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LETTER FROM THE EDITOR

Dear Reader,

Thank you for subscribing to the Texas Journal on Civil Liberties & Civil Rights. We are happy to publish four thought-provoking and timely pieces in this issue. Professor Meghan Boone's article discusses two U.S. Supreme Court cases from 2015. Both cases considered Title VII discrimination claims brought by plaintiffs that believed their employers had discriminated against them because they were members of a protected class—pregnant women and religious believers. However, the Supreme Court reached different results. Boone suggests the reason for the different results lies in the Court's emphasis on the right to spiritual autonomy above the right to physical autonomy.

Natasha Beckford's note identifies an area of law that has failed to keep pace with society's move toward equality: gender and marital status-based credit discrimination. Beckford analyzes an existing circuit split regarding the definition of 'applicant' under the Equal Credit Opportunity Act (ECOA). Beckford explains why including spouse-guarantors under the ECOA would combat discrimination.

Soolean Choy's note considers the pressing challenge of legal representation for misdemeanor defendants. Choy also proposes innovative policy solutions. Millions of misdemeanor cases are filed annually, and representation is often paltry. This interesting topic inspired our annual Spring conference on January 27, 2017, which was co-sponsored by the American Journal of Criminal Law and the Texas Fair Defense Project.

Matthew Drecun's note reckons with Texas's demographic change and the potential for violations of Section 2 of the Voting Rights Act by Texas's mapmakers after the 2020 Census as they seek to preserve the racial and partisan advantages of Texas's current districting scheme. Drecun argues that a recent U.S. Supreme Court decision, *Bartlett v. Strickland*, will leave the minority groups of many Texas districts, particularly the growing Latino population, unprotected by Section 2.

Now more than ever, it is important to study and work for civil liberties and civil rights. Since the Journal was founded twenty-five years ago (and even since I began law school in 2014), our country has made great strides in those areas. Yet 2016 saw a rise in hate-group activity accompanying the presidential election. Moments like these remind us that no matter how far we come, the work for advocates of civil liberties and civil rights will never be complete. The words of one of my constitutional law professors at the University of Texas School of Law ring especially true on this point:

> Too often the history of civil liberties, freedom of the press included, is written from the Whiggish perspective of progress unfolding; but the realities are different. As *Patterson* demonstrates, at the end of the nineteenth century the Supreme Court did not view the First Amendment as a guarantee of political dissent. Yet Dwight Teeter's study of revolutionary-era printers demonstrates that the press of the revolutionary era not only took on Great Britain, but attacked patriot policies as well.
>
> Times change; perceptions of freedom of the press change. Had Patterson attacked a revolutionary-era judiciary, he might have succeeded. Had he lived to write in the second half of this century, he would have succeeded. Civil liberties enjoy times of great celebration and times of strain. Freedom of the press is no exception, although we may hope that the strengths it has shown over the past quarter-century will serve us well into the next one.[1]

I hope you enjoy this issue of the Texas Journal on Civil Liberties & Civil Rights. The liberty to publish this freely should be celebrated. But because history shows that what is celebrated today can be strained tomorrow, we must always remain vigilant.

Thank you,

Jacob R. Porter
Editor in Chief

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[1] LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 15–16 (1991).

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ARTICLE

NOTES

Article

The Autonomy Hierarchy

Meghan Boone*

ABSTRACT

The U.S. Supreme Court decided two cases in Spring 2015—Young v. United Parcel Service, Inc. *and* EEOC v. Abercrombie & Fitch Stores, Inc.—*under Title VII. The plaintiffs in both cases believed that their employers had discriminated against them because they were members of a protected class—pregnant women in the former and religious believers in the latter. Both plaintiffs were seeking minor modifications to workplace policies as accommodations. And in both opinions, handed down within a few months of each other, the Court used the language of favoritism to discuss whether the plaintiffs should prevail and what analysis should be employed. The manner in which the Court used the language of favoritism, however, could not have been more different. In the case of pregnancy, the Court soundly rejected that pregnant employees were entitled to any favored treatment, bending over backwards to avoid a ruling that pregnant employees were part of a 'most favored' class. In the case of religion, the Court took the exact opposite approach, declaring that religious plaintiffs enjoyed 'favored treatment.' This is despite the fact that Title VII provides no explicit textual support for such a distinction. In the absence of such a statutory explanation, what is really behind this difference in approach? This paper explores one potential answer to this question—that these decisions reflect the Court's underlying belief in the*

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paramount importance of the right to spiritual autonomy over and above the importance of a right to physical autonomy. Further, it explores how allowing such a hierarchy, between a right to spiritual autonomy on the one hand and a right to physical autonomy on the other, to animate judicial decisions is both inherently gendered and disproportionately harms women. It concludes by analyzing whether such a hierarchy of rights is reflective of lived experience and discussing possible alternative frameworks for analyzing such claims.

INTRODUCTION

Two Supreme Court cases decided in Spring 2015—*Young v. United Parcel Service, Inc.*[1] and *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*[2]—dealt with plaintiffs claiming the protection of Title VII. Both plaintiffs believed that their employers discriminated against them because they were members of a

[1] 135 S. Ct. 1338 (2015).
[2] 135 S. Ct. 2028 (2015).

protected class—pregnant women in the former and religious believers in the latter. And in both opinions, handed down within a few months of each other, the Court used the language of favoritism to discuss whether the plaintiffs should prevail and what analysis should be employed.

The way the Court used the language of favoritism, however, could not have been more different. In the case of pregnancy, the Court soundly rejected the claim that pregnant employees were entitled to any favored treatment, bending over backwards to avoid a ruling that pregnant workers were part of a 'most-favored-nation' class of employees.[3] In the case of religion, the Court took the exact opposite approach, noting that plaintiffs seeking accommodation for religious beliefs or practices enjoyed 'favored treatment.'[4] While both plaintiffs ultimately prevailed, the difference in the Court's use of the language of favoritism is striking. The fact that the Court came to such different conclusions about whether each plaintiff was entitled to favored treatment under the law is particularly glaring when considered in light of the fact that both plaintiffs brought suit under the same overarching statute (Title VII), were seeking a minor accommodation to workplace policies, and were from classes of people specifically protected under the statute.[5] And it creates the uniquely perverse truth that if Peggy Young had gone to her employer and asked for a *religious accommodation* based on her sincerely-held religious belief that pregnant women should not lift more than 20 pounds, her employer may have been compelled to afford such a request special consideration, while it was not necessarily required to afford such special consideration to a request based on the advice of Ms. Young's doctor.

What accounts for the dramatically different conclusions about favored treatment under Title VII reached by the Court in these two decisions from the same term? In the following sections, this paper will explore the potential reasons that the Court came to such divergent conclusions about whether certain classes of Title VII plaintiffs are entitled to favored treatment under the law and whether such divergence is warranted. The observations contained herein grow out of a tradition of critical legal theory that seeks to make explicit the underlying assumptions that animate legal doctrine and how those assumptions often serve to perpetuate systems of inequality. Section I looks closely at the facts underlying the two cases, and how the language of favoritism was employed in both of the decisions. Section II examines whether the underlying statutory texts form a basis for the Court's conclusions re-

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[3] *Young*, 135 S. Ct. at 1350.

[4] *Abercrombie*, 135 S. Ct. at 2034.

[5] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1)(2012)) (prohibiting discrimination in employment based on the sex or religion of employees).

garding which plaintiffs are afforded favored treatment. After rejecting the textual explanation as a viable reason for the divergent outcomes, Section III explores and then criticizes how the decisions reflect an underlying belief that spiritual autonomy is more important than bodily autonomy and how such a hierarchical ordering disproportionately harms women. Section IV describes one potential outcome when rights to spiritual autonomy and bodily autonomy come into direct conflict with one another. Finally, Section V discusses different approaches to bodily autonomy that courts could adopt that would more meaningfully reflect constitutional and statutory intent while avoiding unnecessarily gendered and outdated ideas.

I. THE *YOUNG* AND *ABERCROMBIE* DECISIONS

A. The *Young* and *Abercrombie* Plaintiffs

Peggy Young worked as a part-time delivery driver for United Parcel Service, Inc. (UPS).[6] As an early morning 'air' driver, she delivered mostly lighter letters and packages sent via air delivery, generally not weighing more than twenty pounds.[7] The air deliveries were occasionally heavier than twenty pounds, however, and infrequently were in excess of fifty pounds.[8]

Ms. Young became pregnant in 2006.[9] After her physician recommended that she not lift packages greater than twenty pounds for the duration of her pregnancy, she alerted her employer to that fact and inquired into the possibility of light duty work.[10] UPS told her that it did not offer light duty for pregnancy and that company policy prevented her from working with a twenty-pound lifting restriction.[11] UPS policy dictated that it only accommodated '(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA).'[12] In fact, there was testimony from a UPS shop steward that the 'only light duty requested [due to physical] restrictions that became an issue' at UPS was

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[6] Young v. United Parcel Serv., No. DKC 08-2586, 2011 WL 665321, at *1 (D. Md. Feb. 14, 2011).
[7] *Id.*
[8] *Id.* at *1 n.2.
[9] *Id.* at *4.
[10] *Id.* at *4–5.
[11] *Id.* at *5–6.
[12] *Young*, 135 S. Ct. at 1344.

from 'women who were pregnant.'[13] According to Ms. Young, one of her supervisors told her 'not to come back in the building until [she] was no longer pregnant because [she] was too much of a liability.'[14]

During her period of involuntary leave, Ms. Young received no pay and lost her medical coverage.[15] Two months after giving birth, Ms. Young returned to UPS and resumed her previous position with the company.[16] She brought suit in October 2008, alleging that UPS had violated her rights under several statutes, including Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.[17] The district court granted UPS's motion for summary judgment, finding that Ms. Young had created no material issue of fact regarding UPS's proffered, non-discriminatory reason for its treatment of her.[18]

* * *

Samantha Elauf is a practicing Muslim who has worn a head scarf since the age of 13.[19] In 2008, Ms. Elauf applied for a job at an Abercrombie Kids store in her local mall.[20] She was unaware at the time of her application that Abercrombie stores had a 'Look Policy' that 'requires employees to dress in clothing and merchandise consistent with that sold in the store; requires that male employees be clean shaven; prohibits female employees from wearing necklaces and bracelets; requires employees to wear specific types of shoes; and prohibits 'caps.'[21] During her interview for the position, Ms. Elauf was not informed of the 'Look Policy,' but was told she must wear clothes that 'looked like Abercrombie.'[22]

Heather Cooke, the assistant store manager who interviewed Ms. Elauf, was responsible for recruiting, interviewing, and hiring new store employees.[23] She testified that she believed Ms. Elauf was a good candidate and recommended hiring her.[24] She also testified that she believed that Ms. Elauf wore the head scarf for religious reasons and was unsure at the time of Ms. Elauf's interview whether wearing a head scarf would violate the 'Look Policy.'[25] As a result, she consulted with her district

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[13] *Id.* at 1347.
[14] *Young*, 2011 WL 665321, at *6.
[15] *Id.*
[16] *Id.*
[17] *Id.* at *6–7.
[18] *Id.* at *15–16.
[19] EEOC v. Abercrombie & Fitch Stores, Inc. 798 F. Supp. 2d 1272, 1276 (N.D. Okla. 2011).
[20] *Id.*
[21] *Id.* at 1275, 1277.
[22] *Id.* at 1277.
[23] *Id.*
[24] *Id.* at 1277–78.
[25] *Id.*

manager, Randall Johnson.[26] Ms. Cooke testified that Mr. Johnson instructed her not to hire Ms. Elauf because she wore a head scarf, even when Ms. Cooke mentioned to him that the head scarf was likely worn for religious reasons.[27] As a result, Ms. Elauf was not offered a job at Abercrombie Kids.[28]

Ms. Elauf filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that she had been discriminated against due to her religious beliefs in violation of Title VII of the Civil Rights Act of 1964, as amended by the Religious Amendments of 1972.[29] The EEOC, which is authorized to bring suit under Title VII, sued Abercrombie & Fitch Stores, Inc. on Ms. Elauf's behalf, seeking an injunction that would prevent Abercrombie from 'engaging in employment practices which discriminate on the basis of religion.'[30] The district court originally granted summary judgment to Ms. Elauf, but the decision was reversed by the U.S. Court of Appeals for the Tenth Circuit, which found that there was 'no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had particularized, actual knowledge—from any source—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.'[31]

* * *

The U.S. Supreme Court ruled in favor of both Ms. Elauf and Ms. Young.[32] In both cases the Court found that Title VII offered protection against the type of discrimination alleged by the plaintiffs, and that summary judgment on behalf of the employer was therefore inappropriate.[33] In reaching this conclusion, however, the Court employed an analysis of whether each plaintiff was entitled to 'favored' treatment under the statute.[34] And despite the fact that both opinions discussed the applicability of a 'favored' standard, the outcome of such deliberations was markedly different in the two cases. As the following sections explore, the use of the language of favoritism in these two cases, and the analysis employed

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[26] *Id.* at 1278.
[27] *Id.* at 1278.
[28] *Id.* at 1279.
[29] Complaint at 1, *Abercrombie*, 798 F. Supp. 2d 1272 (No. 09-CV-602-GKF-FHM), 2009 WL 5212081.
[30] *Id.*
[31] EEOC v. Abercrombie & Fitch Stores, Inc. 731 F.3d 1106, 1128 & n.14 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015) (emphasis omitted).
[32] *Abercrombie*, 135 S. Ct. at 2037; *Young*, 135 S. Ct. at 1355–56.
[33] *Abercrombie*, 135 S. Ct. at 2033–34; *Young*, 135 S. Ct. at 1355–56.
[34] *Abercrombie*, 135 S. Ct. at 2034; *see Young*, 135 S. Ct. at 1355–56.

using such language, reveals that the Court's sense of whether Title VII affords protected classes of plaintiffs favored treatment depends heavily on the type of right each plaintiff was asserting.

B. Playing Favorites in Title VII

As an initial matter, it is important to note that the term 'favorite' or 'favored' appears nowhere in the statutory text of Title VII. Instead, Title VII uses the negative language of discrimination—making it unlawful to 'discriminate' or to 'limit, segregate, or classify' employees based on their membership in a protected class.[35]

Even though it does not appear in the statutory text, courts have used the language of favoritism as a way to distinguish the purpose of Title VII—equality—from the 'favored' treatment that certain groups have historically enjoyed.[36] For example, in *Griggs v. Duke Power Co.* the Court stated that:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.[37]

In this context, courts have seen themselves as guarding against 'favoritism' because they assumed that the individual receiving 'favored' treatment was not a member of one of the protected classes enumerated by Title VII, but was instead the member of one of the majority groups, usually a comparator to the plaintiff in that particular case.

It is only recently, however, that the Court has adopted the language of favoritism as a way to describe groups *protected* under Title VII as either 'favored' or not. This is a striking shift, as it signals courts'—and society's—shift from a concern for protecting minority rights to a concern that perhaps minorities are gaining an unfair advantage as a result of anti-discrimination and affirmative action policies.[38]

Despite its absence from the text of Title VII itself, the language of favoritism is front and center in the Court's decision in *Young*. Some

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[35] 42 U.S.C. § 2000e-2(a)(1).

[36] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[37] *Id.* at 429–30.

[38] The use of affirmative action in educational admissions reflects this trend, as the Court's jurisprudence in this area reflects an increasing concern with "favoring" the previously "disfavored" racial minorities. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J. & Scalia, J., concurring in part and dissenting in part) ("[A] university may not maintain a high admissions standard and grant exemptions to favored races.").

incarnation of the term 'most favored' is unanimously employed in the opinions of all of the writing Justices—four times in the majority, three times in the concurrence, and twice in the dissent.[39] If there had previously been any doubt about whether plaintiffs bringing claims for pregnancy discrimination under Title VII were afforded any manner of favored treatment, the Supreme Court's decision in *Young* clearly and firmly answered that question in the negative. While the majority, concurrence, and dissenting opinions reached different conclusions regarding the outcome of the case and the reasoning that should be employed, all of the Justices converged on the underlying premise that the Pregnancy Discrimination Act (PDA) in no way offered pregnant workers favored treatment. Justice Breyer's majority opinion rejects any implication that the PDA grants pregnant workers a favored position, stating plainly that, '[w]e doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.'[40] Justice Alito agrees in his concurrence, saying that he 'cannot accept [a] 'most favored employee' interpretation.'[41] And the dissent drives the point home, stating:

> Prohibiting employers from making any distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age,

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[39] *See Young*, 135 S.Ct. at 1349 (discussing Young's approach as granting pregnant workers "most-favored-nation" status); *id.* at 1350 (discussing the "most-favored-nation" problem and doubting that pregnant workers enjoyed an "unconditional most-favored-nation status"); *id.* at 1352 (questioning whether the EEOC guidance embraced a "most-favored-nation status" for pregnant workers); *id.* at 1358 (Alito, J. concurring) (stating that he "cannot accept this 'most favored employee' interpretation' and discussing the repercussions of the "most favored employee" interpretation); *id.* at n.3 (discussing "implausible results" that would occur under the "most favored employee" interpretation); *id.* at 1362 (Scalia, J. dissenting) (arguing that prohibiting employers from making any distinctions between pregnant and non-pregnant workers would "elevate pregnant workers to most-favored employees"); *id.* at 1363 (Scalia, J. dissenting) (rejecting characterization of the second clause of the Pregnancy Discrimination Act as a "most-favored-employee law"). If you were to include instances where the Court used all variations on the terms "favor" or "disfavor," the total number of citations increases even further.

[40] *Young*, 135 S. Ct. at 1350. It is particularly interesting that the Court adopted the language of the "most-favored-nation" clause, which has not previously been employed in discrimination cases, but instead was borne out of law governing international treaties and imported into other areas of the law, such as antitrust law. *See, e.g.*, Heim v. McCall, 36 S. Ct. 78 (1915) (determining whether state contracts mandating that state residents would be given preference in hiring for transportation and construction projects violated the "most-favored-nation" clause contained in the treaty between the United States and Italy). The use of "most-favored-nation' in employment discrimination cases has the effect of flattening plaintiffs into interchangeable actors in an economic model, ignoring the particular facts and details which make the plaintiffs' claims viable and compelling. The Court's adoption of this term—and indeed its reliance on the term—is an interesting departure from the Court's previous terminology in this area of the law and is worth additional thought in future scholarship.

[41] *Young*, 135 S. Ct. at 1358 (Alito, J. concurring).

> it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment.[42]

Indeed, the Court seems to take even the suggestion that pregnant workers be treated as a favored class as an affront to the principles of justice and to the underlying purposes of Title VII.[43] When Justice Breyer says any contrary argument 'proves too much,'[44] the reader can almost hear the unspoken sneer at the idea that any serious jurist would suggest that a Title VII plaintiff be afforded favored treatment. In fact, the language of favoritism and references to 'favorite employees' in the opinion is used as a sword to attack the Justices in the majority and a type of rhetorical straw man for the majority to disavow—in both cases allowing the Justices to take turns rejecting that such a standard was, is, or should be used.[45]

Compare this to the almost offhand way that the majority opinion in *Abercrombie* assumes that a plaintiff claiming religious discrimination is entitled to such favored treatment.[46] In Justice Scalia's majority opinion, he states: 'Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment '[47] He does so without citing to any law or precedent other than the text of Title VII itself, apparently assuming the validity of his assertion is so obvious that it needs no additional support.[48] This is despite the fact that in his dissent in *Young*.

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[42] *Id.* at 1362 (Scalia, J. dissenting) (emphasis omitted).

[43] *See id.* ("If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been 'treated the same' as everyone else It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment.") (emphasis omitted); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345–46 (1984-85) (discussing the Court's reasoning in Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976)) (This reasoning has echoes of the earliest Supreme Court precedent involving pregnancy discrimination in the employment context, which treated pregnancy as an 'extra, an add-on to the basic male model for humanity,' and was thus unacceptable because '[e]quality does not contemplate handing out benefits for extras—indeed, to do so would be to grant special benefits to women, possibly discriminating against men.').

