[56] Several reasons could be at work for this lack of proactivity. As Samuel Bagenstos notes, one reason could be owners' rational or irrational concerns about cost.[57] Although accessibility increases the pool of potential customers, owners may either be unaware of the number of additional customers they could serve or may overestimate the costs of reasonable accommodations.[58] The decision also might not be economically rational for a particular store as "[t]he costs of making a business accessible, while small, might not be matched by increased patronage from individuals with disabilities."[59] Finally, in addition to cost concerns, knowing and complying with all ADA regulations can be difficult. The federal compliance manual for new minimum design standards for buildings runs over two hundred pages, and this guidance does not include any overlapping or additional state rules.[60]

B. The Problem with the Current System

The problem with the current system is that the reliance on private plaintiffs does not provide the proper level of enforcement. This Section first rebuts the assumption that widespread small settlements or suits best deter businesses from violating the ADA. Second, it explores the negative consequences of mass filings both in judicial treatment of Title II and III cases and reputational harm to the ADA.

1. Mass Filings as Ineffective Deterrence

Profit-motivated private enforcers will continue to litigate if they can make money. As David Engstrom states, "[p]rofit-driven enforcers will act whenever it pays to do so, even where the *social* cost of enforcement—e.g., the transaction costs incurred, including judicial resources consumed, or the economic and social costs imposed on

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[55] Bagenstos, *supra* note 42, at 14.
[56] *Id.* at 7–8.
[57] *Id.*
[58] *Id.* at 7.
[59] *Id.* at 8.
[60] *See generally* U.S. DEP'T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010), *available at* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf.

affected communities—exceeds any benefit."[61] *In terrorem* lawsuits—which result in the defendant settling to avoid litigation costs even absent violations of the law—compound the waste of social resources. Although Title II and III claims are likely more meritorious than those in other areas,[62] at least two members of Congress have argued that private litigants settle cases with terms that do not require the defendants to be compliant with the ADA.[63]

The current model of ADA enforcement leads to similarly ineffective results. Unlike in the criminal law context, where the probability of sanctions being imposed must arguably be high in order to deter criminal behavior,[64] optimal deterrence in most civil actions "can be achieved by allowing sanctions to be imposed only with a low probability; and sanctions can be raised to avoid dilution of deterrence from the low probability of sanctions."[65] In other words, big penalties on a few violators can save time and money by promoting the same deterrence effect and avoiding litigation.

Title II and III lawsuits work in the opposite way. In order to compensate for a marginal return on each filing, private attorneys might rationally choose to file many suits per year.[66] Accordingly, rather than imposing a large penalty on a single business to serve as a warning to nearby businesses, ADA lawsuits can impose minimal penalties on a large number of defendants.[67] This could lead businesses to rationally calculate that the cost of accessibility is not worth the benefit of avoiding a lawsuit.

Additionally, the prevalence of relatively small settlements dilutes the deterrent effect of Title II and III lawsuits. When business owners believe they will be sued regardless of increased accessibility, little incentive exists to try to accommodate the disabled. *In terrorem* lawsuits create social costs without social benefit, since it less costly for those defendants to settle despite their ADA compliance.

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[61] David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 COLUM. L. REV. 1244, 1254 (2012).

[62] *See* Eagan, *supra* note 10, at 35 ("showing that only 10% of [Title II and Title III] cases are dismissed on the merits or result in a judgment for the defendant, while 78% result in a settlement or voluntary dismissal.").

[63] Bagenstos, *supra* note 42, at 33. As Bagenstos notes, neither congressman "offered specific examples of instances in which plaintiffs' lawyers had entered into settlements that paid attorneys' fees without achieving access to the defendants' businesses." *Id.*

[64] *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1232 (1985) (positing that if the probability of apprehension is too low, it will not be possible to deter criminal behavior even if the sanctions are high).

[65] Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1327 (2008) (quoting STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 484 (2004)).

[66] *See* Bagenstos, *supra* note 42, at 13–14 ("Attorneys who handle serial ADA litigation are thus likely to be among the few lawyers for whom public accommodations cases are cheap enough and lucrative enough to be economically worthwhile.").