[44] *Young*, 135 S. Ct. at 1349.

[45] This is not necessarily an ineffective approach, as the language of favoritism is essentially verboten in the American discourse of equality of treatment and opportunity; *see* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) ("In most social debates, the participants inevitably desire to obtain a rhetorical advantage from the characterization of their positions.").

[46] *See Abercrombie*, 135 S. Ct. at 2033–34.

[47] *Id.* at 2034; *see id.* at 2034–42 (Only Justice Thomas' dissent challenged the majority's position that religious plaintiffs should receive favored treatment. Justice Alito's concurrence differed from the majority opinion only in its treatment of the standard for the employer having notice of a religious accommodation issue, but did not question the majority's assertion that religious plaintiffs should be afforded favored treatment.).

[48] *Id.* at 2034. In other contexts, Justice Scalia has signed on to opinions attacking similar "text-free reasoning" as "caus[ing] confusion. ' Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc. 135 S. Ct. 2507, 2544 (2015) (Alito, J. dissenting) (criticizing the *Griggs* decision

issued just over two months prior, Justice Scalia explicitly stated that it was 'implausible' that a pregnant plaintiff would be afforded favored treatment under Title VII because Title VII *exclusively* guarantees 'equal treatment.'[49]

In contrast to the quick determination of the favored status of the plaintiff in *Abercrombie*, the Court in *Young* grappled at length with how employers must treat women under the PDA.[50] Specifically, the Court struggled to articulate the meaning of the phrase 'other persons not so affected but similar in their ability or inability to work' and what accommodations the clause obligated employers to provide pregnant employees.[51] The Justices wrestled with whether the clause required an employer to provide a pregnant employee with a benefit when *any other* employee similar in their ability to work received that benefit or only when *all* or *most* other employees similar in their ability to work received it.[52] As Justice Scalia phrased it, it was a question of whether a pregnant mechanic was entitled to the same accommodation as an injured director.[53] This concern was at the heart of the Court's inquiry, and ultimately no clear standard emerged. Nevertheless, the struggle with the statutory text focused on the idea that it was the Court's role, at least in part, to ensure that no pregnant employee undeservedly enjoyed 'most favored' status.

No such grappling is apparent in the *Abercrombie* decision. In that case, the Court did not seem concerned that by granting the plaintiff 'favored' status and thus ensuring that she would be entitled to the workplace accommodations necessary to express her religious beliefs, employers may also have to provide such accommodations—or even more arduous accommodations—to both executive and entry level employees (or both 'directors' and 'mechanics' in the words of Justice

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and its progeny because the writing Justices failed to "ground their decisions in the statutory text [of Title VII].").

[49] *Young*, 135 S. Ct. at 1362 (Scalia, J., dissenting) ("It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment."). This debate about how to treat pregnant employees was reminiscent of a long-standing debate in the feminist legal theory community between "equality" feminists and the "special treatment" or "asymmetrical equality" feminists. *Compare* Williams, *supra* note 43, *with* Littleton, *supra* note 45.

[50] *See Young*, 135 S. Ct. at 1357 ("[The second] clause [of the Pregnancy Discrimination Act] raises several difficult questions of interpretation that are pertinent to the case now before us.").

[51] *Id.* at 1356–57.

[52] *See id.* at 1350 ("The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term 'other persons.' It does not say that the employer must treat pregnant employees the 'same' as 'any other persons' (who are similar in their ability or inability to work), nor does it otherwise specify which other persons Congress had in mind.") (emphasis omitted).

[53] *Id.* at 1362 (Scalia, J., dissenting) ("Prohibiting employers from making any distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth.") (emphasis omitted).

Scalia).[54] The Court did not appear concerned that under its analysis, Ms. Elauf was entitled to an accommodation in the form of a modification to a company-wide policy. despite the fact that she was not even an employee at all, but merely an applicant for an entry-level retail position.[55] Her entitlement to an accommodation was based on the fact of her religious belief and her position in the company or a concern for how such an accommodation may affect other workers was not considered. The Court thus created a rule that entitled religious plaintiffs, because of their 'favored' status, to accommodations—full stop.[56] How such favored status played out in a workplace did not seem to cause the Justices any concern, and it was not discussed in the opinion.

II. The Statutory Text Explanation

This extreme difference in how the Court employed the language of favoritism in *Young* and *Abercrombie* warrants further attention. Such a divergence in approach in two opinions which seem as though they *should* be more similar would be noticeable in any context, but the temporal proximity of the two decisions makes the difference that much more glaring.

One obvious source for the different conclusions the Court draws in *Young* and *Abercrombie* regarding which plaintiffs are entitled to favored treatment is the underlying statutory text that the Court was interpreting. While it is true that both plaintiffs were proceeding under Title VII of the Civil Rights Act of 1964, they were doing so specifically under different amendments to Title VII, each containing slightly different statutory language.

Both the Pregnancy Discrimination Act of 1978 (PDA) and the 1972 religious amendments serve double-duty by defining the terms 'sex' and 'religion' more explicitly than in the original statute[57] and also incorporating—explicitly or implicitly—a mandate that employers make accommodations to individuals in each of these categories.[58] Just

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[54] *Id.*, *Abercrombie*, 135 S. Ct. at 2033 ("If the applicant actually requires an accommodation of [a] religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.").

[55] *Abercrombie*, 135 S. Ct. at 2033 ("An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.").

[56] *Id.* at 2033–34 ("[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.").

[57] *See* 42 U.S.C. § 2000e(j), (k) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief. The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. ").

[58] *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986) ("The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.").

as in the main text of Title VII, neither amendment uses any form of the term 'favored' in the statutory language.

The plaintiff in *Young* was proceeding pursuant to the PDA, which amended Title VII to make clear that pregnancy discrimination was sex discrimination. The PDA, in pertinent part, reads:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work .[59]

In essence, the law requires that pregnant employees be offered workplace accommodations to the same extent that other employees are offered workplace accommodations for non-pregnancy related injuries or conditions. Despite the Court's struggle with interpreting the language of the PDA in *Young*, commentators have remarked that '[w]hen read by itself, the PDA appears to be straightforward and easy to understand.'[60] The first clause makes it clear that sex discrimination includes discrimination based on pregnancy, and the second clause 'informs employers that the relevant measure of pregnancy, in comparison with other medical conditions, is its effect on the employee's ability to work.'[61]

When it enacted the PDA, Congress was careful to avoid an outcome that would place an additional burden on employers by requiring them to expand the type of workplace accommodations they already offered.[62] More specifically, Congress drafted the legislation to ensure that employers would not be forced to include new types of previously unaccounted for accommodations, and it mandated only that employers include pregnancy as another type of condition that entitled a worker to an already-available accommodation. It did this by tying accommodations for pregnant workers to the population of employees 'not so affected but similar in their ability or inability to work. Through this language, Congress ensured that an employer was not forced to offer a new workplace

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[59] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

[60] Mary DeLano, *The Conflict Between State Guaranteed Pregnancy Benefits and the Pregnancy Discrimination Act: A Statutory Analysis*, 74 GEO. L.J. 1743, 1747 (1986).

[61] *Id.*

[62] *See* 123 CONG. REC. S15035-60 (daily ed. Sept. 16, 1977) ("The whole purpose of this bill is to say that if a corporation, a business is to provide disability that they cannot discriminate against women because of the unique character of disability that might confront them and thus we are talking about those disabilities that are attendant to the child-bearing potential of women.").

accommodation or one that would unduly burden its business; the law limited the types of accommodations that employers had to provide to those they were already accommodating.

Does the statutory text applied in *Abercrombie*—the 1972 amendments—vary so wildly from that of the PDA that it supports an interpretation that plaintiffs experiencing religious discrimination should be treated as a 'most favored' class of employees? The religious amendments clarified the definition of 'religion' in Title VII, stating that:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[63]

Therefore, the 1972 amendments basically require that employers accommodate workers' religious beliefs or practices unless doing so would be unduly burdensome.[64]

Both statutes boil down to a requirement that employers accommodate workers if it is possible to do so. While Congress phrased this requirement using slightly different language in each statute, the functional work of the statute is the same. Religious workers should be accommodated to the extent that doing so does not require too much from the employer. Pregnant workers should be accommodated to the extent that other workers are accommodated; the fact of this alternate accommodation to a non-pregnant worker in this context signals that it is possible to provide the particular type of accommodation without placing too much burden on the employer. In other words, if the employer already accommodates non-pregnant employees in a particular way, it has already conceded that it is not unduly burdensome to do so. At the very least, the text of the two amendments to Title VII does not, on its face, support an interpretation that one group of employees is clearly entitled to favored treatment while another group is clearly not entitled to such treatment.

Nevertheless, the two amendments to Title VII are, unavoidably, worded differently. If Congress had intended them to have the exact same effect, it could be persuasively argued that it would have employed the exact same language.[65] To the extent that the different text of the two

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[63] 42 U.S.C. § 2000e(j).

[64] Rodriguez v. City of Chi., 156 F.3d 771, 775 (7th Cir. 1998) ("Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business.").

[65] The relative temporal proximity of the enactment of the statutes could be used to argue both sides here. On one hand, the fact that the statutes were enacted a mere six years apart could absolutely support an argument that Congress would likely have employed the same language in each if it

statutes mandates that plaintiffs proceeding under the two amendments are treated differently, it is not clear that plaintiffs proceeding under the PDA get the proverbial short end of the stick. In fact, the PDA—and not the 1972 amendments—contains more explicit textual support for treating pregnant workers as 'favored' under the statute.

The 1972 amendments mandate that employers accommodate their employees' religious beliefs and practices unless it would impose an 'undue burden' on the business of the employer. The statute did not define what constituted 'undue burden,'[66] nor did it specify in what circumstances an accommodation was required.[67] The Court has subsequently found, however, that an employer experiences an undue burden when it is forced to bear anything more than a *'de minimis* cost' as a result of the accommodation.[68] This interpretation explicitly protects employers from having to undertake any major accommodations, such as providing paid leave, break time, or significant restructuring of the physical work space because such accommodations would invariably involve costs that rose above the level of *'de minimis*. For instance, courts have held that employers are not required by Title VII to alter a 'neutral' scheduling system,[69] to offer accommodations that would create safety concerns,[70] or to allow employees to decline to perform some portion of their job duties.[71]

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intended plaintiffs to be treated equally under each. It is not as if language had evolved so dramatically in the intervening six years as to warrant a different explanation of equality under Title VII. Alternately, it could be argued that Congress was aware of the interpretation problems following the passage of the 1972 amendments, and sought to clarify—not change—the operation of Title VII as it applied to workplace modifications when it enacted the Pregnancy Discrimination Act. The Court in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74–75 (1977), noted that:

> [The 1972 amendments provide] no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of § 701(j) is likewise of little assistance in this regard. The proponent of the measure, Senator Jennings Randolph, expressed his general desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law," 118 Cong.Rec. 705 (1972) but he made no attempt to define the precise circumstances under which the "reasonable accommodation" requirement would be applied.

[66] *Hardison*, 432 U.S. 63, 74 ("[T]he statute provides no guidance for determining the degree of accommodation that is required of an employer.").

[67] *Id.* at 75 (noting that the legislative history "made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied").

[68] *Id.* at 84.

[69] Murphy v. Edge Mem'l Hosp. 550 F. Supp. 1185, 1189 (M.D. Ala. 1982) ("[T]his court will evaluate reasonable accommodation in light of an employer's ability to accommodate an employee within the existing framework without denying the benefits of the scheduling system to other employees or incurring a greater than *de minimis* cost.").

[70] *See* EEOC v. Oak-Rite Mfg. Co., 2001 WL 1168156 (S.D. Ind. 2001) (rejecting employee's argument that she should be permitted to wear ankle length skirt instead of pants in manufacturing plant where the employer stated such skirt would present a safety hazard); Bhatia v. Chevron U.S.A. Inc. 734 F.2d 1382, 1383–84 (9th Cir. 1984) (finding that employer did not have to accommodate employee's request that he be permitted to wear a beard where company had legitimate safety concern that beard would prevent airtight seal of mask in the event of exposure to toxic gas and allowing beard would expose company to potential liability under California safety regulations).

[71] Bruff v. N. Mississippi Health Servs. Inc. 244 F.3d 495, 503 (5th Cir. 2001) (holding that employer hospital was not obligated to excuse counselor from her counseling duties when such counsel-

In contrast, the PDA could obligate an employer to provide accommodations to pregnant workers that result in more than a *de minimis* cost to the employer, assuming the employer provided such accommodations to other non-pregnant workers. Such accommodations could include providing leave or changes in schedule or work assignments—accommodations which would not be required under the 1972 amendments because of the cost to the employer.

Therefore, even assuming that Congress intended to create different standards for accommodating pregnant and religious employees within the larger framework of Title VII, it is not clear from the text of the statutes that it intended to 'favor' religious plaintiffs. If anything, it seems likely that the statutory text is intended to 'favor' pregnant plaintiffs by affording them access to a wider range of potentially costly, employer-provided accommodations than religious employees are entitled to under the 1972 amendments. Nevertheless, the Court was compelled to reach a contrary conclusion in the *Young* and *Abercrombie* cases. The following sections will examine one potential reason this was the case.

III. The Autonomy Hierarchy

If a statutory text explanation for the different outcomes in *Young* and *Abercrombie* does not survive careful scrutiny, then what explanation does? The answer may lie not in the statutory text, or even in the differences between the plaintiffs themselves, but instead in the fundamental nature of the rights at issue in the two cases.

While both plaintiffs were seeking minor modifications to workplace policies to accommodate their needs, Peggy Young was seeking a modification to accommodate a physical need associated with her pregnancy, while Samantha Elauf was seeking a modification to accommodate a spiritual need arising out of her religious beliefs. In other words, Ms. Young was seeking an accommodation to exercise her right to bodily autonomy, while Ms. Elauf was seeking an accommodation to exercise her right to spiritual autonomy. While both rights to bodily autonomy and spiritual autonomy have significant underpinnings in both common and constitutional law doctrines,[72] the Court did not hesitate to hold that the spiritual autonomy Ms. Elauf sought afforded her favored status under the law, while the bodily autonomy that Ms. Young sought afforded her no such status. Reviewing these two decisions together suggests that the Court is influenced by an implicit hierarchy which affords

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ing conflicted with her personal beliefs regarding homosexuality and extramarital sexual relationships).

[72] *See infra* Section III.a.i–ii.

spiritual autonomy favored treatment under the law while denying such favored treatment to bodily autonomy. The plaintiff in *Abercrombie* was entitled to spiritual autonomy, and the accommodations essential to exercise that autonomy, but the plaintiff in *Young* was not necessarily entitled to the accommodation that would have been required for her to safely exercise her bodily autonomy—in this instance, the right to bear a child. The following sections explore why such a hierarchy may be present in the Court's reasoning.

A. Autonomy in American Legal Thought

As an initial matter, it is important to define the terms 'bodily autonomy' and 'spiritual autonomy' as used throughout this article,[73] as well as to briefly trace the historical approach to autonomy in American jurisprudence. In the most basic terms, autonomy describes an individual's ability to make choices about his or her own experience and identity, as well as the process of effectuating those choices.[74]

While various terms have been used to describe what I am referring to here as bodily autonomy—including bodily integrity, self-determination, and bodily freedom—I use the term bodily autonomy because it best expresses the right to be free from unwanted invasion of an individual's physical body as well as the right for that individual to make independent decisions about their body—what to do with it and how to use it.[75] The same is true for spiritual autonomy, which, as the term is used in this paper, encompasses both an ability to be free from forced belief or religion as well as the affirmative right to believe, express, and practice

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[73] The term "autonomy" is defined herein not only to educate the uninitiated, but also because there is not a generally accepted definition of the term "autonomy" such that any one author can employ the term without further specifying their meaning. *See generally* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. Rev. 1217, 1246 (2004) (detailing three competing conceptions of autonomy).

[74] *See Autonomy*, Black's Law Dictionary (9th ed. 2009) (defining autonomy as "[a]n individual's capacity for self-determination."). The concept of autonomy, including its history and value as a legal concept, has been extensively written about by numerous legal scholars. *See generally* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 Vill. L. Rev. 1705 (1992) (examining justifications for valuing autonomy).

[75] *See* Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 Denv. U. L. Rev. 1, 14 (2009) (describing bodily autonomy as a "fundamental right to control over one's own body or its parts" which would "not only protect the body from unwanted intrusion, but also would protect one's right to modify one's body, choose to accept or reject medical treatment, and the like," as well as the right to "contract one's autonomy away"). *But see* Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, U. Ill. L. Rev. 1059, 1063 (2014) (defining bodily integrity as the right to repel bodily intrusions and make affirmative decisions about the body, including the decision to use contraception, to choose a sexual partner, or to seek a particular medical treatment).

one's own conception of spiritual truth.[76] Thus, the concept of autonomy covers the range of rights that are associated with an individual's spiritual and physical self, the right to exclude unwanted interference and to seek desired actions and interactions.[77]

i. Bodily Autonomy in the Law

The principle of bodily autonomy has deep roots in the American legal imagination,[78] which can be traced back to at least the founding of the United States, if not much earlier. The right to bodily autonomy is enshrined in common law tort concepts such as assault[79] and battery.[80] John Locke based many of his ideas about property rights on the original concept of ownership of the physical body.[81] And the concept of informed consent and the right to choose appropriate medical treatment are likewise rooted in a right to bodily autonomy.[82]

The principle of a right to bodily autonomy is also contained indirectly in the Constitution. For instance, the Fourth Amendment protects bodily autonomy by prohibiting unreasonable bodily searches as well as stating that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'[83] The Eighth Amendment likewise protects bodily autonomy from the power of the state by prohibiting the state from im-

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[76] *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 142–149 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) (discussing the intertwined nature of spiritual belief and the actions associated with those beliefs).

[77] For an in-depth critique of using the concept of autonomy as the basis for individual rights in the human body, *see* Ramachandran, *supra* note 75 at 24–27.

[78] *See generally* Ramachandran, *supra* note 75 (discussing the importance of the right to bodily integrity in much of legal thought, as well as the different bases for recognizing such a right).

[79] 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *120 (defining assault as "an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him.").

[80] *Id.* (defining battery as "the unlawful beating of another" and noting that '[t]he least touching of another's person wilfully, or in anger, is battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner").

[81] Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367 (2000) ("The image of the body as a form of property possessed by its 'owner' dates back at least to John Locke, whose influential theory of property derived all ownership from the property possessed by individuals in their own persons.").

[82] *See* Stuart v. Camnitz, 774 F.3d 238, 251 (4th Cir. 2014) *cert. denied sub nom.* Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015) ("Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has the information she needs to meaningfully consent to medical procedures.") (internal quotations and citations omitted).

[83] U.S. CONST. amend. IV.

posing 'excessive bail' or 'cruel and unusual punishments.'[84] Others have recognized a right to bodily autonomy enshrined in the Thirteenth Amendment's prohibition of slavery[85] or the Fourteenth Amendment's guarantee of due process before the deprivation of 'life, liberty or property.'[86] The U.S. Supreme Court's jurisprudence on the right to privacy also situates a basic right to bodily autonomy in a collection of rights contained in the Constitution.[87]

Courts have also recognized a basic common law right to bodily autonomy. As early as 1891, the Court held in *Union Pacific Railway Co. v. Botsford*[88] that a federal court could not compel a tort plaintiff to undergo a medical examination to determine the extent of her injuries, stating that '[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'[89] Courts have upheld the legality of individuals' rights to bodily autonomy, even when imposing on such a right may achieve the more morally defensible outcome.[90]

Despite the concept of bodily autonomy having a long and rich history in American jurisprudence, an absolute right to bodily autonomy is far from guaranteed under current legal frameworks.[91] The Court's

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[84] U.S. CONST. amend. VIII.

[85] U.S. CONST. amend. XIII.

[86] U.S. CONST. amend. XIV.

[87] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) ("Roe [v. Wade], however, may be seen not only as an exemplar of Griswold [v. Connecticut] liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.").

[88] 141 U.S. 250 (1891).

[89] *Id.* at 251.

[90] In the case of McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (Pa. Ct. Pl. 1978), the court found that the plaintiff could not legally compel the defendant to provide bone marrow, even though such a donation was likely the plaintiff's only chance for survival. In the words of the court:

> "Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. Many societies adopt a contrary view, which has the individual existing to serve the society as a whole. In preserving such a society as we have, it is bound to happen that great moral conflicts will arise and will appear harsh in a given instance. In this case, the chancellor is being asked to force one member of society to undergo a medical procedure which would provide that part of that individual's body would be removed from him and given to another so that the other could live. Morally, this decision rests with defendant, and, in the view of the court, the refusal of defendant is morally indefensible. For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn. *Id.*

[91] It is interesting to note that the language used to discuss bodily autonomy varies greatly with *which* bodies are being discussed. Not only gender, but race, class, physical ability and other characteristics have a large impact on the way that courts discuss bodies and an individual's right to bodily

stance on the constitutional right of an individual to be free from state intrusions on their physical body is 'murky and equivocal.'[92] Many of the most divisive political issues that courts have been asked to decide are related to this concept of when, how and why an individual's physical autonomy can be undermined—including the 'right to die' cases,[93] the right of the chronically ill to access experimental drug therapies,[94] and the right to abortion.[95] Thus, while bodily autonomy is arguably one of the fundamental principles of Western legal thought, the exact boundaries of a right to bodily autonomy are far from clear.[96]

ii. Spiritual Autonomy in the Law

Spiritual autonomy has a similarly illustrious pedigree in American legal jurisprudence. Indeed, according to some scholars, the right to believe in the religion of one's choice without state intervention 'represents one of America's great contributions to Western civilization.'[97] Thomas Jefferson called it 'the most inalienable and sacred of all human rights.'[98] The belief in religious liberty grew in part out of the experience of religious persecution by the earliest European settlers[99] and was en-

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autonomy, going back to some of the earliest cases which discuss the bodies of those held as slaves. *See* Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1856) (finding that the African-American plaintiff was not a "citizen' for purposes of the Constitution, as they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race"); *see also* Borgmann, *supra* note 75, at 1065 (discussing slavery as the "flagrant exception" to the right to be free of bodily intrusions). Indeed, there are likely interesting parallels to be drawn between the historical expansion of *which* bodies get rights and the parallel constriction of courts' understanding of the fundamental nature of bodily autonomy, although this is a topic for future scholarship.

[92] Borgmann, *supra* note 75, at 1061 (noting the "Court's tendency to place bodily intrusions into compartments that focus too narrowly on the type of intrusion involved or the government's reasons for intruding"); *see also* Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEXAS L. REV. 277 (2007) (noting that the Court has not consistently deferred to the state in constitutional cases regarding medical treatment decisions, but instead based its level of deference on "largely superficial determinations about what type of case is before it").

[93] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990), Washington v. Glucksburg, 521 U.S. 702 (1997).

[94] *See, e.g.*, Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 703 (D.C. Cir. 2007) (en banc) (addressing the right of the chronically ill to access experimental drugs).

[95] *See* Roe v. Wade, 410 U.S. 113 (1973), *holding modified by Casey*, 505 U.S. 833.

[96] *See* Rao, *supra* note 81, at 363 ("The law of the body is currently in a state of confusion and chaos. Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights.").

[97] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1560 (1989).

[98] Thomas Jefferson, *Freedom of Religion at the University of Virginia (Oct. 7, 1822)*, *in* THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS 957, 957–58 (Saul K. Padover ed., 1969).

[99] *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 214 (1963) ("Nothing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage.") (citations omitted); *see also* Scharffs, *supra* note 73, at 1230 ("The pursuit of religious liberty was one of the

shrined in the Constitution much more explicitly than the right to bodily autonomy in the form of the First Amendment,[100] which states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'[101] Justice Goldberg articulated the underlying purpose of this constitutional mandate as 'promot[ing] and assur[ing] the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.'[102] Judges and scholars have often advocated that religious belief is entitled to special protection because it is distinct from other types of rights.[103]

The enduring primacy of the right to spiritual autonomy can also be witnessed through the passage of modern legislation such as the Religious Freedom Restoration Act of 1993 (RFRA).[104] RFRA reinstituted a strict scrutiny test to determine whether a federal rule of general applicability nevertheless burdened the free exercise of religion. Its companion legislation, the Religious Land Use and Institutionalized Persons Act,[105] prohibits the federal government from burdening prisoners' rights to practice religion and preventing land owners from using their property in ways that burden their religious beliefs and practices.

Just as in the case of bodily autonomy. the right to spiritual autonomy is seen by many as a fundamental right and a 'cornerstone of a free society.'[106] It is likewise a right whose exact boundaries remain unclear; jurists have not been able to consistently delineate the exact boundary between the state's mandated neutrality towards religion and its duty to afford religious belief and practice special protection.[107]

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most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic.").

[100] E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 486 (2009) ("The First Amendment contains a separate clause addressing the free exercise and nonestablishment of religion, thus distinguishing religious freedom from freedoms of speech, press, assembly, and petition.").

[101] U.S. CONST. amend. I. *See generally* Adams & Emmerich, *supra* note 97, at 1560 (discussing the historical and philosophical basis for the establishment clause). However, using the First Amendment as a basis to assert that religious rights are afforded special protection is a problematic argument as well. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 572–73 (2006) (noting the tension inherent in the First Amendment's mandate of religious neutrality alongside its apparent grant of special protection to religious practices).

[102] *Schempp*, 374 U.S. at 305 (1963) (Goldberg, J. concurring).

[103] *See* Koppelman, *supra* note 101, at 572 (noting judicial decisions and scholarly publications that argue for religion's special and primary place in the American system of legal rights).

[104] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[105] 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

[106] *See* Adams & Emmerich, *supra* note 97, at 1598–1600 (discussing the views of religious liberty as "inalienable" and rooted in God's law).

[107] *See* Koppelman, *supra* note 101, at 577–78, 589–90 ("The text [of the First Amendment] is vague, and the doctrine is confused.").

B. Spirit/Body Dualism

Human beings love a good dichotomy.[108] Whether the dichotomy describes moral concepts such as good and evil, natural concepts such as night and day, or artistic concepts such as highbrow and lowbrow, for much of the history of human thought, we have used dichotomies to explain and understand the world around us.[109] As Frances Olsen has noted:

> Since the rise of classical liberal thought, and perhaps since the time of Plato, most of us have structured our thinking around a complex series of dualisms, or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/ emotion; culture/nature; power/sensitivity: objective/ subjective; abstract/contextualized; principled/personalized. These dualistic pairs divide things into contrasting spheres or polar opposites.[110]

Legal thought is not immune from this dualistic thinking, and legal scholars have explored the use of dualisms in contexts as varied as copyright law, criminal law, tax law, tort law, and property law.[111]

One of the oldest dichotomies in Western thought is that between body and spirit.[112] This dichotomy divides the self into two distinct and separable elements—the thinking, feeling soul or mind, and the physical, natural body.[113] While this dichotomy is most famously associated with

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[108] PAUL BLOOM, DESCARTES' BABY: HOW THE SCIENCE OF CHILD DEVELOPMENT EXPLAINS WHAT MAKES US HUMAN xii (2004) ("We can explain much of what makes us human by recognizing that we are natural Cartesians—dualistic thinking comes naturally to us.").

[109] SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 2 (1970) ("The division Yin and Yang pervades all culture, history, economics, nature itself.").

[110] Frances Olsen, *The Sex of Law*, *in* THE POLITICS OF LAW 453, 453 (David Kairys, ed. 1990).

[111] *See generally* Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 IND. L.J. 975, 977 & n.15 (2015) (discussing the presence of dualism in legal doctrines and collecting legal scholarship which examines the role of dualism in particular fields of legal thought).

[112] I use the word spirit here for sake of consistency, but could just have easily substituted other words, such as "soul," "mind, "intellect," or "ego." Each of these words encapsulates the idea of the non-physical element or essence of an individual person.

[113] *See* Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 234 & n.154 (2005) (noting that "[a]ccording to th[e] traditional conception the self is not a unified whole but instead is comprised of two parts; a soul (or mind) and a body" and citing philosophers such as Kant, Aristotle and Plato's who shared this notion).

seventeenth-century French philosopher Rene Descartes,[114] it is clearly articulated much earlier—at least as early as ancient Greece.[115]

Legal thinkers have been heavily influenced by the concept of the fundamental separateness of the body and spirit or mind.[116] This distinction has been used to differentiate between the unconstitutional compulsion of the criminally accused's thoughts or memories and the constitutional compulsion of bodily. physical evidence, such as blood samples.[117] As Adam Benforado stated in the introductory text of his article on embodied cognition:

> There is the body. There is the mind. They are separate and distinct. This is the language of the law and the core of our culture. This is the discourse of Western existence. Mens rea and actus reus; mind over matter; body and soul.[118]

Like many other dichotomies, the split between spirit and body is not an equal one; the spirit is elevated over the body.[119] Humans have long believed that it is the human soul or spirit that elevates them above animals[120] and connects them to a higher power or supreme being.[121] Our souls are, in essence, what make us human.[122] On the other hand, the

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[114] "Cartesian dualism" is the philosophical theory that the mind and body are two distinct ontological entities. *See* RENE DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS 112 (Dover Pubs. 2003) ("Although I possess a body with which I am very intimately conjoined it is certain that this I [that is to say, my soul by which I am what I am], is entirely and absolutely distinct from my body, and can exist without it."); Marya Torrez, *Combatting Reproductive Oppression: Why Reproductive Justice Cannot Stop at the Species Border*, 20 CARDOZO J.L. & GENDER 265, 270–71 (2014) (discussing Cartesian dualism and its connection to both the human/animal dichotomy and the male/female dichotomy).

[115] *See* Elizabeth Spelman, *Woman as Body: Ancient and Contemporary Views*, 8 FEMINIST STUDIES 109, 111 (1982) (discussing the use of the mind-body dichotomy in Plato's Symposium and The Apology).

[116] *See* Fox & Stein, *supra* note 111, at 979 (noting the "pervasiveness" in the law of the division between mind and body that "much of our doctrine treats mind and body as if they work and matter in critically different ways").

[117] *See id.* at 993–97 (discussing Schmerber v. California, 384 U.S. 757 (1966) and the Court's distinction between protection for mental compulsion as opposed to physical compulsion).

[118] Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185, 1187 (2010).

[119] *See* Matambanadzo, *supra* note 113, at 234 (noting that the understanding of a mind/soul distinction '[t]raditionally privileges the soul (mind) over the body, claiming that the soul constitutes the 'real' self, and at best, the body merely houses the soul. The 'real' self is considered separate from the needs and peculiarities of the body, and some believe that the body often hinders the progress and development of the soul.").

[120] Letter from René Descartes to Marquess of Newcastle, (Nov. 23, 1646) *in* DESCARTES: PHILOSOPHICAL LETTERS (Anthony Kenny ed. & trans.. Oxford: the Clarendon Press) (contrasting rational and intelligent man with animals, which he argued were controlled by instinct and thus more akin to machines).

[121] *See* Matambanadzo, *supra* note 113, at 234 n.154 (noting that mind-body dualism "is also an aspect of Judeo Christianity, where freedom from the body is sought in order to achieve grace or enlightenment for the soul").

[122] BLOOM, *supra* note 108, at 190–91 ("To my knowledge, nobody has systematically asked people about the more general premise of a body/soul duality Do you believe that you are (A) a

body is often written about negatively, as a hindrance to the soul.[123] As Bordo writes: '[t]he body as animal, as appetite, as deceiver, as prison of the soul and confounder of its projects: these are common images within Western philosophy.'[124] The American legal system, too, explicitly privileges rights to spiritual belief in some instances where physical autonomy is afforded no such privilege. For instance, both Congress and courts have long held that religious or spiritual objections to war are sufficient to excuse compulsory military service, whereas a physical concern for the safety of the body is not seen as a sufficient reason to avoid service.[125]

Indeed, throughout history this dichotomy between spirit and body has been utilized to divide people into two groups—those with moral or spiritual worth and those that are 'just bodies' and thus not entitled to the same protection or care—often to disastrous effect.[126] Various groups of 'disfavored' people have been associated with the physical body generally or with the parts of the physical body that are considered undesirable. As Martha Nussbaum articulates:

> [T]hroughout history, certain disgust properties—sliminess, bad smell, stickiness, decay, foulness—have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior human status. Jews, women, homosexuals, untouchables, lower-class people—all these are imagined as tainted by the dirt of the body.[127]

This tendency is also apparent in the hyper-sexualization of black bodies, which serves the dual purpose of associating the black body with an

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machine or (B) an immaterial soul? (B) is the aesthetically appealing choice We do not feel as if we *are* bodies; we feel as if we *occupy* them. Some might wish to answer 'all of the above, self-identifying as both a body and as a soul. But only a small minority would choose just (A).").

[123] *See* Matambanadzo, *supra* note 113, at 234–35 (discussing how in the soul/body dichotomy '[t]he body is merely a hindrance as it clouds the soul's judgments with needs and desires").

[124] SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 3 (1993).

[125] *See* Koppelman, *supra* note 101, at 582 (discussing Welsh v. United States, 398 U.S. 333 (1970) and United States v. Seeger, 380 U.S. 163 (1965), and concluding that "[t]he Court avoided privileging religious over nonreligious claims, but some privileging was going on. The argument should by now be familiar. Those who objected to going to war for family reasons, or even just because they did not want to risk getting hurt, had no constitutional claim at all. Once one has decided to give exemptions to some but not all claims, one is already privileging.").

[126] *See* BLOOM, *supra* note 108, at 177 ("Disgust is a response to people's bodies, not to their souls. If you see people as souls, they have moral worth: You can hate them and hold them responsible; you can view them as evil; you can love them and forgive them, and see them as blessed. They fall within the moral circle. But if you see them solely as bodies, they lose any moral weight. Empathy does not extend to them.").

[127] Martha Nussbaum, *'Secret Sewers of Vice' Disgust, Bodies and the Law*, *in* THE PASSIONS OF LAW 19, 29 (Susan Bandes, ed. 1999).

animal-like physicality and attempting to justify the oppression of black people through such association.[128]

C. Gendered Dualism

Many would situate this tendency to break the world into two opposite but complementary concepts on the supposedly binary nature of the sexes,[129] particularly the difference between the male and female roles in the reproductive process.[130] As the two physical sexes are such a large part of the human experience, the argument goes, we are therefore more likely to view the world as full of similar binaries.[131]

Western legal thought, as well, is based on the idea of two—and only two—dichotomous sexes.[132] Sex has historically been used as the primary determinant for many legal rights—including those of political participation[133] and property ownership[134]—and continues to form the

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[128] *See* BORDO, *supra* note 124, at 9–10 (discussing the racist images and ideology that constructs black women and men as more "bodily" than white people and how such a construction has been used to oppress people of color and justify slavery).

[129] Olsen, *supra* note 110, at 453 (1990) ("The division between male and female has been crucial to this dualistic system of thought. Men have identified themselves with one side of the dualisms: rational, active, thought, reason, culture, power, objective, abstract, principled. They have projected the other side upon women: irrational, passive, feeling, emotion, nature, sensitivity, subjective, contextualized, personalized."). I say "supposedly" binary nature of the sexes because, as we now understand, physical sex is not a perfect binary, but instead a rich continuum in which a large portion of people are not entirely physically male or entirely physically female. This nuanced understanding of physical sex is relatively contemporary and dependent at least in part in the ability of modern medicine to reveal markers of physical sex that were invisible to us before. *See* MERRY E. WIESNER-HANKS, GENDER IN HISTORY: GLOBAL PERSPECTIVES 13 (2d. ed. 2011) ("Despite the presence of third and fourth genders, intersexed people, and transgendered individuals, most of the world's cultures have a system of two main genders in which there are enormous differences between what it means to be a man and what it means to be a woman"). Because of the nature of inquiry in this paper, I assume the binary nature of physical sex. This is not to say that I agree with such a binary or think it is correct, but only that it continues to inform the majority of Western thought, including legal thought. *See* Matambanadzo, *supra* note 113, at 213 ("The dichotomous sexual tradition constructs the Anglo-American legal landscape [M]any legal distinctions depend on there being two and only two sexes.").

[130] Firestone, *supra* note 109, at 8 (stating that "biology itself—procreation—is at the origin of the dualism" and that the reproductive functions of men and women are inherently unequal, setting up the domination of one sex by the other).

[131] Also, the prevalence of binaries in nature (sun/moon) has led some cultures to perceive these binaries as divinely created, and thus to also see divine intent in the male/female dichotomy. *See* WIESNER-HANKS, *supra* note 129, at 13. ("Some of these dichotomies, such as sun/moon and light/dark, are naturally occurring and in many cultures viewed as divinely created ").

[132] *See* Matambanadzo, *supra* note 113, at 218 ("Anglo-American law constitutes/is constituted by a conception of legal sex that assumes that sex is gendered, dichotomous, easily determined and fixed.").

[133] *See* U.S. CONST. amend. XIX (granting women the right to vote).

[134] *See* Elizabeth Cady Stanton, *Declaration of Sentiments* (1848) ("He has taken from her all right in property, even to the wages she earns.").

basis for certain legal rights and obligations even today.[135] The legal system, as many scholars have persuasively argued, is simply not equipped to engage with individuals whose sex is not easily understood as either male or female.[136]

The primacy of the male/female dichotomy. moreover, can also be witnessed through its incorporation into other dichotomies.[137] Even dichotomies that don't have any obvious connection to gender are nevertheless gendered—for instance, the sun and the moon.[138] Thus, a 'natural' division between male and female becomes the basis for cultural divisions that are equally gendered.[139] Take, for instance, the public/private dichotomy. Women are traditionally associated with the private world and as a result have historically been expected to focus on domestic and family life. Men have traditionally been associated with the public world and as a result have historically participated more actively in the world outside the home, including in professional and political realms.[140] Beyond our historical and cultural associations, however, there is not anything obviously connecting the female body with one sphere or the either, and the same can be said for the male body. However, the connection between women/private and men/public works both ways; it both encourages certain behaviors in men and women and works to gender particular spaces. The home becomes associated with feminine characteristics such as warmth and care, while the public square becomes associated with masculine characteristics such as ambition and independence. In this way, gender is imprinted onto other, not-obviously

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[135] *See* Military Selective Service Act, 50 U.S.C. § 3802 (2012) ("Except as otherwise provided in this chapter it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.").

[136] *See generally* Matambanadzo, *supra* note 129.

[137] *See* WIESNER-HANKS, *supra* note 129, at 13 ("This dualistic gender system has often been associated with other dichotomies, such as body/spirit, public/private, nature/culture, light/dark, up/down, outside/inside, yin/yang, right/left, [and] sun/moon ").

[138] *Id.* ("This dichotomy, along with others with which it was associated, has generally been viewed as a hierarchy, with the male linked with the stronger and more positive element in other pairs (public, culture, light, right, sun, etc.) and the female with the weaker and more negative one (private, nature, dark, left, moon, etc).").

[139] FIRESTONE, *supra* note 109, at 175 (noting that the biological dualism of the sexes for purposes of reproduction is then transferred into other cultural divisions, such as the association of men with the sciences and women with the arts).