[67] John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 231 (1983) (noting that the private attorney general system incentivizes inadequate settlements and the bringing of a high number of cases to spread risk).

Beyond settlements from *in terrorem* lawsuits, ordinary settlements through negotiation can also decrease the deterrent effect by allowing businesses to get off fairly cheaply even if a meritorious suit is brought against them. *This American Life* documents one lawyer who brought over 500 claims in three years, but in "[m]ost cases settle[d] out of court for a thousand [dollars] or two."[68] Another example is South Florida attorney John Mallah, who filed 740 lawsuits in less than four years, and who settled most cases out of court for $3,000 to $5,000 in fees, along with agreements to become ADA-compliant.[69] While settlements may decrease the cost of litigation in one particular case, the result—where businesses opt to wait and settle rather than proactively meet ADA standards—risks undermining the ADA's overall purpose to improve access for the disabled.

2. Judicial Backlash

Optimal deterrence is not the only casualty of the current system. Under this regime, judges are more likely to rule against individual litigants in particular cases and create unfavorable rules for all Title II and III litigants. Margaret Lemos examined judges' negative reactions to mechanisms which encourage enforcement, including shifting of attorney's fees.[70] Since such enhancements encourage lawsuits, judges often find—or at least believe they find—their dockets inundated with the same types of cases.[71] This increased load, or perception thereof, puts pressure on federal judges who work to push cases through their expanding docket at a reasonable pace. "[J]udges are prone to react with hostility to any marked increases in the number of claims filed under a given statute," Lemos continued, "especially if they were not favorably inclined toward those claims in the first place."[72] Judicial hostility can take the form of pressuring parties to settle cases, aggressively granting summary judgment,[73] or even questioning plaintiffs' motives.

There is already anecdotal evidence of backlash from Title II and Title III suits. In 2004, Judge Gregory A. Presnell of the Middle District of Florida—number two in the list of Top Ten Districts for Title II and III litigation[74]—criticized the mass filings by a "currently unemployed" quadriplegic who was represented in each suit by the same lawyer.[75]

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[68] *This American Life*, *supra* note 1.

[69] Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 98 (2006).

[70] Margaret Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011).

[71] *Id.* at 826. Although Lemos's article casts some doubt on whether fee-shifts actually do increase litigation, judges "may believe that they do" in part because of the satellite litigation over attorney's fees caused by fee-shifts. *Id.*

[72] *Id.* at 785.

[73] *Id.* at 827.

[74] *Supra* Figure 3.

[75] Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1279 (M.D. Fla. 2004).

Declaring that a "[c]ottage [i]ndustry [was] [b]orn" from the ADA, Judge Presnell identified the lawsuit as a "case in point" of a system where the plaintiff is "merely a professional pawn in an ongoing scheme to bilk attorney's fees from the [d]efendant."[76]

Likewise, California has seen judges become skeptical of repeat players. In the Central District of California, a senior district judge castigated a plaintiff and his lawyer for repeated filings. In this case, the plaintiff claimed that, in a single day, he had been injured at three different establishments while transferring from his wheelchair to the toilet in non-ADA compliant bathrooms.[77] The judge required the plaintiff to obtain court permission before filing another Title III complaint, declaring him a "vexatious litigant."[78] Although the judge recognized that "[i]t is possible, even likely, that many of the businesses sued were not in full compliance with the ADA," he found the suits were still vexatious because of the plaintiff's improper purpose of extorting money.[79]

Whatever the merits of these particular claims, the judges' language in both cases is expansive. Both see multiple claims under the ADA as evidence of vexatious litigation and suggest that even claims with merit can be undermined by the filing history of the plaintiff. The declaration that the ADA has spawned a "cottage industry" and that the claims represented a "sham" suggests that judges are already thinking about using legal rules such as the "improper purpose" prohibition[80] to cut back Title II and III lawsuits. Although some judges have fought against this backlash,[81] the trend will likely only grow more pronounced as the suits continue to receive negative treatment in the press.

3. Reputational Harm to the ADA

Starting in 2000, press stories began about the mass Title II and III filings. That year, a plaintiff sued Clint Eastwood because his ranch in

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[76] *Id.* at 1280–81, 1285.