[140] *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.").

gendered dichotomies, and those dichotomies, in turn, become associated with gender.[141]

The public/private divide is only one of a large list of dichotomies that is gendered such that women are associated with one half of the dichotomy and men the other. Predictably, the less-favored half of the dichotomy is the one generally associated with femaleness.[142] Women are the dark to men's light, the feminine passive to the masculine active. This is not simply 'a matter of men taking the best for themselves and assigning the rest to women, but instead, 'perceiving the 'worst' as being whatever women are perceived to be.'[143] As a result, the gendered dichotomies are not just a division of the world into two, complementary halves, but instead make up a hierarchy in which the thing associated with the masculine half is exalted over the thing associated with the female half.[144]

Thus, the human tendency towards dualistic thinking that is either explicitly or implicitly gendered often reinforces existing hierarchies, which place feminine characteristics and female bodies in subordinate positions to male characteristics and bodies.

D. Spirit/Body, Male/Female

The dichotomy between body and spirit described above is also understood as deeply gendered.[145] Under this worldview, women are associated with the physical body while men are associated with the non-

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[141] *See, e.g.*, SIMONE DE BEAUVOIR, THE SECOND SEX 69 (H.M. Parshley ed. and trans. Vintage Books 1989) ("Man never thinks of himself without thinking of the Other; he views the world under the sign of duality which is not in the first place sexual in character.").

[142] *See* Littleton, *supra* note 45, at 1280 ("A history of almost exclusive male occupation of dominant cultural discourse has left us with more than incompleteness and bias. It has also created a self-referencing system by which those thing culturally defined as 'male' are more highly valued than those identified as 'female, even when they appear to have little or nothing to do with either biological sex.").

[143] *Id.*

[144] *See* Olsen, *supra* note 110, at 454 ("The system of dualisms is hierarchized. The dualisms do not just divide the world between two terms; the two terms are arranged in a hierarchical order. Just as men have traditionally dominated and defined women, one side of the dualism dominates and defines the other. Irrational is considered the absence of rational; passive is the failure of active; thought is more important than feeling; reason takes precedence over emotion.").

[145] *See* Matambanadzo, *supra* note 129, at 234 ("Since dualism's introduction into Western Civilization, its anti-somatic attitudes have often been misogynistic. Western thought has associated women with the body and men with the soul.").

physical spirit or soul.[146] As in other gendered dichotomies, the female half of the dichotomy is assigned the less favored position—the body.[147]

This gendered dichotomy between body and soul is discussed in works by both Plato[148] and Aristotle.[149] It is woven through literature both ancient[150] and modern.[151] Early medical understandings of the reproductive process attributed the 'spark of life' exclusively to the male sperm, whereas the female body was merely the physical matter from which the fetus was created.[152] Even with a modern, medical understanding of reproduction, women's particular role in reproduction continues to contribute to, and support, the concept of a gendered mind/spirit dichotomy.[153] Women's association with the physical is also, in part, one of necessity. The physical needs of the body—food, care, comfort—must be attended to by someone or some group of people. By associating women with these base physical needs, men are freed from the necessity of attending to such matters and can therefore focus on matters of the mind and spirit.[154]

Religious beliefs have also supported the concept of a gendered spirit/body dichotomy. Scholars of Christianity have understood the story of Adam and Eve to embody the soul/body hierarchy. as 'Adam and Eve present both an ideal and a counter-ideal' and it is 'the weakness of Eve

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[146] *See* BORDO, *supra* note 124, at 11 ("This duality of active spirit/passive body is also gendered, and it has been one of the most historically powerful of the dualities that inform Western ideologies of gender."); Adam Thurschwell, *Radical Feminist Liberalism at the Heart of Freedom: Feminism, Sex, & Equality, by Drucilla Cornell (Princeton University Press 1998)*, 51 RUTGERS L. REV. 745, 765 (1999) ("The hierarchical dichotomy between 'mind' and 'body' (like that between 'culture' and 'nature') has long been associated with the gender hierarchy between 'man' and 'woman. ").

[147] Alison M. Jaggar & Susan R. Bordo, *Introduction* to GENDER/BODY/KNOWLEDGE 4 (Alison M. Jaggar & Susan R. Bordo, eds. 1989) ("The body, notoriously and ubiquitously associated with the female, regularly has been cast, from Plato to Descartes to modern positivism, as the chief enemy of objectivity.").

[148] *See generally* Spelman, *supra* note 115, at 109–31 (discussing the gendered mind-body dichotomy and its use in Plato's Symposium and The Apology).

[149] SARAH E. JOHNSON, STAGING WOMEN AND THE SOUL-BODY DYNAMIC IN EARLY MODERN ENGLAND 8 (2014) ("Both Platonic and Aristotelian schools of thought hierarchize the components of soul and body in a way that corresponds and contributes to early modern notions of gender hierarchy.").

[150] *See generally id.* at 1–26 (discussing the "traditional gendering of the rational soul as masculine and the body as feminine" in early modern English literature).

[151] ROSALIE OSMOND, MUTUAL ACCUSATION: SEVENTEENTH-CENTURY BODY AND SOUL DIALOGUES IN THEIR LITERARY AND THEOLOGICAL CONTEXT 157–61 (1990).

[152] EVE KELLER, GENERATING BODIES AND GENDERED SELVES: THE RHETORIC OF REPRODUCTION IN EARLY MODERN ENGLAND 112 (2006).

[153] *See generally* BORDO, *supra* note 124, at 11–14, 71–97 (discussing how women's role in reproduction often causes society to view them only as "bodies," not as embodied persons); FIRESTONE, *supra* note 109, at 8 (discussing that "biology itself—procreation—is at the origin of the dualism" and that the reproductive functions of men and women are inherently unequal, setting up the domination of one sex by the other).

[154] *See* ROBIN WEST, CARING FOR JUSTICE 112 (1997) ("Someone must tend to the body's very real, earthbound, and contingent needs if the mind is to be freed for transcendental and political deliberations. So long as women disproportionately tend to those earthly, bodily needs, they are that much less equipped for the duties of citizenship—as citizenship has been traditionally understood.").

that is analogous to the flesh.'[155] This take on the Genesis story has sometimes been explicitly taught by Christian leaders.[156]

This association of women with the natural, physical body has been discussed from the earliest days of the feminist movement.[157] Feminists disagree sharply over whether such a dichotomy has any basis in reality. and whether women's association with the natural and physical is inherently harmful to the cause of women's equality or could be viewed as a source of special power.[158] But whether or not this association *could be* turned into something positive for women, it is clear that up to this point in history that it has primarily served to cement women's inferiority.[159] As persuasively stated by Susan Bordo:

> The cost of such projections to women is obvious. For if, whatever the specific historical content of the duality. *the body* is the negative term, and if woman *is* the body. then women *are* that negativity. whatever it may be: distraction from knowledge, seduction away from God, capitulation to sexual desire, violence or aggression, failure of will, even death.[160]

Thus, the Court's use of a hierarchy which preferences spiritual autonomy over bodily autonomy—even if it is applied evenly to all people—is deeply problematic because such a hierarchy is inherently gendered.[161] The hierarchy is inherently gendered for a number of inter-

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[155] OSMOND, *supra* note 151, at 158.

[156] *See, e.g.*, JEREMY TAYLOR, XXV SERMONS PREACHED AT GOLDEN GROVE: BEING FOR THE WINTER HALF-YEAR, BEGINNING ON ADVENT-SUNDAY, UNTIL WHIT-SUNDAY 172 (1673) ("The dominion of a man over his Wife is no other than as the Soul rules the body ").

[157] *See generally* DE BEAUVOIR, *supra* note 141 at 37 (discussing, in part, how "the body of woman is one of the essential elements in her situation in the world").

[158] *See generally* Ynestra King, *Healing the Wounds: Feminism, Ecology, and Nature/Culture Dualism*, *in* GENDER/BODY/KNOWLEDGE, *supra* note 147, at 115, 115–134 (discussing differing reactions to the natural/cultural dichotomy by liberal feminists, cultural feminists, radical rational feminists, ecofeminists, socialist feminists, the women's spirituality movement, and ecofeminism).

[159] G. Kaplan and Lesley J. Rogers, *The definition of male and female: Biological reductionism and the sanctions of normality*, *in* FEMINIST KNOWLEDGE, CRITIQUE AND CONSTRUCT 209 (S. Gunew, ed., 1990) ("Feminine virtues have been celebrated by men for thousands of years—without much evidence of gaining women any more rights or freedoms"). Similar patterns are evident in the association and subsequent degradation of people of color with the physical body. *See* BORDO, *supra* note 124, at 9 ("[R]acist ideology and imagery that construct non-European 'races' as 'primitive, 'savage, sexually animalistic, and indeed more *bodily* than the white 'races' extends to black women as well as black men."); CHRIS SHILLING, THE BODY AND SOCIAL THEORY 49 (2d ed. 2003) ("[B]lack peoples represented 'dangerous others' and were viewed as uncivilized, uncontrollable sexual and physical beings who constituted a threat to the moral order of Western civilization."). This association was used to bolster the moral case for slavery. *Id.* at 51 (indicating that a focus on the black body was widely used as a justification for slavery).

[160] BORDO, *supra* note 124, at 5 (emphasis in original).

[161] This argument—that the Court's use of a hierarchy which preferences spiritual autonomy over bodily autonomy is inherently gendered—should not be confused with an argument that the Court's opinion in either *Young* or *Abercrombie* are themselves sexist. After all, the plaintiffs in both cases

related reasons. First, as women have traditionally been associated with the physical body while men have been associated with the mind or spirit, any hierarchy that places one type of autonomy over the other recreates the hierarchy between men and women generally by placing the thing associated with femaleness (the body) in an inferior position to the thing associated with maleness (the spirit).[162] Such a hierarchy necessarily brings along with it a parallel understanding of a hierarchy that places maleness over femaleness.[163] Moreover, women are more likely to experience threats to their bodily autonomy because of their unique role in the reproductive process and their historical subjugation as a sex—thus making robust legal protections for bodily autonomy inherently more valuable to women.[164]

Although there may be compelling reasons for the law to preference spiritual autonomy. it should not go unnoticed that such a system recreates an already existing system of gender privilege. Such an unexamined reinforcement of existing systems of privilege runs the risk of unintentionally perpetuating a hierarchy between the advantaged and disadvantaged group—even when such groups are not obviously implicated on the face of legal principles.

E. Women's Investment in Bodily Autonomy

The harm created through the use of a hierarchy which preferences legal rights to spiritual autonomy over legal rights to bodily autonomy is not merely a philosophical harm, however. As this section explores, such a hierarchy is problematic for women for reasons more immediate and practical.[165] Specifically. women's greater investment in legal protec-

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were women, and both plaintiffs ultimately prevailed. Instead, this argument is based in a deeper critique of the fundamentally gendered understanding of which rights are worthy of protection and why.

[162] *See* BORDO, *supra* note 124, at 11 ("This duality of active spirit/passive body is also gendered, and it has been one of the most historically powerful of the dualities that inform Western ideologies of gender.").

[163] The recognition of an underlying hierarchy in legal thought which preferences rights to spiritual autonomy over rights to physical autonomy in no way undermined the fact that the rights to spiritual autonomy are often inappropriate curtailed by private and state actors, as well. Of course, there are countless examples of religious oppression and discrimination that have occurred throughout the course of American history. The presence of this discrimination against religious believers does not undermine that, taken as a whole, rights to spiritual autonomy are still afforded a more favored position than rights to physical autonomy in much of legal thought and precedent.

[164] *See* WEST, *supra* note 154, at 102 ("When a woman suffers violence or threats of violence from an intimate she loses not only her sense of security against physical assault, but also her privacy—both the privacy of her body and the privacy of the dwelling in which the abuse occurs.").

[165] *See* Littleton, *supra* note 45, at 1316 (attributing "[t]he inequality of women in their lived-out experience" to the infringement of "having everything that is associated with women defined as less valuable, less necessary to consider, less important.").

tions for bodily autonomy guarantee that they experience greater harm when such protections are absent or subordinated to other types of rights.

How can this be when men, too, would benefit from robust protection for bodily autonomy? Indeed, all people share an interest in a right to bodily autonomy. Many would describe bodily autonomy as a fundamental human right—at the very heart of human dignity. The ability for an individual to be free from unwanted physical intrusions, as well as the freedom to use their body to move through the world in the way they choose, is vitally important to both men and women.

Marginalized individuals, however, have an even more vested interest in the preservation of the importance of bodily autonomy in legal systems because absent this protection such people are more in danger of experiencing violations of their bodily autonomy. It could thus be persuasively argued that a paramount right to bodily autonomy is equally important to every individual whose body differs in any meaningful respect from those bodies that are societally favored—i.e. any bodies which are not white, male, cisgender, able-bodied, etc.[166] Those with 'favored' bodies need legal protections much less often because, to a large extent, the law assumes the presence of these types of bodies and their centrality. For instance, laws regarding the housing and treatment of prisoners assume cisgender bodies and may have negative consequences for transgender prisoners whose bodies do not conform to society's expectation for their gender.[167] Likewise, it is obvious that laws mandating that public spaces be accessible to those in wheelchairs are more vital to individuals who require wheelchairs than those individuals who are not in wheelchairs.[168] Thus, laws that protect or promote bodily autonomy are inherently more important to those with disfavored bodies because absent these laws, these individuals encounter additional obstacles that those with favored bodies need not contend with.

The autonomy of women's bodies is more consistently undermined than the bodies of men.[169] Whether because of the realities of human

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[166] *See* SHILLING, *supra* note 159 at 53 ("Historically, the practice of equating an individual's worth with their body has favoured dominant groups in society. Locating the causes of social inequalities in the unchanging, natural, biological body serves to make protests against the status quo appear both futile and misguided.").

[167] Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 176–77 (2006) ("Upon incarceration, transgender individuals find themselves at the mercy of a hyper-gendered system: prisoners are sorted into sex-segregated facilities where traditional gender roles are strictly enforced.").

[168] *See* Koppelman, *supra* note 101 at 598 ("Primary goods have different value for different people. The same bundle of goods will give much more freedom to a healthy young man than it will to a pregnant woman or a paraplegic.").

[169] Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUMAN RIGHTS QUARTERLY 486, 486–92 (1990) (detailing the various assaults to women's bodily autonomy worldwide).

biology and reproduction, the prevalence of gender inequality, or the practice of certain religious or cultural traditions, across history women have had less ability to control their physical persons.[170] Further, even those women who have 'disfavored' bodies in ways unconnected to their sex must often bear the double weight of these characteristics combined with their status as women.[171] For example, many state statutes mandate that a physically incompetent pregnant woman be kept alive for purposes of protecting fetal life, even when her previously expressed wishes, the wishes of her family or medical power of attorney, or even her healthcare provide otherwise.[172] Thus, while laws protecting individuals' right to bodily autonomy are critical for every person, these laws are even more critical for women because women's right to bodily autonomy is more likely to be challenged and undermined—even while it may be challenged on the basis of other identities in overlapping or intersecting ways.

The following sections will examine several ways in which women are uniquely dependent on robust legal protections for bodily autonomy and explore how laws protecting such autonomy correlate to gender equality.

i. Reproductive Capacity

Legal protections for bodily autonomy are particularly important to women because of women's unique role in the reproductive process,[173] particularly the demands of pregnancy and childbirth.[174] A woman's

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[170] *Id.*

[171] Such an intersectional approach, which takes into account the overlapping systems of oppression and how such intersecting identities change the lived experience of an individual, is obviously a worthwhile and necessary project. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). This paper focuses on just aspect of this phenomenon—sex—in order to bring to light the fundamental incorrectness of the soul/body dichotomy and the inappropriateness of its use to determine rights for particular plaintiffs. This focus is entirely the result of time and space constraints, and indeed, the need for a more robust intersectional analysis in future work analyzing the use of such dichotomies is clear.

[172] Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 93 (1997) ("[T]he advance directive statutes of thirty-six states require that life-prolonging medical care not be withheld or withdrawn from an incompetent pregnant woman, regardless of her own wishes previously expressed in a living will, or, in many states, the wishes of her designated proxy decisionmaker.").

[173] *See* WEST, *supra* note 154, at 127 ("Surely the most obvious and perhaps the most significant difference between women and men is the different roles the two parents play in the biology of reproductions. The mother's biological role in reproduction minimally involves pregnancy, childbirth, and lactation, while the father's is limited to ejaculation. One consequence of that baseline difference is that women, unlike men, invest a good bit *more* of their material, physical, bodily resources into the development of fetal life.").

[174] *See* FIRESTONE, *supra* note 109, at 8 ("[W]omen throughout history before the advent of birth control were at the continual mercy of their biology—menstruation, menopause, and 'female ills,

ability to make decisions about what happens to her body in the childbearing process clearly implicates her right to bodily autonomy: such ability represents a temporal subset of her right to make decisions about her physical body throughout her life. Legal scholars have recognized this fact and tied a woman's right to decide when and how to bear children as fundamental to women's legal autonomy.[175] The U.S. Supreme Court has also anchored the right to abort a pregnancy to 'a concept of personal autonomy derived from the due process guarantee.'[176]

Despite the supposedly fundamental nature of the right to physical autonomy, pregnancy is a time period in which the legal protections for bodily autonomy are consistently undermined or entirely absent.[177] Historically, women's role in the reproductive process was an accepted legal basis for treating them entirely different than men.[178] And even now, a woman's right to physical autonomy during pregnancy and childbirth is a constantly shifting right, and one that is often dependent on the particular circumstances of her pregnancy, her socioeconomic status, and her geographic location.[179] Pregnant women have been forced to undergo major surgery[180] and receive blood transfusions against their wishes,[181] have been criminally punished for 'harm' inflicted on a fetus they were carry-

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constant painful childbirth, wetnursing and care of infants, all of which made them dependent on males (whether brother, father, husband, lover, or clan, government, community-at-large) for physical survival.").

[175] *See* April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 726 (2004) ("*Roe v. Wade* is perhaps the most important case decided by the United States Supreme Court furthering women's autonomy, equality, and hence citizenship, in the twentieth century."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984) ("[R]estricting access to abortion dramatically impairs the woman's capacity for individual self-determination.").

[176] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 380–81 (1985).

[177] *See, e.g.*, Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L.J. 9 (1987).

[178] *See* Williams, *supra* note 43, at 333 ("From the beginnings of our Republic until well into the twentieth century, the legal rights and duties of men and women were pervasively and significantly different from each other. The legal distinctions flowed from the central premise that men and women were destined for separate social roles because of innate differences between them, most centrally women's reproductive function.").

[179] Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 592 (2010) (discussing the class-based effect of Supreme Court's ruling in UAW v. Johnson Controls, Inc.).

[180] *See* Jefferson v. Griffin Spalding Cty. Hosp., 274 S.E.2d 457 (Ga. 1981) (per curiam) (affirming a court order compelling caesarian section when physicians testified that vaginal delivery posed a 50% chance of the mother's death and a 99% chance of fetal death, as compared to an almost 100% chance that both would survive with surgery); In re Madyun, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. 1986) (requiring caesarian surgery to be performed for the benefit of the fetus); In re A.C. 573 A.2d 1235, *57–72 (D.C. 1990).

[181] See Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537 (D.C. 1964) (ordering pregnant woman to undergo blood transfusion over her religious objections to preserve the fetus' life); *In re* Jamaica Hosp., 491 N.Y.S. 2d 898 (Sup. Ct. 1985) (same).

ing because of their choices during pregnancy.[182] and have been forced to undergo transvaginal sonograms before gaining access to legal abortion.[183]

Women's reproductive capacity doesn't merely serve to undermine women's bodily autonomy only when that capacity is utilized. The state has a long history of impinging on the bodily autonomy of women because of the potential of women's reproduction. Starting with the cases which approved of the use of forced sterilization of women because of 'feeble-mindedness"[184] all the way through modern day practices of forcing women to be sterilized before receiving government assistance[185] or as part of criminal plea deals,[186] women's right to control their own bodies has been undermined because of their reproductive capacity whether that capacity is currently being utilized or not.

It is not the case, however, that courts permit the physical autonomy of parents to be undermined—regardless of their sex—for the sake of their current or potential children. Despite the fact that courts regularly undermine women's bodily autonomy because of women's role in the reproductive process, bodily autonomy remains sacrosanct when a challenge to such autonomy would equally affect men and women. For instance, there is no legal duty for a parent to provide life-saving blood or bone marrow to a child because such a requirement would undermine the physical autonomy of the parent.[187] This is in contrast to the simple fact that many abortion restrictions have the exact same effect on a woman's physical autonomy by forcing her to carry an unwanted pregnancy to term.[188]

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[182] Nina Martin, *This Law is Supposed to Protect Babies, But It's Putting Their Moms Behind Bars*, MOTHER JONES (Sept. 23, 2015), http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war [http://perma.cc/EC2M-6TS5] (discussing state laws which prosecute mothers for child endangerment as a result of prenatal drug use).

[183] *See* Borgmann, *supra* note 75, at 1122–27 (discussing the increasing use of forced ultrasound examinations on women seeking abortions).

[184] *See* Buck v. Bell, 274 U.S. 200, 205 (1927) (ruling that state law permitting compulsory sterilization of the intellectually disabled did not violate Due Process).

[185] *See* Pamela D. Bridgewater, *Reproductive Freedom As Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 404 (2000) (discussing the mandated use of Norplant for women in public assistance programs).

[186] *See* Stacy Barchenger, *A dead baby, an ill mother and a DA's intervention: Sterilization as Bargaining Chip in Child Neglect Case Prompts District Attorney to Take Notice*, THE TENNESSEAN, http://www.tennessean.com/longform/news/crime/2015/03/17/jasmine-randers-committed/24870929/ [http://perma.cc/82AR-7XQH] (discussing how assistant district attorney "would not discuss a plea deal unless [the defendant] agreed to get her tubes tied").

[187] *See* Susan Frelich Appleton, *Unraveling the "Seamless Garment" Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294, 299 (2005) ("[T]he law never asks the parent of a child to provide, say for example, a kidney or bone marrow for transplantation even if the child would die without the donation, because even recognized duties to rescue steer clear of such physical invasions and risks.").

[188] *See* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571–73 (1979) (noting that abortion restrictions are often at odds with the general law of samaritanism, which does not require the impingement or forfeiture of your own physical body in order to save another).

Women's unique role in the reproductive process thus makes them more vulnerable to a variety of assaults on their bodily autonomy as the state continues to interfere in the reproductive process in ways that primarily or solely affect women. Women are, therefore, more inherently invested in robust legal protections for bodily autonomy generally. as they are more likely to need such protections in the face of a historical belief that women's bodily integrity is somehow less important as a result of her reproductive capacity or that state intervention in bodily autonomy is permissible in the reproductive context.[189] Legal structures that fail to recognize the importance of such protections to women specifically—such as those that subjugate bodily autonomy to spiritual autonomy—are inherently and unavoidably unfair to women.

ii. Violence Against Women

Violence against women is a worldwide problem.[190] For many women, physical violence is the rule, not the exception. Over 50% of women in the United States report experiencing physical assault as a child, 17.6% have been the victims of rape, 8.1% of women report being stalked, and 22.1% of surveyed women report being physically assaulted by an intimate partner at some point in their lives.[191]

Both women and men experience violence as a threat to their bodily autonomy, but the nature of violence against women is unique in several important respects.[192] First, women are three times more likely than men to be physically assaulted by an intimate partner.[193] Women are even more likely than men to suffer severe violence at the hands of an intimate

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[189] *See* WEST, *supra* note 154, at 96 (noting that harms that are particular to women "often do not 'trigger' legal relief in the way that harms felt by men alone or by men and women equally do" and that women are thus doubly injured—first by the harm itself and second by the lack of legal response to such harms).

[190] *See generally* U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE WORLD'S WOMEN 2010: TRENDS AND STATISTICS (2010), http://unstats.un.org/unsd/demographic/products/worldswomen/WW_full%20report_color.pdf [http://perma.cc/G2JL-A3JM] [hereinafter Trends and Statistics].

[191] U.S. DEP'T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii—iv (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf [http://perma.cc/7ATZ-NQCJ] [hereinafter Violence Against Women Report].

[192] Keerty Nakray, *Introduction* to GENDER-BASED VIOLENCE AND PUBLIC HEALTH: INTERNATIONAL PERSPECTIVES ON BUDGETS AND POLICIES 1, 4 (Keerty Nakray ed., 2013) (noting that one of the "main hindrances to an effective response to gender-based violence is the misconception that the parity or symmetry of violence that is perpetrated by males against females is the same as violence perpetrated by women against men").

[193] Violence Against Women Report, *supra* note 191, at 26 (noting that one out of five U.S. women has been physically assaulted by an intimate partner, while only one out of fourteen U.S. men report physical assault of this type).

partner—up to 14 times more likely.[194] This type of violence carries particularly long-lasting consequences, as violence at the hands of an intimate partner is more likely to be ongoing, harder to escape, and accompanied by other forms of violence, such as psychological or sexual violence.[195] In addition, this type of violence exposes women to distinctive types of harm because it has ramifications not only for a woman's physical well-being, but also her sense of security in her body and her home.[196]

Compounding this problem is the fact that traditional criminal justice remedies for the victims of violence are often developed with the male victim in mind, and do not account for the particular needs of women who may experience violence in distinct and unique ways.[197] While progress has been made to address these deficiencies, state laws that address gender-based or domestic violence are still often absent, or ineffective at meaningfully addressing the problem they seek to resolve.[198] Thus, women are less likely to enjoy protections or redress for the types of violence they experience.

Further, women are much more likely to experience violence because of their gender—often in response to the assailant's perception that the victim failed to adhere to gender expectations (including a woman's expression of personal autonomy). Gender-based violence 'occurs as a cause and consequence of gender inequalities. '[199] Such violence includes a range of harmful behaviors, the most egregious of which is femicide.[200] Violence against women is often explained as a natural reaction to a woman who asserts her own bodily autonomy. whether through her choice of dress or daring not to be physically cowed by a man.[201] Indeed, in

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[194] *Id.* at 27 (noting that women were only two to three times more likely to report incidents of intimate partner violence that included pushing, grabbing or shoving than men, but seven to fourteen times more likely to report incidents of intimate partner violence that included beating, choking, attempted drowning or threats with a firearm).

[195] Trends and Statistics, note 190, at 131 (2010) ("Violence that women suffer from their intimate partners carries particularly serious and potentially long-lasting consequences, as it tends to be repetitive and accompanied by psychological and sexual violence as well.").

[196] *See* WEST, *supra* note 154, at 102 ("When a woman suffers violence or threats of violence from an intimate she loses not only her sense of security against physical assault, but also her privacy—both the privacy of her body and the privacy of the dwelling in which the abuse occurs.").

[197] *See* Ronagh McQuigg, *Gender-based violence as a public health issue and the legal perspective: A critical overview*, in GENDER-BASED VIOLENCE AND PUBLIC HEALTH: INTERNATIONAL PERSPECTIVES ON BUDGETS AND POLICIES 41–42 (Keerty Nakray, ed. 2013).

[198] *See, e.g.* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits, at *15–20, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032809 (detailing failed state policies to address domestic violence and other types of violence against women).

[199] ALYS M. WILLMAN & CRYSTAL CORMAN, SEXUAL AND GENDER-BASED VIOLENCE: WHAT IS THE WORLD BANK DOING, AND WHAT HAVE WE LEARNED? 6 (2013).

[200] *Id.* at 8.

[201] *See* BORDO, *supra* note 124, at 7 ("In numerous 'slasher' movies, female sexual independence is represented as an enticement to brutal murder, and chronic wife batterers often claim that their wives 'made them' beat them up, by looking at them the wrong way, by projecting too much cheek, or by some other (often very minor) bodily gesture of autonomy.").

many places throughout the world, women themselves accept that asserting their physical independence or autonomy is a sufficient basis for physical violence against them.[202] Repeated acts of such gender-specific violence impairs a woman's ability to express her own autonomy, as she learns to subjugate her own desires and self-expression in order to avoid further violence against her.[203] Noting the specific harms associated with gender-based violence is critical to combating such violence,[204] especially considering the historical context, which suggests that the law is less responsive to the types of harm that are unique to women.[205]

While the right to be free from physical violence is important to all people, the ability to be free from violence is particularly important to women who are more likely to be the victims of such violence in their intimate and familial lives, more likely to experience such violence as a result of their gender or their assertion of bodily autonomy, and less likely to enjoy effective state intervention into the types of violence that are specific to their experience. Thus, in this context as well, women are more invested in robust protections to bodily autonomy, which may serve to counteract these inequities in their experience of physical violence.

iii. Women's Bodily Autonomy and Gender Equality

The particularly gendered issues surrounding threats to bodily autonomy detailed in the previous two sections share a common theme—their connection to women's equality. Each threat to women's bodily autonomy undermines women's ability to participate as equal members of society, both through and as a result of attacks on their bodily autonomy. Thus, the importance of physical autonomy to women is rooted not

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[202] *See* Trends and Statistics, *supra* note 190, at xi (noting that in many countries women believe that transgressions such as "venturing outside without telling their husband" are "sufficient grounds for being physically hit").

[203] *See* WEST, *supra* note 154, at 104 (noting that repeated intimate partner violence has the potential to cause the "death of a liberal and individualistic sense of self-possession" as "the self has been invaded by the desires, pleasure, will, and actions of another, and stronger, life-threatening human being").

[204] *See* Nakray, *supra* note 192, at 4 (noting that one of the "main hindrances to an effective response to gender-based violence is the misconception that the parity or symmetry of violence that is perpetrated by males against females is the same as violence perpetrated by females against males").

[205] *See generally* WEST, *supra* note 154, at 94–178 (discussing how women are protecting by the law only to the extent that their harms mirror the type of harm experienced by men, and that harms unique to women are often not legally redressable).

only in the importance of their physical control of their own person, but how such control enables them to enjoy equality in all spheres of life.[206]

This connection between bodily autonomy and equality is not novel. Many theorists have noted that women's ability to control their physical bodies, and more specifically their reproductive autonomy. is critical to ensuring that women have the ability to be equal with men in all spheres of society.[207] Absent the ability to control their own physical childbearing capacity. women cannot participate as equals in professional or political life to the same extent as men because of the physical requirements of pregnancy and childbirth.[208] Similarly. many scholars have noted how violence against women is often employed in the service of the maintenance of an unequal gender system.[209]

Thus, while all people are invested in a robustly protected right to bodily autonomy. women's position in society suggests that the protection of such autonomy is even more critical to them. This importance stems both from the increased likelihood that their physical autonomy is challenged by individual men, religious traditions, or society at large, and because absent such bodily autonomy they cannot meaningfully participate as equal members of society.

Despite the clear link between granting women full, legally-protected bodily autonomy and gender equality. this is still not the framework in which courts discuss issues of bodily autonomy. The U.S. Supreme Court has been unable to meaningfully incorporate the link between bodily autonomy and equality of treatment, choosing instead to view them as separate concepts.[210]

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[206] *See* Littleton, *supra* note 45, at 1316 (attributing "[t]he inequality of women in their lived-out experience" to the infringement of "having everything that is associated with women defined as less valuable, less necessary to consider, less important").

[207] *See* Ginsburg, *supra* note 176, at 375 ("Inevitably, the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life.").

[208] *See* FIRESTONE, *supra* note 109, at 11 (arguing that a sex class revolution would only be possible were women to be able to own their own bodies, including their fertility).

[209] *See* Trends and Statistics, *supra* note 190, at 137 (2010) ("Wife-beating is a clear expression of male dominance; it is both a cause and consequence of women's serious disadvantage and unequal position compared to men."). Indeed, reproductive justice movements and movements targeted at preventing or addressing violence against women are both deeply rooted in a basic concept of women's right to bodily autonomy and the connection between that autonomy and access to equality. *See* Eesha Pandit, *On the Same Bodies: Exploring the Shared Historical Legacy of Violence Against Women and Reproductive Injustice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 549, 550 (2015) ("The way we conceive, define and fight for reproductive freedom as well as freedom from violence is rooted in the belief that our bodies are our own. Both of these struggles stand in opposition to historical and contemporary efforts to ensure that the bodies of women, cis-and transgender women alike, are not fully ours. The ability to control our body is deeply connected to the amount of economic, social, cultural and political power we have.").

[210] *See* Ginsburg, *supra* note 176, at 375–76 (noting that the Supreme Court has treated reproductive autonomy under a substantive due process rubric not expressly linked to issues of gender discrimination).

As the preceding sections make clear, a hierarchy that subordinates rights to physical autonomy has real consequences for women, which extends beyond the theoretical harm that results from disfavoring the category of rights traditionally associated with women. It also continues to undervalue a type of right that is uniquely important to women's lived experience, including their ability to participate equally in all facets of society.

IV. THE HIERARCHY IN PRACTICE – *HOBBY LOBBY*

In the year prior to deciding the *Abercrombie* and *Young* cases, the Court handed down another important opinion that reveals its reliance on a hierarchy between rights of physical autonomy and spiritual autonomy. In *Burwell v. Hobby Lobby Stores, Inc.*.[211] a for-profit corporation sought a ruling that the Affordable Care Act's (ACA) mandate that employers provide health insurance coverage—which included contraception and related education and counseling—violated the company's constitutional and statutorily-granted rights to religious freedom.[212] The Court found that the regulations violated the Religious Freedom Restoration Act (RFRA), which 'prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest. '[213] The holding and reasoning in *Hobby Lobby* is problematic for a number of reasons, argued persuasively by other scholars.[214] What is interesting about *Hobby Lobby* for purposes of the present discussion is that it neatly previews the contrasting approaches to physical autonomy and spiritual autonomy that the Court goes on to adopt in the *Abercrombie* and *Young* decisions the following year.

In *Hobby Lobby*, the Court explicitly invokes the concept of spiritual autonomy. As Justice Kennedy's concurring opinion states:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator

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[211] 134 S. Ct. 2751 (2014).

[212] *Id.* at 2765.

[213] *Id.* at 2759.

[214] *See, e.g.* Travis Gasper, *A Religious Right to Discriminate: Hobby Lobby and 'Religious Freedom' As a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 416 (2015) (arguing that the "exemption based upon *any* 'sincerely held' religious belief could lead to increased discrimination against employees, ' especially LGBT employees); Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 76 (2015) (arguing the holding of *Hobby Lobby* is problematic because it "elevates the power of corporate managers over that of secular society").

> and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.[215]

The Court's concern with preserving this autonomy of religious beliefs is paramount to their decision, which focuses almost exclusively on the spiritual rights of the plaintiff.[216]

Almost as an aside, the Court 'assumes that the [Department of Health and Human Services] regulation here at issue furthers a legitimate and compelling interest in the health of female employees.'[217] Thus, the employees' right to physical autonomy in the form of access to a range of healthcare products and services, although recognized by the Court as a freestanding interest, is seen as less important than the spiritual autonomy of the employer. The dissent persuasively points to this disparity in treatment, stating that:

> In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.[218]

Clearly linking women's ability to access these services to a concept of physical autonomy, Justice Ginsburg states that '[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan' will be 'the woman's autonomous choice.'[219] Further, the dissent explicitly connects the ability of women to enjoy bodily autonomy to gender equality, stating '[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.'[220]

Thus, *Hobby Lobby* served as a warning shot for what would happen when a right to spiritual autonomy clashed with a contrary right to physical autonomy. The Court used the *Young* and *Abercrombie* deci-

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[215] *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J. concurring).
[216] *Id.* at 2782–83.
[217] *Id.* at 2786 (Kennedy, J. concurring).
[218] *Id.* at 2787 (Ginsburg, J. dissenting).
[219] *Id.* at 2799 (Ginsburg, J. dissenting).
[220] *Id.* at 2787 (Ginsburg, J. dissenting) (quoting Casey, 505 U.S. at 856 and drawing attention to the fact that the birth control coverage was expressly included to be "responsive to women's needs" and that the Court ought to be more cognizant of the "genesis of [the] coverage" as a source to "enlighten the Court's resolution" of the case).

sions decided the next year, however, to expand on the themes from *Hobby Lobby*, clearly establishing the importance of a right to spiritual autonomy over and above the right to physical autonomy. And the Court did so even in the context of a case where the physical autonomy claim was front and center.

V. Correcting the Spirit/Body Hierarchy

By implicitly favoring the right to spiritual autonomy over the right to bodily autonomy in its recent decisions, the Court has (perhaps unwittingly) enforced a hierarchy that undermines women's legal status and equality. But as *Hobby Lobby* makes clear, there may be situations in which such rights come into direct conflict with one another—in such a scenario, how is the Court to determine which rights are paramount? The following sections explore options to address this potential conflict.

A. Flipping the Script to Favor Bodily Autonomy

One potential response to the Court's use of a mind/body autonomy hierarchy would be to invert the hierarchy, and recognize that bodily autonomy may be more important that spiritual autonomy. There is certainly an argument that bodily autonomy can be seen as a right of paramount importance because it is often through the body that we explore and express various social, political, and cultural identities.[221] Absent a robust and comprehensive right to bodily autonomy, individuals may be prevented from meaningfully expressing any other type of autonomy, including spiritual autonomy, because lacking control over their physical person prevents them from worshiping in the manner that they find spiritually necessary.[222] As such, the right to bodily autonomy becomes almost a prerequisite for all other human rights, and on that basis one could argue that bodily autonomy should be favored over other types.

Further, inverting the hierarchy in order to preference the right to bodily autonomy may have a positive, and salutary, effect on women by injecting a greater level of scrutiny to scenarios in which bodily autonomy is challenged—including those scenarios discussed above which uniquely or overwhelmingly affect women. Perhaps through 'flipping

[221] *See* Ramachandran, *supra* note 75, at 4, 29–44 (2009) (arguing that the body is a "primary site for exploring different values, subcultures, and identities").
[222] *Cf.* Feldblum, *supra* note 76, at 123–156 (describing interaction between conduct and belief).

the script' on the autonomy hierarchy, women will have the chance to participate equally because they will receive special and additional protections in areas where historically they have endured the opposite.

This inversion would be reflective of a particular strand of feminist thought that accepts the natural division of feminine and masculine traits into a dichotomy but believes that feminine traits are as good, or in some instances better, than those associated with masculinity. As a result, this type of feminist thought would likely support an argument that bodily autonomy is more important than spiritual autonomy not in spite of its connection with the feminine half of the dichotomy, but indeed because of it.[223]

B. Affording All Autonomy Rights Favored Status

Another approach is to resist the tendency to place these two rights to spiritual and bodily autonomy into a hierarchy at all. Such an approach would recognize that rights to both physical and spiritual autonomy are important and necessary to a concept of individual liberty. If Ms. Young's and Ms. Elauf's claims were to be evaluated under such a standard, each could have been 'favored' because the rights implicated would be recognized as crucial. Using such an approach, however, would necessitate the creation of a method for determining which rights take precedence when the two collide, such as in *Hobby Lobby*, without relying on the spirit/body hierarchy. While suggesting such a system is outside the scope of the current project, a number of options are immediately available, including analyzing the nature or extent of the burden on individual rights, the closely-held nature of the rights involved, or the likelihood that choosing one set of rights over another would negatively impact that group or individual's ability to participate equally in society.[224] Whatever method is employed to determine which rights take precedence, however, would not rely on the assumed superiority of a right to spiritual autonomy.

A further reason to afford physical and spiritual autonomy equal footing is that describing physical and spiritual autonomy as separate, and even conflicting, is normatively incorrect.[225] Despite the human ten-

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[223] *See* Olsen, *supra* note 110, at 455 (describing feminist strategies when confronted with gendered dichotomies, including one that "accepts the identification of women with irrational, passive, and so forth, but proclaims the value of these traits; they are as good or better than rational, active, and so forth").

[224] *See* Feldblum, *supra* note 76, at 123–150 (describing how such conflicting rights might be analyzed is under a Due Process analysis).