[77] Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 864–65 (C.D. Cal. 2004), *aff'd in part, dismissed in part sub nom.* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007). For a more detailed account, *see* Becker, *supra* note 69, at 101–05.

[78] *Id.* at 867–68.

[79] *Id.* at 865.

[80] *See* FED. R. CIV. P. 11 (mandating that by presenting a pleading, motion or other paper to a court, an attorney is certifying that, to the best of his knowledge, it is not brought with an improper purpose and authorizing sanctions for its violation). The defendant in *Molski v. Mandarin Touch Restaurant* sought sanctions against Molski under Rule 11, but the court denied the motion—even though the court declared that Molski had brought suits for the improper purpose of extorting settlements. *Molski*, 347 F. Supp. 2d at 865, 868.

[81] *See, e.g.*, Doran v. Vicorp Rest., Inc., 407 F. Supp. 2d 1115, 1119 (C.D. Cal. 2005) ("Nor can it be said that because an attorney has chosen to specialize in an area which provides statutory attorney[']s fees his practice is necessarily suspect."). In *Doran*, the court denied the defendant's motion to have the plaintiff declared a vexatious litigant, distinguishing *Mandarin Touch*. *Id.* at 1116, 1119.

California did not contain a ramp to the registration office, provide a second accessible guest room, or have proper signage for handicap-accessible bathrooms.[82] Eastwood transformed the suit into a public battle against "abusive lawsuits," fighting the claim in court, appearing on national TV shows, and testifying before Congress about the potential for abuse.[83]

National press has recently refocused on this phenomenon because of the sharp increase in suits. *This American Life*'s "Crybabies" episode followed Tom Mundy, a plaintiff in over 500 cases in three years who used the lawsuits as his sole means of support.[84] The reporter interviewed a small business owner whom another plaintiff had sued without warning because the mirror in the bathroom did not hang low enough and the coat hook was not accessible.[85] Although the episode emphasized the structural reasons for these types of lawsuits,[86] the defendant appeared sympathetic.[87] In 2011, *The New York Times* ran a front-page article discussing the "flood of lawsuits some cite as unfair," detailing how Florida lawyer Ben-Zion Bradley Weitz had been suing small businesses throughout Manhattan.[88]

California has also seen a spate of recent articles. One typical article in the *San Francisco Examiner*, entitled "ADA Complaints in San Francisco Cause Legal Headaches for Businesses," quotes a commercial landlord as saying that plaintiffs are "pick[ing] on the immigrant minority businesses who don't know any better" and details the efforts of U.S. Senator Dianne Feinstein and state Senate President Pro Tempore Darrell Steinberg to pass a bill protecting businesses already ADA-compliant or in the process of becoming compliant.[89]

This coverage should be alarming for disability advocates. *The New York Times* and *This American Life* are not media aimed exclusively at the legal community; rather, both shape opinion among broader audiences. Although some Americans have a disabled family member, many do not encounter the ADA on a day-to-day basis. The ADA narrative can quickly become about abusive lawsuits and wealthy lawyers. This narrative, pushed by small business advocates, has led prominent officials like Dianne Feinstein to advocate for changes to the ADA and California law that could endanger effective private enforcement of the ADA.[90]

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[82] Becker, *supra* note 69, at 105.

[83] *Id.* at 106.

[84] *This American Life*, *supra* note 1.

[85] *Id.*

[86] *Id.* ("By choosing not to have an agency monitoring these laws, something like OSHA or a building inspector, we've invited individuals to seek their own justice, to decide for themselves what they're willing to put up with, what is worth fighting over, and when, if ever, it pays to ask nicely.")

[87] *Id.* The defendant, La Cienga Car Wash owner Maurice Golnirahi, was quoted as saying, "It doesn't make sense for me to pay $4,000 for someone that can't hang their coat up . . . He could have at least told us or let us know." *Id.*

[88] Secret, *supra* note 5.

[89] Koskey, *supra* note 5.