[225] *See* Fox & Stein, *supra* note 111, at 1009 (arguing that the "widely held assumption [that mind and body are distinct, separate entities] reflects a deep delusion—conceptually flawed and empirically false—that distorts our laws in pernicious ways").

dency to separate things into dichotomies, such a separation is not always reflective of reality.[226] The separation of spiritual and bodily autonomy is one such false dichotomy. In fields outside the law, such a separation has been rejected[227]—in some cases supported by scientific evidence that a sharp distinction between physical and non-physical sensation is not reflective of the human brain.[228]

The separation breaks down flowing in both directions. The spirit, as far as we know, cannot be physically separated from the body.[229] It is dependent on the body for its existence and experiences the world through the physical senses of the body.[230] The body, however, derives its meaning and understands its purpose through the soul within it. We use our bodies to move through the world and to express our spirit—in small ways such as our choice of dress and adornment and in large ways such as our devotion to performing religious or spiritual rituals using our physical bodies.[231] The falseness of the autonomy dichotomy becomes particularly apparent in a number of circumstances, including circumstances that solely affect women. For instance, the recent rise of state laws which require women seeking an abortion to undergo a forced sonogram implicates not only the physical autonomy of the woman undergoing the sonogram, but also her right to be free of the moral judgments of the state in her choice.[232] Thus, a system of legal thought that sepa-

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[226] *See* Olsen, *supra* note 110, at 458–59 (noting that feminists "have begun to question the basic dichotomies themselves" and to "challenge[ ] the border between the two terms in each of the dualisms, problematize[ ] the straightforward opposition between them, and deny their separateness.").

[227] *See* Fox & Stein, *supra* note 111, at 978 ("It should come as little surprise that mind-body dualism has most much of its influence in philosophy and has been widely rejected within psychiatry, psychology, and neuroscience.").

[228] As Adam Benforado explains in his article, *supra* note 118, at 1190:

> '[R]ecent research in embodied cognition by cognitive psychologists, social psychologists, and neuroscientists, among others, casts strong doubt on the traditional understanding of the mind and body as placed "in opposition, as well as more recent scientific understanding of thought as abstract, disembodied information processing." In particular, that research suggests "the body helps to constitute the mind" and that the Cartesian boundaries between the mind and the body must be dissolved. Our perceptions, attitudes, feelings, memories, and judgments are influenced—indeed, constructed—by bodily states and experiences. Abstract thought is actually grounded to a significant extent in our bodies' interactions with the concrete, physical world.

[229] *See* Fox & Stein, *supra* note 111, at 1009–10 ("Contemporary neuroscience, psychology, and psychiatry make plain that our mental and physical lives interact with each other (and our environment). A person cannot be reduced to his mind or separated from his body. He is, inescapably, both at once.").

[230] *See* Jaggar & Bordo, *supra* note 147, at 4 (challenging the conventional hierarchy of mind over body and asserting that the body is central to epistemology). *See generally* Benforado, *supra* note 118, at 1191.

[231] James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and A Democratic State*, 1998 B.Y.U. L. REV. 479, 484 (1998) ("The ultimate basis of religious liberty, as with all civil liberty, is found in the dignity and sanctity of the human person and the inviolability of the human conscience.").

[232] *See* Borgmann, *supra* note 75.

rates the two types of autonomy may not be representative of the reality of human experience.[233]

Indeed, the *Young* and *Abercrombie* cases are a prime example of how the dichotomy between spiritual and physical autonomy is not reflective of lived experience. While Ms. Elauf was claiming the protection of Title VII due to her religious beliefs, the act she was seeking to protect—wearing a head scarf—was undeniably a physical act. Physically adorning her body in a particular way was a reflection of her spiritual beliefs, and her ability to engage in that act of physical adornment was critical to the full expression of her beliefs. Ms. Elauf was therefore claiming a right to both physical and spiritual autonomy because the two were interrelated.

Likewise, Ms. Young's decision to bear a child encompasses the physical right to be pregnant and her decision to create new life—undoubtedly a decision that touches on deeply personal and spiritual beliefs. The Court, at times, has seemed to understand the intertwined nature of physical and spiritual autonomy—at least as it relates to the decision to have a child. For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[234] the Court described the right to physical autonomy (in the context of a right to abortion) in language that undeniably expresses a spiritual element to such physical choices:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[235]

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[233] Further, even if a rational distinction could be made between physical and spiritual autonomy which would support the current hierarchy which preferences the latter over the former, the continuation of such a hierarchy in the face of an understanding of its negative impact on women would be misguided. *See* Olsen, *supra* note 110, at 465 ("Law cannot be successfully separated from politics, morals, and the rest of human activities, but is an integral part of the web of social life.").

[234] *Casey*, 505 U.S. 833.

[235] *Id.* at 851 (internal citations and quotation omitted).

As this quote illustrates, the decision concerning whether to have a child is related to an individual's 'concept of existence' and relationship to the 'mystery of human life. Such decisions are undeniably spiritual, and not purely physical, in nature. Thus, Ms. Young required a pregnancy accommodation to effectuate her physical choice to carry a child and to express her spiritual choice to bring a new life into the world.

Stated simply, our ability to fully express our spiritual autonomy is dependent on our bodily autonomy, and conversely our bodily autonomy means little without spiritual autonomy.[236] Both forms of autonomy are critical, and any substantial impingement of either should prompt the Court to provide 'favored' protection.[237]

Further, although it is clear that women are most often the disfavored group whenever rights are separated into dichotomous, gendered hierarchies, it is not altogether clear that men benefit from such a system of separation.[238] For instance, men who have 'disfavored' bodies would stand to benefit from a system of rights that equally favored the protection and encouragement of physical autonomy. And there are a number of instances in which men would equally benefit from the robust protection of physical autonomy, including the protection of rights regarding physician-assisted suicide or the right to be free from certain invasive search procedures at the hands of law enforcement. Thus, the adoption of a framework that lessens a particular harm or risk to women could also result in positive outcomes for men.[239]

If such an equality of treatment for spiritual and physical autonomy had been employed in the context of *Young* and *Abercrombie*, the decisions would have reflected that both Ms. Young and Ms. Elauf were entitled to the same treatment—minor accommodations to their workplace which served to protect their rights to physical and spiritual auton-

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[236] Ironically, this tendency to see the connection between the two types of autonomies, instead of placing them in a hierarchy, could easily be labeled a "female" approach. *See* Littleton, *supra* note 45, at 1281 (describing Carol Gilligan's work "In a Different Voice" as noting that women "reason[ ] morally in terms of connection and relationship, rather than in terms of separation, hierarchy of values, and abstraction of principles"). Whether or not my proposal is inherently "female," it seems in this instance to better reflect the lived experience of people of both sexes.

[237] *See* Koppelman, *supra* note 101, at 581("We do not have nerve endings in every one of our preferences, either. Some are more pressing than others. Some aim at ends that are unusually valuable. If two human undertakings are equally urgent or valuable, then this is a reason to treat both with equal regard."); *Schempp*, 374 U.S. at 305 ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.").

[238] *See* Williams, *supra* note 43, at 329–30 ("[A] belief that a dual system of rights inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations—at enormous cost to women and not insubstantial cost to men.").

[239] *Id.* at 331 ("The goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.").

omy regardless of their sex or religion. Such an outcome would have avoided the awkward result that Ms. Young could have more easily achieved the accommodation she required by asserting a religious, rather than a physical, need to avoid lifting packages heavier than twenty pounds. It may also have affected the outcome in *Hobby Lobby* by forcing the Court to consider seriously the bodily autonomy claims that weighed in favor of mandating that employers provide health insurance coverage that included contraception to female employees. Even if the outcome in *Hobby Lobby* remained the same, however, a meaningful commitment to concepts of bodily autonomy would have necessitated an analysis like the one undertaken in the dissent, which at least would have taken such concerns seriously.

Even if such a result would be preferable, though, is it the Court's role to subvert the deeply entrenched physical/spiritual hierarchy, along with its gendered implications?[240] Displacing fundamental concepts such as this one could certainly have extensive repercussions, including the potential to alter legal doctrines unrelated to Title VII claims.[241] Even if these repercussions were unavoidable, it is undeniably the Court's role to disavow a worldview that is both inequitable and unreflective of reality.[242]

The truth, however, is that the Court would need to do no such thing in order to have reached an equal result in the *Young* and *Abercrombie* cases. Moreover, the language of 'favoritism' need not have been employed for the Court to reach equivalent conclusions. The basis for finding that both plaintiffs were entitled to accommodation under Title VII is located, intuitively and easily, from the text of Title VII itself, which explicitly states that both 'sex' and 'religion' are protected categories.[243] And both the PDA and the 1972 religious amendments make clear that plaintiffs claiming sex or religious discrimination under Title VII are entitled to workplace accommodations. The underlying public policy of Title VII thus already 'favors' the enumerated categories of protected plaintiffs by specifically listing them in the text of the statute itself.[244] The Court need not, and should not, further separate the individ-

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[240] *Id.* at 374–75 (noting the limitations of courts to fundamentally readjust the social order).

[241] *See, e.g.*, Fox & Stein, *supra* note 111, at 1010 ("Displacing dualism with mind-body integrationism has far-reaching implications for the American legal system.").

[242] *See id.* at 984 ("[T]he law might draw distinctions between mind and body as an imperfect proxy that makes it easier for judges to resolve complex disputes or for citizens to understand confusing rules. But even large gains in administrative efficiency cannot generally excuse the accumulation of substantive errors in the delivery of justice. A related justification is that expelling dualism from the doctrine would upset the settled expectations of those who count on the stability of law. Notwithstanding the importance of stare decisis, our legal system's reliance on dualism cannot be justified unless the costs of correction exceed the benefits of correcting it.").

[243] 42 U.S.C. §2000e-2(a)(1).

[244] Title VII thus already reflects the State's determination that discrimination on either religious or pregnancy-related basis is contrary to public policy, and the State is entitled to make such distinctions. *See* Koppelman, *supra* note 101, at 594 ("Given the diversity of human goods, there is some-

uals protected under Title VII into 'favored' and 'disfavored' plaintiffs. There is no basis for that distinction in the statutory language and describing protected groups in this way will inevitably lead to an unwarranted belief that individuals in such a group are receiving *more*, when in fact that are only being made *equal*.[245] One plaintiff under Title VII should be no more 'favored' than the next; language that suggests, and outcomes that reflect otherwise, should be discarded.

CONCLUSION

It is perhaps tempting to think of the gendered nature of the spirit/body dichotomy as nothing more than a philosophical issue, unlikely to affect real lives. This would be incorrect.[246] The Court's decisions in *Young* and *Abercrombie* reveal that the operation of this dichotomy in the background of legal thought leads courts to not only disfavor plaintiffs who make bodily autonomy claims to the detriment of those plaintiffs, but to do so in a way in which the underlying assumptions are never addressed or acknowledged.[247]

As this paper has explored, such an unchallenged dichotomy results in the favoring of spiritual autonomy claims to the detriment of bodily autonomy claims. Such a process is not only inherently gendered in a way that makes it suspect in the abstract, but also works to materially disadvantage women and impede societal progress to true gender equality.[248] Further, the dichotomy is a false one—predicated on the incorrect assumption that the soul and body are distinct, divisible entities. As the Court continues to develop its approach to cases that implicate either type of autonomy, it should be more conscious of the disfavoring of bod-

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times good reason to entrench respect for some of them by institutional mechanisms to ensure that these goods retain their privileged status.").

[245] *See* Williams, *supra* note 43, at 367 (discussing the Court's tendency to see accommodations for "the atypical worker" as suspect).

[246] *See* Benforado, *supra* note 118, at 1192 (discussing mind/body dualism and concluding that, '[i]t is not only that these commonsense ideas about what moves us are deeply affirming and have been established over centuries, and that many of the processes at work are beyond our conscious awareness or control, but also that there are powerful entities that benefit greatly from maintaining the status quo."); JOHNSON, *supra* note 149, at 3 ("[T]he conventional gendering of the soul-body relationship is at once debilitating and deeply problematic for women, and yet something that risks being overlooked as mere convention, as unimportant because it does not really reflect sincere belief.").

[247] Indeed, it is arguably more pernicious if such a hierarchy is operating in the minds of the Justices without them being consciously aware of its presence. *See* Fox & Stein, *supra* note 111, at 983 ("The Justices need not have been self-conscious dualists for [their] opinions to reflect the estrangement of mind from body.").

[248] *See* Williams, *supra* note 43, at 331 ("The ability to challenge covert as well as overt gender sorting laws is essential both for challenging in court a male defined set of structures and institutions and for requiring the reconstruction to reflect the full range of our human concerns.").

ily autonomy claims, and embrace a doctrine that seeks to avoid the curtailment of the fundamental autonomy of individuals—in whatever form such a constraint takes.

Notes

No Guarantee for a Spousal-Guaranty: A Critical Analysis of Regulation B's Spouse-Guarantor Rule under the Equal Credit Opportunity Act (ECOA) and Conflicting Federal Circuit Court Interpretations of the Term "Applicant" under *Chevron*'s Two-Step Analysis

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I. INTRODUCTION

Gender and marital status-based credit discrimination remains rampant across the nation. Pregnant women and married women on maternity leave are continuously denied mortgages and other lines of credit because of the erroneous fear held by creditors that they will either not reenter the workforce or, due to their stereotypical familial responsibilities, default on their loans. Despite Congress's great effort to combat discrimination through enacting the Equal Credit Opportunity Act (ECOA or 'the Act")[1] and the Federal Reserve's promulgation of Regulation B,[2] marital status-based discrimination is still on the rise.[3] Thus, the Federal Reserve (and now the Consumer Financial Protection Bureau (CFPB))[4] is correct in applying a broader interpretation of the definition

[1] 15 U.S.C. § 1691, *et seq.* (2012).
[2] *See* 12 C.F.R. § 202.1, *et seq.* (2013).
[3] *See* Press Release, U.S. Dep't of Hous. and Urban Dev. HUD Announces $5 Million Wells Fargo Settlement After Complaints of Discrimination Against Women on Maternity Leave or Pregnant (Oct. 9, 2014), https://archives.hud.gov/news/2014/pr14-124.cfm [http://perma.cc/62P2-69PA] [hereinafter Press Release].
[4] Congress originally made the Federal Reserve responsible for promulgating the purpose of ECOA, but in 2010 Dodd-Frank transferred this obligation to the newly created CFPB. *See* JEREMIAH BATTLE, JR. ET AL., NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION 10 (6th ed. 2013) ("[T]he Dodd-Frank Act makes the CFPB [Consumer Financial Protection Bureau] the agency currently responsible for regulation and enforcement of the ECOA."). For purposes of simplicity, this comment refers to the Federal Reserve and the CFPB collectively as the Federal Reserve.

of 'applicant' under the ECOA, and thereby allowing a spouse-guarantor to seek protection and remedies for an ECOA violation for the purpose of enforcing the Regulation's Spouse-Guarantor Rule.

Prior to the Eighth Circuit's 2014 holding in *Hawkins v. Cmty. Bank of Raymore*,[5] many courts rightfully allowed a spouse-guarantor to seek ECOA protection and remedies for violations of the ECOA.[6] But the Eighth Circuit's recent, unduly restrictive, reading of the ECOA's definition of 'applicant' for the purpose of enforcing the Spouse-Guarantor Rule failed to grant principal deference to the Federal Reserve's interpretation of the ECOA.[7] As an unfortunate result, the Eighth Circuit created a circuit split which undermined the Federal Reserve's interpretation of the ECOA.[8] The Eighth Circuit's decision incentivizes more ECOA violations when such violations are already on the rise.[9] The ECOA should be liberally construed in favor of consumers, not lenders, and neither the Eighth Circuit nor other federal circuits should be permitted to undercut the underlying purpose of the ECOA by narrowly interpreting the Act. On March 2, 2015, the United States Supreme Court granted certiorari in the *Hawkins* case to decide whether spousal-guarantors are unambiguously excluded from being Equal Credit Opportunity Act (ECOA) 'applicants.'[10] The Court affirmed the *Hawkins* decision by an equally divided Court on March 22, 2016.[11]

This comment argues that the Supreme Court should include spouse-guarantors under the ECOA to further the purpose of combating, among other things, gender and marital status-based discrimination. Part II of this comment introduces the perpetuation of gender and marital status-based discrimination leading to the enactment of the ECOA and the Federal Reserve's broadened definition of 'applicant' under Regulation B's Spouse-Guarantor Rule. Part III reviews the Supreme Court's two-step analysis formulated in *Chevron U.S.A. Inc. v. NRDC, Inc.*[12] used to determine whether an agency's interpretation of a statute it administers is entitled to deference.[13] Part IV examines the recent circuit split between the Sixth Circuit's decision in *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp. LLC*,[14] and the Eighth Circuit's decision in *Haw-*

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[5] 761 F.3d 937, 943 (8th Cir. 2014).
[6] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014) ("Our conclusion accords with the vast majority of courts that have examined this issue.").
[7] *See Hawkins*, 761 F.3d at 942 ("Because the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve's interpretation of applicant ").
[8] *Id.*
[9] *See* Press Release, *supra* note 3 ("Since 2010, 190 maternity leave discrimination complaints have been filed with HUD, resulting in more than 40 settlements for a total of nearly $1.5 million.").
[10] *See Hawkins*, 761 F.3d at 940 (explaining that the case turns on the definition of the applicant).
[11] 761 F.3d 937 (8th Cir. 2014), *aff'd per curiam*, 136 S. Ct 1072 (2016).
[12] 467 U.S. 837 (1984).
[13] *Id.* at 844.
[14] 754 F.3d 380 (6th Cir. 2014).

kins in applying *Chevron*'s two-step analysis to the Federal Reserve's broadened definition of 'applicant' under the ECOA. Finally, Part V highlights the manner in which the Eighth Circuit failed to properly apply *Chevron*'s two-step test in its review of the Federal Reserve's broadened definition of 'applicant, and discusses the implications of the Supreme Court adopting a narrower definition of the term 'applicant' under the ECOA.

II. The ECOA Historical Background and the Federal Reserve's Spouse-Guarantor Rule

Prior to 1974, it was well-documented that lenders would customarily require creditworthy women who sought individual credit to obtain their husband's signature to guaranty their loan(s).[15] In 1974, however, Congress enacted the Equal Credit Opportunity Act 'to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.'[16] In 1976, Congress amended the Act to broaden the prohibited conduct to include race, religion, and other traits.[17] Accordingly, the ECOA prohibits creditors from discriminating against any credit applicant on the basis of race, color, religion, national origin, sex or marital status, or age.[18] Congress charged the Federal Reserve with promulgating regulations to carry out the statute's purpose.[19] Regulation B resulted from Congress's directive.[20] Regulation B aims to prevent discriminatory practices by creditors whilst promoting 'the availability of credit to all creditworthy applicants.'[21]

Despite the Federal Reserve's best effort of promulgating Regulation B to carry out the statute's purpose, it was evident that gender-based credit discrimination continued to pervade the American markets. In 1979, the Federal Trade Commission (FTC)[22] successfully challenged the practices of a credit corporation that used information by consumer reporting agencies to divide credit applications into 'divorced, 'wid-

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[15] *See* CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 96 (E.D. Va. 1992) (discussing the previous practice of lenders requiring the guarantee signatures of husbands whose wives sought credit).
[16] *RL BB Acquisition, LLC*, 754 F.3d at 383 (citing Mays v. Buckeye Rural Elec. Coop., Inc. 277 F.3d 873, 876 (6th Cir. 2002) (quotation marks omitted)).
[17] *Id.*
[18] 15 U.S.C. § 1691(a)(1) (2012).
[19] 15 U.S.C. § 1691b(a) (2012).
[20] *RL BB Acquisition, LLC*, 754 F.3d at 383.
[21] *Id.*
[22] 15 U.S.C. § 45(a)(1) (2015) (the Federal Trade Commission (FTC) is an independent federal agency charged by Congress with protecting American consumers from "unfair methods of competition' and "unfair or deceptive acts or practices" in the marketplace).

owed, or 'single' when evaluating applications for its consumer credit plans.[23] Judicial efforts were necessary to combat gender-based credit discrimination as well. In 1982, the Ninth Circuit correctly held that a lender violated the ECOA after requiring a loan applicant, who qualified independently, to procure her husband's signature on the loan documents.[24] Such discriminatory conduct by creditors clearly violates the ECOA and continues to have a detrimental impact on women.

More recently, the U.S. Department of Housing and Urban Development (HUD)[25] 'has focused on ending maternity leave-related lending discrimination.'[26] Since 2010, HUD has received 190 claims of maternity leave discrimination, 'resulting in more than 40 settlements for a total of nearly $1.5 million.'[27] One of HUD's first cases 'resulted in a Department of Justice settlement with Mortgage Guarantee Insurance Corporation (MGIC), the nation's largest mortgage insurance provider, which established a $511,250 fund to compensate 70 people, and pay a $38,750 civil penalty.'[28] Other settlements include a $45,000 settlement with Bank of America in 2013 and a $750,000 settlement with Cornerstone bank in 2011.[29]

In one of its most recent press releases, HUD announced a $5 million settlement with Wells Fargo Home Mortgage, the nation's largest provider of home mortgage loans.[30] Six families from across the nation alleged that Wells Fargo denied them mortgage loans because of their gender, familial status, or unwillingness to sacrifice their maternity leave.[31] Additionally, 'discriminatory remarks were made 'to and against women who were pregnant or who had recently given birth.'[32] Several women were told that they had to either forfeit maternity leave or be denied a home loan.[33] As a result, some women suffered from emotional distress because they were unable to spend time with their infants and had difficulty finding emergency childcare.[34] These findings establish that gender and marital status-based credit discrimination remains problematic in the American markets.

The Federal Reserve promulgated Regulation B to combat gender and marital status-based discrimination.[35] The Spouse-Guarantor Rule is

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[23] Matter of Westinghouse Credit Corp., 94 F.T.C. 1280, at *3 (1979).
[24] Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982).
[25] *See* 24 C.F.R. § 1.1 (HUD is a cabinet department overseeing home mortgage lending practices).
[26] Press Release, U.S. Dep't of Hous. and Urban Dev. *supra* note 3.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See* 12 C.F.R. § 202.1(b) (2016) (stating that the purpose of Regulation B is "to promote the availability of credit to all creditworthy applicants without regard to sex [or] marital status [and

a provision of Regulation B that prohibits creditors from requiring a spousal-guaranty even if a guaranty is required to secure a loan.[36] Although creditors are prohibited from requiring a spouse-guarantor, a spouse may voluntarily serve as a guarantor.[37] Furthermore, the Spouse-Guarantor Rule prohibits creditors from requiring a spousal signature, except when the spouse is a joint applicant, on any credit document if the applicant is individually creditworthy for the loan requested.[38] Limited exceptions 'allow a creditor to require an applicant's spouse's signature if the creditor reasonably believes the signature is necessary to satisfy the debt in the event of default.'[39] A creditor can be subject to actual damages, punitive damages, and attorney's fees if it violates the ECOA and Regulation B.[40] In order for the protections and remedies of the ECOA to apply, the aggrieved spouse must be an 'applicant' for the purpose of enforcing Regulation B's Spouse-Guarantor Rule.[41]

The ECOA defines an 'applicant' as 'any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.'[42] The definition under the ECOA does not expressly include guarantors. But Regulation B's definition of 'applicant' expanded in 1985 to include guarantors for the purpose of enforcing the Spouse-Guarantor Rule.[43] Although this may be interpreted to mean that guarantors and similar parties are *not* otherwise applicants, 'guarantors, sureties, and similar parties would seem to fall within the definition of those 'who may become contractually liable' on the obligation.'[44] Prior to 1985, Regulation B 'limited applicants to those who may *be* contractually liable, while the 1985 amendment changed that phrasing to those who may *become* contractu-

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other factors] [and] prohibits creditor practices that discriminate on the basis of any of these factors.").

[36] *See* 12 C.F.R. §§ 202.7(d)(5), 1002.7(d)(5) (2016) (explaining that a spousal-guaranty is when a lendee's spouse serves as a co-signer for the credit requested).

[37] *Id.*

[38] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 383 n.3 (6th Cir. 2014) (citing 12 C.F.R. §§ 202.7(d)(1), 1002.7(d)(1) (2016)).

[39] *Id.* (citing 12 C.F.R. §§ 202.7(d)(2)-(4), 1002.7(d)(2)-(4)).

[40] *See* 15 U.S.C. § 1691(e) (2011) (discussing provisions for actual damages (a), punitive damages (b), and attorney fees and costs(d)).

[41] 15 U.S.C. § 1691e (a) (2011).

[42] 15 U.S.C. § 1691a(b) (2011).

[43] *See* BATTLE, JR. ET AL., *supra* note 4, at 23–24 (explaining the expansion of the definition of "applicant"); *see also* Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018 [hereinafter Equal Credit Opportunity] (Nov. 20, 1985) ("The Board has revised the definition of 'applicant' in paragraph (e) to include guarantors, sureties, endorsers, and similar parties for purposes of § 202.7(d), which contains rules regarding signatures.").

[44] *See* BATTLE, JR. ET AL., *supra* note 4, at 24.

ally liable.'[45] This change made guarantors (who are not initially liable but who may become liable) into 'applicants.'[46]

Furthermore, Regulation B's definition of 'applicant' could correctly 'be viewed as an effort to unambiguously overrule some earlier cases to the contrary and not as an attempt to modify the ability of guarantors more generally to qualify as applicants.'[47] But because the ECOA does not expressly include guarantors in its definition of 'applicant, the Eighth Circuit prohibited aggrieved spouse-guarantor protections and remedies under the ECOA.[48] As this Comment explains in part V *infra*, however, this interpretation is too stringently construed.

III. *CHEVRON'S* TWO-STEP ANALYSIS

An administrative agency such as the Federal Reserve usually has power to exercise only the authority conferred to it by Congress.[49] But Congressional delegations of authority are not always clear, especially when 'the legislative delegation to an agency on a particular question is implicit rather than explicit.'[50] As a result, agencies interpret any ambiguities in the statutes they administer in order to carry out Congress's delegation. An agency's interpretation, however, is not always granted deference by lower courts. Accordingly, courts apply *Chevron*'s two-step analysis when evaluating whether an agency's interpretation of a statute *it administers*[51] is entitled to deference.

Chevron's two-step analysis was established in 1984. In *Chevron*, the United States Supreme Court held that a court must answer two questions when reviewing an agency's construction of a statute it administers.[52] A court must first determine whether Congress has expressly addressed the question at issue.[53] If Congress has expressly addressed the question at issue, the court and agency's inquiry into the matter ends and Congress's express intent controls.[54] But if the statute is silent or ambiguous on the question at issue, and an agency has interpreted it, the court

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[45] *Id. see also* Equal Credit Opportunity, *supra* note 43.
[46] BAITLE, JR. ET AL., *supra* note 4, at 24.
[47] *Id.*
[48] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 943 (8th Cir. 2014) (affirming summary judgment granted to Bank in ECOA claim on basis that guarantor plaintiffs were not applicants within the meaning of the ECOA).
[49] Louisiana Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act unless and until Congress confers power upon it.").
[50] Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
[51] *See id.* at 842 ("When a court reviews an agency's construction of the statute which it administers ").
[52] *Id.* at 842–43.
[53] *Id.* at 842.
[54] *Id.* at 842–43.

must determine whether the agency's interpretation is a permissible construction of the statute.[55]

As the Supreme Court in *Chevron* noted, if Congress explicitly leaves a gap for the agency to fill, the agency is expressly permitted to interpret the particular statutory provision by regulation.[56] Furthermore, 'legislative regulations are given controlling weight unless they are arbitrary. capricious, or manifestly contrary to the statute. '[57] Although legislative delegation to an agency on a particular question is not always explicit, a court may not use its own statutory construction in lieu of a reasonable one made by the agency's administrator.[58] Most notably. the Supreme Court has long recognized that considerable weight should 'be accorded to an executive department's construction of a statutory scheme '[59]

In *Chevron*, the Supreme Court was tasked with determining whether the Environmental Protection Agency (EPA) regulation, implementing permit requirements for nonattainment states pursuant to the Clean Air Act Amendments of 1977[60] was a reasonable interpretation of the term 'stationary source. '[61] The Supreme Court recognized that the relevant part of the amended Clean Air Act did not expressly define what Congress deemed a 'stationary source' and that the question at issue was not expressly addressed in the legislative history.[62] Nonetheless, the Supreme Court held that the EPA's interpretation of 'stationary source' was reasonable for the agency to make.[63]

The Supreme Court reasoned that although a word may have its own meaning 'not to be submerged by its association. [T]he meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. '[64] The Court also indicated that the legislative history and policies of the Clean Air Act motivated the EPA's definition of 'stationary source. '[65] The EPA's broadened definition of 'stationary source' was not only consistent with its environmental objectives and policy concern of promoting reasonable economic growth, but was also supported by private studies.[66] Ulti-

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[55] *Id.* at 843.
[56] *Id.* at 842–43.
[57] *Id.* at 844.
[58] *Id.*
[59] *Id.*
[60] 42 U.S.C. § 7502 (2015).
[61] *Chevron*, 467 U.S. at 837.
[62] *Id.* at 841.
[63] *Id.* at 845.
[64] *Id.* at 860–61 (citing Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923)).
[65] *Id.* at 863.
[66] *Id.*

mately, the Supreme Court granted deference to the EPA's interpretation of the term 'stationary source' under the Clean Air Act and the Supreme Court's holding in *Chevron* served as the analytical framework for determining whether an agency's interpretation of a statute it administers is entitled to deference.[67]

A. Ascertaining Congressional Intent and Step One of *Chevron*

In order to ascertain whether Congress intended to include guarantors within its definition of 'applicant' under the ECOA, courts must examine the meaning of the term itself 'as well as the language and design of the statute as a whole.'[68] The Supreme Court's decision in *Household Credit Services Inc. v. Pfennig*[69] is illustrative. In *Household Credit Services*, the Supreme Court determined whether the Federal Reserve Board's Regulation Z, which excluded over-the-limit fees from the definition of 'finance charge, conflicted with the Truth in Lending Act (TILA).[70] Congress defined 'finance charge' as 'all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.'[71] Although TILA did not expressly address whether over-the-limit fees were included within the definition of 'finance charge, the Sixth Circuit had held that 'Regulation Z's explicit exclusion of over-the-limit fees from the definition of 'finance charge' conflicted with' TILA.[72]

The Supreme Court disagreed. It reasoned that, in holding that over-the-limit fees were not unambiguously included within the meaning of 'finance charge, the Sixth Circuit failed to examine the critical phrase 'incident to the extension of credit' *within* Congress's definition of 'finance charge.'[73] The Supreme Court further reasoned that the phrase 'incident to' did not clarify whether 'a substantial (as opposed to a remote) connection is required.'[74] The Supreme Court also examined TILA's related provisions and determined that the related provisions provided more support for the Federal Reserve's interpretation of the statute.[75] As a result, the Supreme Court deferred to the Federal Reserve's interpretation of TILA and expounded that the Sixth Circuit was required

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[67] *Id.* at 842–43.
[68] Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232 (2004).
[69] *Id.* at 239 (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).
[70] *Id.* at 235.
[71] *Id.* at 239 (citing 15 U.S.C. § 1605(a)).
[72] *Id.* at 237.
[73] *Id.* at 239.
[74] *Id.* at 241.
[75] *Id.* at 241–43.

to examine not only the particular statutory language at issue but also the language and design of the statute as a whole before reaching its conclusion.[76]

Similarly, in *General Dynamics Land Systems v. Cline*[77] the Supreme Court broadly construed the term 'age' under the Age in Employment Act of 1976 (ADEA) after examining the term within the language and design of the statute as a whole.[78] The Supreme Court rejected the respondent's argument that the ordinary meaning of the term 'age' was controlling and that its plain meaning should be used throughout the entire statute.[79] The Supreme Court noted that age does not have the same meaning wherever the ADEA uses it,[80] emphasizing that statutory language must be read in context from the words around it.[81] Justice Thomas, dissenting in *General Dynamics Land Systems*, noted that 'the plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old.'[82] Nevertheless, after considering the design of the statute as a whole, the Majority held that the ADEA's legislative history rejected the natural meaning of the term 'age.'[83]

B. Step Two of *Chevron*'s Analysis: Determining Whether to Grant Principal Deference to an Administrative Agency's Interpretation of a Statute it Administers

An agency's interpretation of any ambiguity in a statute it administers is controlling unless demonstrably arbitrary, capricious, or contrary to the statute.[84] In *Ford Motor Credit Co. v. Milhollin*,[85] the Supreme Court decided whether TILA[86] required 'that the existence of an acceleration clause always be disclosed on the face of a credit agreement.'[87] The respondents in *Ford Motor* financed their automobile purchases through standard retail installment contracts assigned to a finance com-

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[76] *Id.* at 239.
[77] 540 U.S. 581 (2004).
[78] *Id.* at 594–95.
[79] *Id.*
[80] *Id.* at 595–96.
[81] *Id.* at 596 (citing Jones v. United States, 527 U.S. 373, 389 (1999) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).
[82] *Id.* at 603 (Thomas, J. dissenting).
[83] *Id.* at 586.
[84] Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232, 239 (2004).
[85] 444 U.S. 555 (1980).
[86] Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2012) (commonly referred to as TILA).
[87] *Ford Motor Credit Co.* 444 U.S. at 557.

pany.[88] Each contract provided that 'respondents were to pay a precomputed finance charge, and, as required by TILA and implementing Federal Reserve Board Regulation Z, the front page of each contract disclosed and explained certain features of the contract.'[89]

The respondents' contract contained the requisite facial disclosures, with the exception of an acceleration clause found in the body of the respondents' contract.[90] Consequently. the respondents sued the finance company arguing that the acceleration clause violated TILA and Regulation Z because the acceleration clause was not on the face of their contract.[91]

The respondents in *Ford Motor* argued that TILA and the Federal Reserve Board's Regulation Z expressly mandated facial disclosure of acceleration clauses because TILA required creditors to disclose 'default, delinquency. or similar charges payable in the event of late payments.'[92] A provision of Regulation Z also required disclosure of the 'amount, or method of computing the amount, of any default, delinquency. or similar charges payable in the event of late payments.'[93] In granting principal deference to the Federal Reserve Board's interpretation of TILA, the Supreme Court held that acceleration clauses could not be equated with 'default, delinquency, or similar [charge]' subject to disclosure under TILA and Regulation Z because the Federal Reserve reached this decision with caution.[94] The Supreme Court noted that the Federal Reserve Board's construction of TILA should be dispositive unless demonstrably irrational.[95] The Supreme Court further noted that not only should the Federal Reserve Board's interpretation of TILA be given considerable respect, but also that 'Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law.'[96] In short, the Supreme Court granted principal deference to the Federal Reserve Board's interpretation of TILA because its interpretation of the statute was rational. Likewise, the Federal Reserve's broadened definition of 'applicant' under the ECOA should be dispositive because its interpretation of the ECOA is rational.[97]

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[88] *Id.*

[89] *Id.* (citing 15 U.S.C. § 1631; 12 C.F.R. § 226.6(a) (1979)).

[90] *Id.* at 558.

[91] *Id.*

[92] *Id.* at 558 (citing 15 U.S.C. §§ 1638 (a)(9), 1639 (a)(7)).

[93] *Id.* at 560.

[94] *Id.* at 561.

[95] *Id.* at 565.

[96] *Id.* at 566.

[97] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014).

IV. The Circuit Split: Determining Whether to Grant Deference to the Federal Reserve's Broadened Definition of "Applicant" Under the ECOA

Prior to 2007, a vast majority of federal courts correctly decided that Regulation B's definition of 'applicant' was entitled to deference under the ECOA.[98] This was short-lived, however, as Seventh Circuit dicta in *Moran Foods*, Inc. v. Mid-Atlantic Mkt. Dev. Co.[99] frustrated this universal deference to Regulation B.[100] Some lower courts have subsequently relied on this dicta in denying standing to spouse-guarantors for the purpose of enforcing the Spouse-Guarantor Rule.[101]

In *Moran Foods*, the Seventh Circuit denied standing to a wife who guaranteed her husband's debt because she failed to establish discrimination under ECOA.[102] But the Seventh Circuit noted that even if the wife-guarantor could establish discrimination under ECOA, she would not be considered an applicant for the purpose of enforcing the Spouse-Guarantor Rule.[103] According to the Seventh Circuit, the definition of 'applicant' under the ECOA was not ambiguous, and an applicant could not be confused with a guarantor.[104] The Seventh Circuit reasoned that 'to interpret 'applicant' as embracing 'guarantor' opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept.'[105]

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[98] *Id.* at 386; *see also* Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 30–31 (3d Cir. 1995) (accepting the Federal Reserve Board's broadened definition of "applicant" under the ECOA); Mayes v. Chrysler Credit Corp., 167 F.3d 675, 677 (1st Cir. 1999) ("The paradigm case is the spouse who is wrongly made to co-sign or guarantee a debt but may be unconscious of the violation "); Citgo Petroleum Corp. v. Bulk Petroleum Corp., 2010 U.S. Dist. LEXIS 106495, at *26 (N.D. Okla. Oct. 5, 2010) (declining to follow *Moran Foods* and adhering to Regulation B's broadened definition of "applicant"); F.D.I.C. v. Medmark, Inc., 897 F.Supp. 511, 514 (D. Kan. 1995) (concluding that a guarantor may assert an alleged ECOA violation defensively); Bank of the West v. Kline, 782 N.W.2d 453, 458 (Iowa 2010) (holding that guarantors are "applicants" under the ECOA).

[99] 476 F.3d 436 (7th Cir. 2007).

[100] *See* id. at 441 (doubting that the ECOA "can be stretched far enough to allow" the interpretation of "applicant" as including a guarantor).

[101] *See, e.g.* Champion Bank v. Reg'l Dev. LLC, No. 4:08CV1807 CDP, 2009 U.S. Dist. LEXIS 40468, at *7 (E.D. Mo. May 13, 2009) (agreeing with dicta in *Moran Foods*); *see also* Arvest Bank v. Uppalapati, No. 11-03175-CV-S-DGK 2013 U.S. Dist. LEXIS 1937, at *11 (W.D. Mo. Jan. 7, 2013) (agreeing with the reasoning adopted by the court in *Champion Bank* and *Moran Foods*).

[102] Moran Foods, Inc. 476 F.3d at 441.