[90] *See* Ross, *supra* note 5 (reporting that Feinstein asked Steinberg to help pass legislation to

IV: TOWARD AN ADMINISTRATIVE GATEKEEPER ROLE

This Section suggests a new gatekeeper role for the DOJ as a partial solution to mass ADA filings. This Section first provides a descriptive and empirical analysis of the DOJ's current enforcement under Titles II and III. Second, this Section addresses solutions to mass ADA filings, including the recently enacted California reform and an increased fee model pushed by private litigants. Finally, this Section posits that Congress should grant the DOJ increased intervener powers so that the agency can assume a more targeted, gatekeeper role.

A. The Current Role of the DOJ

The ADA empowers the DOJ to enforce Titles II and III. Under Title II, an individual may file a complaint with the DOJ or other appropriate agency, which then must investigate the complaint and attempt informal resolution.[91] If informal resolution fails and the applicable agency finds noncompliance, it refers the complaint to DOJ, which attempts to negotiate compliance and potentially files suit.[92]

Under Title III, DOJ also must investigate claims and periodically review compliance of covered entities.[93] Title III authorizes the U.S. Attorney General to sue for violations that constitute either a pattern or practice of discrimination or which raise an issue of general public importance.[94] The Attorney General may also assess up to a $50,000 civil penalty for a first violation and up to a $100,000 civil penalty for a second violation under Title III if such action "vindicate[s] the public interest."[95]

The data indicates that DOJ does not operate as a gatekeeper for private litigation, but rather operates mainly as a litigant or advocate. In order to quantify DOJ actions, I searched CourtLink for any instance in which the DOJ or the U.S. Attorney General had been a party in a NOS Code 446 filing across the country. After eliminating cases where the United States was the defendant, I cross-referenced the list with the ADA Status Reports from the years in question.[96] Finally, I added DOJ formal

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prevent "abusive" ADA lawsuits and warning that she would introduce federal legislation if the state failed to act).

[91] Waterstone, *supra* note 8, at 1865–66.

[92] *Id.* at 1866.

[93] 42 U.S.C. § 12188(b)(1)(A)(i) (2006).

[94] *Id.* § 12188(b)(2)(B).

[95] *Id.* § 12188(b)(2)(C).

[96] The DOJ issues quarterly status reports detailing department efforts to enforce the ADA. *ADA Enforcement*, U.S. DEP'T OF JUSTICE, http://www.ada.gov/enforce.htm. To compile the data, I looked at all ADA Status Reports from the first quarter of 2009 to the last quarter of 2010.

settlement activity to the totals.[97]

Figure 8: DOJ enforcement does not match that of private litigants in the Top Ten Districts.

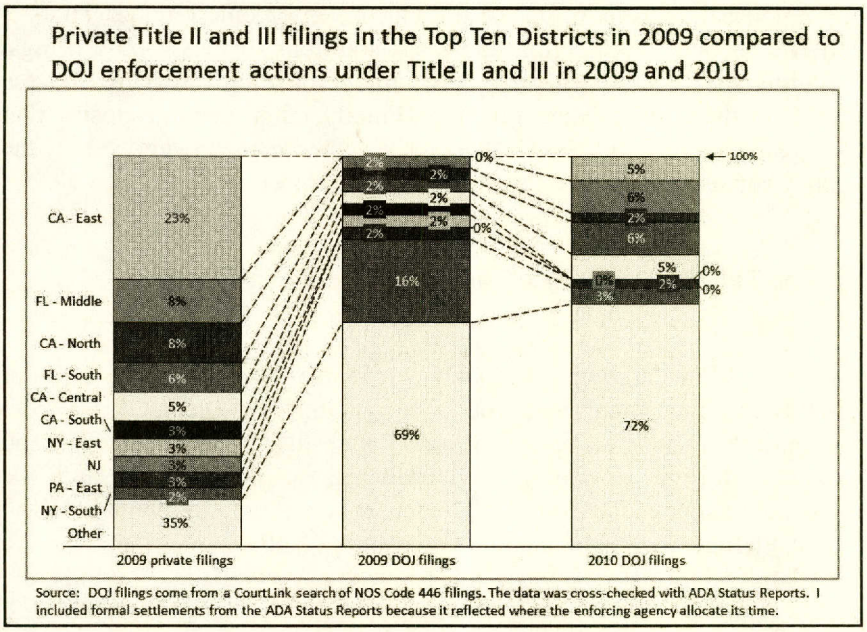

Figure 8 compares the 2009 private filings in the Top Ten Districts with 2009 and 2010 DOJ actions. I used both 2009 and 2010 DOJ data to determine if (1) the DOJ allocated its time in the same geographic areas as private litigants and (2) the DOJ reacted in 2010 to high levels of private litigation in 2009.

Neither the former nor the latter appears to be true. The DOJ filed forty-five and sixty-five cases or formal settlements in 2009 and 2010, respectively. The agency litigated around two-thirds of its cases in 2009 and 2010 in the districts in which private litigants spent one-third of their time. For example, in 2009, the DOJ spent less time in California and more time in the Southern District of New York than private litigants. Although the DOJ did become more active in the districts with the highest number of private lawsuits in 2010—including the Eastern District of California and the Middle District of Florida—overall, it actually concentrated even fewer enforcement efforts on the Top Ten Districts than in 2009.

Several competing potential narratives emerge from Figure 8. One is that the DOJ made a conscious choice to litigate in areas where private litigants have not. If the DOJ assumed that private litigants provided

[97] While the settlements could have started in earlier years, I chose to err on the side of over-inclusion because ignoring formal settlements underestimates where the DOJ spent its resources.

effective counterparts to public enforcement efforts, then it would logically choose to enforce in rural areas or states with lower damages remedies, because there would be less private litigation in these areas. The higher DOJ litigation in 2010 in California, Florida, and New York, however, seems to belie this narrative and suggests that the DOJ may simply be acting where claims arise or responding where the ADA is getting press.

A second, more plausible explanation is that the DOJ did not even take into account private litigation and instead used other considerations in deciding where to concentrate its enforcement efforts. Indeed, that is what seems to be the case. For example, in implementing Project Civic Access—a Title II enforcement effort designed "to work cooperatively with local governments" to improve accessibility[98]—the DOJ targeted particular local governments based on census data on disabled and underserved populations.[99] In addition, as per Waterstone's suggestion, the DOJ may also pursue lawsuits where violations appear systemic.[100] Since the 1999 decision *Olmstead v. L.C.*,[101] which required states to place mentally disabled patients in community settings rather than institutions when appropriate, the DOJ has repeatedly sued to enforce *Olmstead*, the "*Brown v. Board of Education* of the disability rights movement."[102]

The DOJ's current strategies to target underserved communities and to push the *Olmstead* decision should continue. Indeed, Figure 8 should show some imbalance, given that the DOJ can afford to bring suits in states without damage remedies and in rural areas with few lawyers. The DOJ should, however, also work to combat the bad reputation of both the ADA and disabled plaintiffs caused by mass filings of Title II and III suits in concentrated districts.

B. Previously Proposed Solutions

Proposed solutions to mass filings have sought to discourage most private litigation and change the nature of the litigation being brought. The California legislature recently enacted one version of reform. California Senate Bill 1186,[103] which passed by an overwhelming margin

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[98] U.S. DEP'T OF JUSTICE, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE: JULY–SEPT. 2010 8 (2010) [hereinafter SEPT. 2010 ADA STATUS REPORT], *available at* http://www.ada.gov/julsep10.pdf.

[99] Telephone Interview with attorney in Dep't of Justice, Civil Rights Div., Disability Rights Section (May 25, 2012). The attorney's name is omitted because the attorney spoke on the condition of anonymity.

[100] *See* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 497 (2007) (advocating "a public commitment to systemic litigation").

[101] 527 U.S. 581 (1999).

[102] SEPT. 2010 ADA STATUS REPORT, *supra* note 98, at 6. The report lists four cases in which it filed briefs in support of effectuating *Olmstead*'s integration mandate. *Id.*

[103] S.B. 1186, 2011–2012 Leg. (Cal. 2012) (codified in scattered sections of CAL. BUS. & PROF.

and was signed into law by Governor Jerry Brown,[104] decreases the potential state penalties for businesses that fix ADA violations within a certain number of days of being served with a complaint.[105] The law requires judges to consider "the reasonableness of the plaintiff's conduct in light of the plaintiff's obligation, if any, to mitigate damages" for multiple claims on the same accessibility violation.[106] In addition, the law regulates the demand letters that are central to *in terrorem* suits.[107] The law has received widespread praise from California politicians and journalists.[108]

Although the California reform does help reduce fraud and bad faith, it does not solve the broader problem of Title II and III enforcement. The California law attempts to solve the problem of vexatious litigation against business owners by decreasing the amount of private litigation and *in terrorem* lawsuits. While decreasing, but not eliminating, additional state remedies might attack this narrow problem, the California law does not create a substitute enforcement mechanism to combat widespread violations of the ADA. Without this substitute enforcement mechanism, the law could perversely increase the financial incentive for businesses to ignore the ADA and simply pay a decreased fine if caught.

A second set of proposals, by Samuel Bagenstos, seeks to change the nature of the litigation being brought. After discussing the structural problem with the Title III remedies, Bagenstos contends that a better response "would be to reinstate the catalyst theory, and perhaps authorize a damages remedy for violation of the statute."[109] Although his argument is that these solutions would decrease mass filings,[110] both solutions would increase the number of suits. A catalyst payout could lead to

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CODE, CAL. CIV. CODE, CAL. CIV. PROC. CODE, CAL. GOV'T CODE, and CAL. HEALTH & SAFETY CODE), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1186_bill_20120919_chaptered.pdf.

[104] Marc Lifsher, *Gov. Jerry Brown Signs Bill to Overhaul Disabled Access Law*, L. A. TIMES, Sept. 20, 2012, http://www.latimes.com/business/money/la-fi-mo-disabled-access-law-20120919,0,4876174.story (noting that the bill passed the California Assembly 77–0 and the California Senate 34–3).

[105] CAL. CIV. CODE § 55.56(f) (2012).

[106] *Id.* § 55.56(h).

[107] *Id.* § 55.31.

[108] *See, e.g.*, Kim Stone, Op-Ed., *Viewpoints: Will ADA Litigation Reform Work? It's Worth Finding Out*, SACRAMENTO BEE, Sept. 19, 2012, http://www.sacbee.com/2012/09/19/4832745/will-ada-litigation-reform-work.html (arguing that "[i]t is worth finding out" whether S.B. 1186 would be successful in curbing disability access suits and praising its attempt at reform); Press Release, Office of Dianne Feinstein, Feinstein Urges Brown to Sign ADA Reform Bill (Sept. 12, 2012), http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=aa330b2b-5807-49bd-b2cf-54921f0a33a4 (urging Gov. Jerry Brown to sign S.B. 1186 to "bring needed relief to small business from [ADA] predatory lawsuits and demand letter, while still preserving needed access for Californians with disabilities"); Press Release, Office of Senate President Pro Tempore Darrell Steinberg, Governor Signs Legislation Reforming Disabled Access Law (Sept. 19, 2012), http://sd06.senate.ca.gov/news/2012-09-19-governor-signs-legislation-reforming-disabled-access-law (describing S.B. 1186 as a reform to the existing disability access legal framework).

[109] Bagenstos, *supra* note 42, at 36.

[110] *Id.* (arguing that these changes would eradicate some of the incentives that cause mass filings).

increased litigation, especially if plaintiff lawyers are able to spend less time on a case, sue quickly, and see a return. Moreover, even with notice provisions tied to catalyst fees, businesses may not comply.[111] The damages remedy would also likely increase, rather than decrease, suits. Providing more money for every lawsuit, especially when litigators are often victorious, would likely cause the experienced lawyers to increase filings and bring new lawyers into the field. Moreover, it is unclear why Bagenstos believes increased damages would lead private litigants to abandon their current cases, most of which succeed.[112]

Michael Waterstone, in a third proposed solution, has pushed for a more activist DOJ to bring structural litigation. For Title II, Waterstone's solution counters the sovereign immunity hurdle for private litigants suing a state entity.[113] And, as discussed above, the DOJ has moved towards more structural litigation. Waterstone's solution, however, does not address mass filings, and nor did he intend to do so. Waterstone did not see Title III mass filings as a problem in 2007, arguing that the cases are "inherently unattractive for the private bar to bring."[114]

C. Toward a Gatekeeper Role

The goal of the DOJ should be to incentivize state and local governments and places of public accommodation to voluntarily adopt ADA standards. Phrased differently, the DOJ should aim for widespread deterrence at minimum transaction costs in litigation. Since the DOJ alone cannot effectively enforce Titles II and II, it should target an optimal amount of private litigation rather than try to eliminate it.

First, the DOJ should consider areas of mass litigation in deciding where to pursue formal settlements, such as through DOJ's Project Civic Access. Even without the problem of deterrence, the ADA faces a severe reputational risk in New York, California, and other high litigation states. Civil rights plaintiffs are being called pawns. When serial litigation comes to neighborhoods in California or New York, the DOJ should consider extending its Project Civic Access programs to both government and private businesses in the area. The DOJ could provide a warning to small businesses based on private litigant activity and even use that as leverage to push cooperation.

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[111] *See* Eagan, *supra* note 10, at 34 (arguing that "notice may not be effective in inducing compliance"). In suggesting that notice may not induce compliance, Eagan relays a *Sacramento Bee* report on a so-called serial plaintiff who gave 200 wineries notice, allowing them to avoid a lawsuit, but only twenty agreed to make structural changes. Bagenstos argued for reinstating notice provisions as long as catalyst payouts are also available. Bagenstos, *supra* note 42, at 36.

[112] *Id.* at 35.

[113] Waterstone, *supra* note 100, at 464. The Supreme Court has held that state government employers have Eleventh Amendment immunity from suits for money damages under Title I of the ADA. Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). It is unclear, however, how far *Garrett* extends.

[114] Waterstone, *supra* note 100, at 475.

Second, the DOJ could also use its existing powers to improve deterrence. Under Title II, the DOJ should continue to sue for compensatory damages in individual and pattern or practice suits. While individuals can also argue for compensatory damages, they are severely restrained by the Eleventh Amendment.[115] The DOJ can not only pursue systemic claims, but also extend its carrot-and-stick approach under Project Civic Access.

Under Title III, the DOJ can bring large penalties to vindicate the public interest. Further research should examine how the DOJ currently uses this power, but the power to bring these damages provides the only avenue—besides state remedies—to award more than injunctive relief and attorney's fees. The DOJ should assess maximum penalties on a few noncompliant businesses in a particular geographic area. The DOJ can set the enforcement level so that other businesses fear the penalty enough to make the necessary ADA improvements. Unlike the current structure, the revised structure would incentivize proactive avoidance of greater damages from the DOJ.

Second, Congress should grant the DOJ increased intervener powers so it can better modulate the level of private lawsuits. Under the current system, DOJ can bring cases or intervene, but the private litigant has the ultimate right to try the suit. The private litigant, therefore, would not be deterred from bringing suits. On the contrary, the private litigant has a better reason to take over the suit after the DOJ is involved to benefit from the agency's work and still get a return, especially if the agency finds the claim meritorious. This is not the model for all civil rights laws. For example, when the EEOC brings a claim under the Age Discrimination in Employment Act (ADEA), the private litigant is precluded from bringing her own claim,[116] and most courts have held the litigant cannot even intervene.[117]

Although Titles II and III are not employment-related, Congress should give the DOJ the same enforcement power under those titles as it gave the EEOC under the ADEA. Based on the data, there are specific litigants in specific areas who must be deterred. In order to change the attorneys' calculus, the attorneys have to anticipate lower returns on the lawsuits they file. This can be done in two ways: either by decreasing attorney's fees and damages remedies or by decreasing the likelihood of payout. Decreasing attorney's fees or injunctive relief at the national level would likely undermine most necessary, private efforts to enforce the ADA. If an administrative agency, however, can modulate the expected likelihood of payout for private litigants by intervening in cases

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[115] Unlike individuals, the federal government can, at times, bring a Title II claim if it interferes with another fundamental rights, such as access to the courts. *See* Tennessee v. Lane, 541 U.S. 509 (2004).

[116] 29 U.S.C. § 626(c)(1) (2006).

[117] *See, e.g.*, EEOC v. The Boeing Co., 109 F.R.D. 6, 10 (W.D. Wash. 1985) (denying the parties' motion to intervene because the EEOC was actively pursuing the case and therefore adequately represented them).

in particular areas and reducing or eliminating private payouts in those instances, the system has a better chance to reach the optimal level of private enforcement.

Admittedly, this Note's proposed solution does not provide a formula for optimal enforcement. The Note does argue that the current levels of private enforcement are inefficient and counterproductive. And it argues that agencies—rather than private enforcers—are in the best position to decide on and regulate optimal enforcement. Indeed, agencies have the flexibility to adjust, either through the amount or strategy of enforcement,[118] whereas private litigators will continue to file claims so long as it is profitable.

Because of the ambiguity on optimal levels, the DOJ should run a pilot program with or without explicit Congressional authorization. The agency could pick two districts: one of the top four (such as the Northern District of California) where the issue gets press and another growing district (such as the Northern District of Georgia) where claims have rapidly increased. In each district, the DOJ should roll out Project Civic Access to both governments and private businesses and aggressively screen and intervene in cases brought by private litigants. If Congress has granted the additional powers, the DOJ should consider whether, like in *qui tam* claims,[119] a private litigant should receive a payment for bringing the lawsuit and how large that payment should be. While the DOJ does not want to incentivize excessive private litigation, it cannot eliminate private litigants as an enforcement mechanism. It should assume a gatekeeper role to strike a balance.

V. CONCLUSION

In 1990, the ADA passed by an overwhelming bipartisan majority.[120] Through this legislation, Congress made the choice to shift the costs of accommodation and risks of enforcement to the private sphere, leaving the DOJ with less power to act as a gatekeeper than it had under other civil rights frameworks, such as the ADEA. This Note has analyzed the unforeseen consequences of Congress's choice.

The main unforeseen consequence, starting almost twenty years later, has been a private litigation boom. Using an original nationwide data set, Section II detailed the rapid increase of Title II and III filings and their concentration in California, New York, and Florida districts. It

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[118] Rose, *supra* note 65, at 1328–30.

[119] *Qui tam* statutes authorize private individuals to bring suits on behalf of the federal government, usually for a monetary bounty; one example of such a statute is the False Claims Act, under which individuals can sue over the defrauding of the federal government. Ara Lovitt, Note, *Fight for Your Right to Litigate:* Qui Tam, *Article II, and the President*, 49 STAN. L. REV. 853, 853–54 (1997).

[120] The House and Senate voted 377–28 and 91–6 respectively. Colker, *supra* note 53, at 6.

also examined the Hot Spots of litigation, where ADA filings have often doubled from year to year. The data showed that a small set of private litigants filed tens or even hundreds of claims per year in a concentrated number of districts.

In Section III, this Note argued that the rapid and concentrated rise of Title II and III filings poses a threat to the ADA's effectiveness and reputation. Although the ADA should have stronger enforcement, the current mass litigation model actually incentivizes businesses to wait to make improvements until being sued. In addition to suboptimal deterrence, the flood of ADA litigation risks a judicial backlash where judges doubt the motives of plaintiffs and create defendant-friendly rules. Perhaps, most importantly, the press has caught on to the trend. The headlines the public reads in *The New York Times* or the segments the public listens to on *This American Life* suggest that the ADA benefits scheming lawyers rather than the disabled.

To combat this perception, Section IV proposes that the DOJ should take action. Under Title II, the DOJ can emphasize its current work of bringing systemic litigation enforcing the *Olmstead* decision and working with local governments under Project Civic Access. Under Title III, the DOJ should pursue greater damages from a few places of public accommodation in the most problematic districts to incentivize businesses to proactively meet the ADA requirements. The DOJ should also extend Project Civic Access to work with local businesses wherever they work with local governments. For both titles, the DOJ should ask for, and Congress should grant, additional intervener powers. These powers will allow the DOJ to take over suits when necessary to slow the pace of private litigation.

The ultimate fear is that without change, the ADA will go the way of other civil rights narratives where businesses become the victimized and the disabled cannot escape the stigma the ADA was designed to combat. The disabled should not be labeled as crybabies.