[103] *Id.*

[104] *Id.*

[105] *Id.*

A. The Sixth Circuit Grants Deference to Regulation B's Broadened Definition of "Applicant" under the ECOA and The Eighth Circuit Creates a Circuit Split

In *RL BB Acquisition*,[106] the Sixth Circuit correctly granted deference to Regulation B's definition of 'applicant' under *Chevron*'s two-step analysis. In *RL BB Acquisition*, a franchisee for numerous fast food chains sought to refinance $10 million of his debt, which resulted from a global financial crisis.[107] Upon reviewing the franchisee's personal financial statement, the bank determined that the franchisee and a company he owned were not independently creditworthy for a loan.[108] The franchisee's wife alleged, however, that the loan was subsequently approved after she was required to become a spouse-guarantor.[109] The Sixth Circuit rightfully held that the wife was an applicant for the purpose of enforcing the Spouse-Guarantor Rule, which entitled her to raise ECOA claims against the bank.[110] The Sixth Circuit's victory, however, was short-lived. Approximately two months after *RL BB Acquisition* was decided, the Eighth Circuit's decision in *Hawkins* created a circuit split by narrowly interpreting Regulation B's definition of 'applicant' under *Chevron*'s two-step analysis.[111]

The recent Eighth Circuit Court case, deciding whether the Federal Reserve's broadened definition of 'applicant' includes guarantors for the purpose of enforcing the Spouse-Guarantor Rule, establishes that a spouse-guarantor may no longer be able to seek protection and remedies under the ECOA.[112] In *Hawkins*, two owners of a Limited Liability Company (LLC) secured four loans to fund the development of a residential subdivision.[113] After each loan modification, the owners of the LLC and their wives executed personal guaranties in favor of the bank to secure the loans.[114] When the owners of the LLC failed make loan payments, the bank declared the loan in default, accelerated the loans and demanded payment from the LLC owners and their wives.[115] The wives sought damages and to void their guaranties under the ECOA, after alleging that the bank required them to execute the guaranties solely because

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[106] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380 (6th Cir. 2014).
[107] *Id.* at 381–82 (6th Cir. 2014)
[108] *Id.* at 382.
[109] *Id.*
[110] *Id.* at 384–87.
[111] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 941 (8th Cir. 2014) (interpreting the ECOA's definition of "applicant" to not include guarantors).
[112] *Id.* at 941-42.
[113] *Id.* at 939.
[114] *Id.*
[115] *Id.*

they were married to their respective husbands.[116] The Eighth Circuit, citing to the Seventh Circuit dicta in *Moran Foods*, incorrectly held that the wives were not considered applicants for the purpose of enforcing the Federal Reserve's Spouse-Guarantor Rule and therefore could not raise ECOA claims.[117]

B. The Sixth and Eighth Circuit's Conflicting Application of *Chevron*'s Two-Step Analysis

In deciding whether the Federal Reserve's broadened definition of 'applicant' includes guarantors for the purpose of enforcing the Spouse-Guarantor Rule, the Sixth and Eighth Circuit were required to apply *Chevron*'s two-step analysis.[118] Both courts first decided whether the definition of applicant under the ECOA explicitly excluded guarantors, or whether the ECOA was ambiguous on the issue.[119] The Sixth Circuit correctly held that the definition of applicant under the ECOA was ambiguous because 'it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves—a category that includes guarantors.'[120] The Sixth Circuit's decision rested on the terms, 'applies' and 'credit' in the definition of applicant under the ECOA.[121] The term 'applies' in the dictionary means 'to make an appeal or a request formally and often in writing and [usually] for something of benefit to oneself,'[122] or '[t]o make an approach to (a person) for information or aid; to have recourse or make application *to*, to appeal *to*; to make a (formal) request for.'[123] The Sixth Circuit, therefore, reasoned that a guarantor, although not personally requesting credit, 'does formally approach a creditor in the sense that the guarantor offers up her own personal liability to the creditor if the borrower defaults.'[124]

The Sixth Circuit further reasoned that 'the term 'credit' furthered the ambiguity of the statutory definition.'[125] The ECOA defines 'credit' as 'the right granted by a creditor to a debtor to defer payment of debt or

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[116] *Id.*
[117] *See id.* at 941–42.
[118] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp. LLC, 754 F.3d 380, 384 (6th Cir. 2014).
[119] *Id.*
[120] *Id.* at 384–85.
[121] *Id.* at 385.
[122] *Id.* at 385 (citing Webster's Third New International Dictionary 105 (1993)).
[123] *Id.* at 385 (citing Oxford English Dictionary (3d ed. 2008), http://www.oed.com/view/Entry/9724 [http://perma.cc/PQG3-3UFX]).
[124] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[125] *Id.*

incur debts and defer its payment or to purchase property or services and defer payment therefor[e]. '[126] Therefore, 'an 'applicant' requests credit, but a 'debtor' reaps the benefit. '[127] These two terms, according to the Sixth Circuit, suggested that an applicant does not necessarily always have to be the debtor. Accordingly, 'the applicant could be a third party, such as a guarantor. '[128]

Conversely, the Eighth Circuit did not defer to the Federal Reserve's interpretation of applicant under Regulation B.[129] The Eighth Circuit focused on the term 'apply' in the definition of applicant under the ECOA, and the term 'guaranty,' reasoning that 'the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit. '[130] A 'guaranty' is defined as 'a promise to answer for another person's debt, default, or failure to perform. More specifically, a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, of another person in the event of default. '[131] According to the Eighth Circuit, a guarantor only desires for a borrower to be extended credit from a lender, but does not individually request credit or get involved in the credit application process.[132] Therefore, the Eighth Circuit reasoned that a guarantor 'engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant. '[133]

The Eighth Circuit noted that the underlying purpose of the ECOA is to ensure that women have 'fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrower's marital status. '[134] But according to the Eighth Circuit, this policy consideration is inapposite to guarantors because, although guarantors may be improperly *included* in the lending process due to marital status, they are not improperly *excluded* due to their marital status.[135] Consequently, the Eighth Circuit held that *Chevron*'s first step could not be established by a guarantor because they do not request credit.[136] Additionally, the Eighth Circuit did not apply *Chevron*'s second step analysis.

The Sixth Circuit continued *Chevron*'s two-step analysis by determining whether Regulation B was a permissible construction of the

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[126] 15 U.S.C. § 1691a(d) (2012).
[127] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[128] *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004)).
[129] *Hawkins*, 761 F.3d at 942.
[130] *Id.* at 941.
[131] *Id.* (citing 38 AM. JUR. 2D GUARANTY § 1 (2014)).
[132] *Id.*
[133] *Id.* at 942.
[134] *Id.*
[135] *Id.*
[136] *Id.*

ECOA.[137] The Sixth Circuit correctly found that the term applicant includes guarantors in at least one of its natural meanings, and as a result, Regulation B's interpretation is a permissible construction of the ECOA.[138] The Sixth Circuit further noted that the Federal Reserve reached the decision with caution.[139] Specifically, 'when the Federal Reserve began the process of amending Regulation B to cover guarantors, it initially proposed that guarantors would be deemed applicants throughout the regulation, '[140] permitting guarantors to sue for any Regulation B violation.[141] The Sixth Circuit further expounded that the final version of Regulation B's definition of applicant was limited to the Spouse-Guarantor Rule 'in response to the concerns of industry commenters who believed that the unlimited inclusion of guarantors and similar parties in the definition might subject creditors to a risk of liability for technical violations of various provisions of the regulation. '[142]

V. The Federal Reserve's Broadened Definition of "Applicant" Is Supported by the Underlying Purpose of the ECOA and Demands Deference by the Supreme Court

Federal circuits should liberally construe the ECOA to implement its central goal of eradicating gender and marital status-based credit discrimination in the American marketplace.[143] The ECOA is designed to protect and provide remedies for individuals who have been unlawfully discriminated against by creditors, and should be broadly interpreted in favor of consumers to satiate the underlying Congressional purpose.[144] Many Courts rejected unduly restricting interpretations of the Act and its regulations, and began to uphold broader language interpretations.[145] Ac-

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[137] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[138] *Id.* at 385–86 (quoting Harris v. Olszewski, 442 F.3d 456, 467 (6th Cir. 2006)).
[139] *Id.* at 386.
[140] *Id.* (citing 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985)).
[141] *Id.*
[142] *Id.*
[143] *See* Bros. v. First Leasing, 724 F.2d 789, 793–94 (9th Cir. 1984) (discussing the plain purpose of ECOA).
[144] *See, e.g.* Silverman v. Eastrich Multiple Inv'r Fund, L.P., 51 F.3d 28, 33 (3d Cir. 1995) (noting the broad remedial provisions in the ECOA); *see also* Bros. 724 F.2d at 793 (literal language of the ECOA must be construed so as to effectuate its underlying purposes); Jochum v. Pico Credit Corp. of Westbank, 730 F.2d 1041, 1047 (5th Cir. 1984) ("A regulation should be interpreted in a manner that effectuates its central purposes.").
[145] *See, e.g.* United States v. ITT Consumer Fin. Corp., 816 F.2d 487, 489 (9th Cir. 1987); *Bros.* 724 F.2d at 793-94 ("We must construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose."); Williams v. AT & T Wireless Servs. Inc., 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998).

cordingly, lower courts should grant deference to the Federal Reserve's broadened definition of applicant under the ECOA to prevent lenders from avoiding liability by using spouse-guarantors as a proxy for gender-based credit discrimination.

Although the definition of applicant under the ECOA does not explicitly include guarantors, federal courts should defer to the Federal Reserve's interpretation of ECOA because the definition of applicant under the ECOA is not only ambiguous but also broad enough to include spouse-guarantors.[146] Spouse-guarantors should be recompensed for a creditor's violation of the law.[147] Furthermore, judges do not fully understand the complex nature of ECOA and should not attempt to interpret the Act without sufficiently relying on precedent. If federal courts are permitted to narrowly construe the term applicant under the ECOA, lenders will be incentivized to discriminate against spouse-guarantors because a spouse-guarantor would not be able to seek protection and remedies. Moreover, the Spouse-Guarantor Rule is limited to *spouses* for the purpose of enforcing Regulation B's Spouse-Guarantor Rule, and is therefore not over-inclusive. The rule serves to prohibit gender-based discrimination primarily targeted towards married women in the American credit markets.

A. The Definition of "Applicant" Under the ECOA is Broad Enough to Include Spouse-Guarantors

The Supreme Court's reasoning in *Chevron* suggests that there is an implicit Congressional delegation to the Federal Reserve to determine whether the term applicant includes a spouse-guarantor under the Spouse-Guarantor Rule. Courts must only determine whether the Federal Reserve's response to the issue is based on a permissible construction of the ECOA. As the Supreme Court correctly noted, 'Judges are not experts in the field, and are not part of either political branch of the Government.'[148] Thus, the Supreme Court has continuously granted principal deference to administrative interpretations seeking to interpret statutes or to reconcile conflicting policies, which depend upon more than ordinary knowledge due to the regulatory scheme's complexity and technicality.[149] Thus, if the Federal Reserve's definition of applicant is a reasonable construction of the statute, '[the court] should not disturb it unless it

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[146] *RL BB Acquisition, LLC*, 754 F.3d at 384–86.
[147] *Id.*
[148] Chevron, U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984).
[149] *See id.* at 844 (citing Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953)).

appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'[150]

In *Moran Foods*, the Seventh Circuit offered no competing interpretation of the term applicant under the ECOA 'apart from its offhanded dismissal of Regulation B's definition.'[151] The Seventh Circuit also failed to consider Congressional silence on the issue. Specifically, Congress has not invalidated the Federal Reserve's broadened definition of applicant, and since *Moran Foods* was decided, an extensive amendment to the ECOA was made.[152] Guarantors are thus arguably applicants for the purpose of enforcing the Spouse-Guarantor Rule because, although Congress has had ample opportunity and notice, it has not proactively invalidated Regulation B's definition of applicant.

The Federal Reserve Board, therefore, did not exceed its authority by broadening the definition of applicant under the ECOA, as posited by Judge Colloton in his concurrence opinion in *Hawkins*.[153] Judge Colloton asserted that guarantors were not included in the natural reading of the term 'apply' and that 'unusual meanings of 'apply' that encompass making a request on behalf of another is not sufficient to make a term ambiguous for purposes of *Chevron*.'[154] But consistent with the Supreme Court's reasoning in *Chevron*, *Household Credit Servs.* and *Gen. Dynamics Land Sys. Inc.* respectively, the Sixth Circuit correctly examined the terms 'applies' and 'credit' within the meaning of applicant under the ECOA *along with* the larger context of the ECOA whilst applying step one of *Chevron*.[155] Specifically, the Sixth Circuit noted that the ECOA prohibited discrimination 'with respect to any aspect of a credit transaction.'[156] Furthermore, the Sixth Circuit correctly noted that the ECOA has broad remedial goals.[157] This context confirms what the plain language reveals: that the definition of applicant under the ECOA is broad enough to include guarantors and the statute is ambiguous.[158] Conversely, the Eighth Circuit in *Hawkins* failed to examine the surrounding language of the term applicant under the ECOA *as well as* the language and design of the statute as a whole.[159] As a result, the Eighth Circuit in *Hawkins* did not appropriately ascertain whether the term applicant under the ECOA was broad enough to include guarantors.

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[150] *Chevron, U.S.A., Inc.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)).
[151] *RL BB Acquisition, LLC*, 754 F.3d at 386.
[152] *Id.*
[153] Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 943 (8th Cir. 2014) (Colloton, J., concurring), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).
[154] *Id.*
[155] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[156] *Id.* (citing 15 U.S.C. § 1691(a) (2012) (emphasis added)).
[157] *Id.*
[158] *Id.*
[159] *Hawkins*, 761 F.3d at 941.

Judge Colloton further asserted that the Federal Reserve Board 'seemed to recognize the plain meaning of 'applicant' in the first decade after the ECOA was enacted.'[160] But simply because the Federal Reserve seemed to recognize the plain meaning of the term applicant for approximately one decade does not mean that the Federal Reserve could not subsequently expand it.[161] In *Chevron*, the Supreme Court posited that the fact that an agency 'has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.'[162] Since the 1985 Federal Reserve's expanded definition of applicant, including guarantors for the purpose of enforcing the Spouse-Guarantor Rule, there have been neither testimonies, reports, nor congressional findings to the contrary.[163] Therefore, the Federal Reserve's acknowledgment of the narrow definition of applicant under the ECOA from its enactment until 1985 is unpersuasive.

Similarly, prior to 2007, a vast majority of federal courts of appeals granted deference to Regulation B's broadened definition of applicant. After the influential 2007 dicta in the Seventh Circuit case of *Moran Foods*, however, numerous lower courts have diverged from this deferential precedent.[164] As the Supreme Court noted before deciding *Gen. Dynamics Land Sys. Inc.* '[T]he Court of Appeals and the District Courts have read the law the same way, and have enjoyed virtually unanimous accord in understanding the ADEA to forbid only discrimination preferring young to old.'[165] The Court further noted that the strength of the consensus was 'enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view.'[166] Accordingly, the strength of the deferential consensus until 2007 establishes that the definition of applicant under the ECOA was and currently is ambiguous, and congressional silence on the issue supports adherence to this view.

Furthermore, in *Hawkins*, the Eighth Circuit acknowledged that the policies of the ECOA 'focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status.'[167] But the Eighth Circuit posited that guarantors are not applicants because they are improperly *included* rather

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[160] *Id.* at 944 (Colloton, J. concurring).

[161] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863 (1984) ("[A]n initial agency interpretation is not instantly carved in stone.").

[162] *Id.* at 864.

[163] BATTLE, JR. ET AL., *supra* note 4, at 23–24. *See also* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp. LLC, 754 F.3d 380, 384 (6th Cir. 2014).

[164] *See RL BB Acquisition, LLC*, 754 F.3d at 386 (citing Empire Bank v. Dumond, No. 13-CV-388, 2013 U.S. Dist. LEXIS 169984, at *6 (N.D. Okla. Dec. 3, 2013) (collecting cases)).

[165] Gen. Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 593 (2004).

[166] *Id.* at 594.

[167] Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014).

than excluded from the lending process and are not denied access to credit.[168] This argument is also unpersuasive because credit applicants who are victims of ECOA violations are eventually *included* in the credit transaction by unlawful means. A spouse who is unlawfully required by a lender to secure his or her spouse's signature on a loan has formally applied for credit and would necessarily be improperly *included* in the credit transaction, though he or she was implicitly denied access to credit in the first instance. Although the spouse-applicant would be protected under the ECOA because of his or her formal application for credit, the spouse-guarantor would not. Therefore, both formal applicants and spouse-guarantors who are improperly included in the lending process by unlawful means should be protected under the ECOA.

B. Regulation B's Definition of "Applicant" Is Not Demonstrably Irrational and Demands Deference

In *RL BB Acquisition*, the Sixth Circuit reasoned that the Federal Reserve's reasoning was not 'arbitrary. capricious, or manifestly contrary to the statute' and was therefore entitled to deference under the second step in *Chevron*'s two-step analysis.[169] But the Eighth Circuit did not reach the second step in *Chevron*'s two-step analysis to determine Regulation B's rational interpretation because it reasoned that the definition of applicant under the ECOA unambiguously excluded guarantors.[170] As exemplified by the Sixth Circuit in *RL BB Acquisition*, however, the definition of applicant under the ECOA is still unclear and arguably includes guarantors.[171] Thus, the Eighth Circuit should have determined only whether the Federal Reserve's broadened definition of applicant for the purpose of enforcing the Spouse-Guarantor Rule was rational and appropriately balanced.

Because the term applicant under the ECOA is ambiguous, Regulation B's broadened yet demonstrably rational definition of applicant for the purpose of enforcing the Spouse-Guarantor Rule should be binding on lower courts. The Sixth Circuit in *RL BB Acquisition* rightfully reasoned the Federal Reserve's broadened definition of applicant under the

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[168] *Id.*

[169] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014) (quoting Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (quotation marks omitted).

[170] *Hawkins*, 761 F.3d at 942.

[171] *RL BB Acquisition, LLC*, 754 F.3d at 386.

ECOA was demonstrably rational.[172] The Sixth Circuit's correct reasoning is most analogous to the Supreme Court's reasoning in *Household Credit Servs.*[173] The Supreme Court in *Household Credit Servs.* expounded that the concept of 'meaningful disclosure' underlying TILA's purpose does not mean *more* disclosure.[174] Instead, it 'describes a balance between 'competing considerations of complete disclosure and the need to avoid [information overload].'"[175] Regulation B, like Regulation Z under TILA, strikes an appropriate balance, because Regulation B only applies to spouses in enforcing the Spouse-Guarantor Rule, and it is not over-inclusive, as only a spouse-guarantor is protected by ECOA. Accordingly, the Federal Reserve Board gave considerable thought to competing interests on both ends of the spectrum with respect to Regulation B, just as it did when it promulgated Regulation Z under TILA.

Additionally, the Supreme Court in *Ford Motor* recognized that it would have been equally reasonable for the Federal Reserve Board to adopt the respondent's alternative interpretation of the statute and regulation.[176] Instead, the Supreme Court granted considerable deference to the agency's interpretation of TILA. TILA, like the ECOA, was enacted by Congress to help consumers by preventing the unlawful conduct of lenders.[177] Specifically, the broad purpose of TILA is to promote the informed use of credit by disclosing meaningful credit terms so that consumers can make informed decisions regarding any credit made available to them.[178] TILA also protects consumers against inaccurate and unfair credit practices.[179] Therefore, both TILA and the ECOA protects consumers in the credit markets. Moreover, the Federal Reserve Board's opinion construing the ECOA through Regulation B, like TILA through Regulation Z, must also be dispositive because its broadened definition of applicant is rational and appropriately balanced to provide protection to consumers in the credit markets.

The Supreme Court has repeatedly held that an agency's construction of its own regulation is authoritative, noting that agencies have an in-depth understanding of the complex nature of market credit practices.[180] The Supreme Court would likely regard the Eighth Circuit's de-

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[172] *See* RL BB Acquisition, LLC, 754 F.3d at 386 (holding guarantors can "seek relief for violations of the spouse-guarantor rule").

[173] Household Credit Servs. Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (citing K Mart Corp. v. Cartier, Inc. 486 U.S. 281, 291 (1988)).

[174] *Id.*

[175] Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1990) (citing S. Rep. 96–73, p.3 (1979) (accompanying S. 108, Truth in Lending Simplification and Reform Act)).

[176] *Ford Motor Credit Co.*, 444 U.S. at 569 (1980).

[177] *See* 15 U.S.C. § 1601(a) (2012).

[178] *Id.*

[179] *Id.*

[180] *See, e.g.*, Power Reactor Dev. Co. v. Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 408 (1961) ("We see no reason why we should not accord to the Commission's

cision in *Hawkins* as embarking 'upon a voyage without a compass when it disregards the agency's views.'[181] Specifically, this is because the Eighth Circuit neither correctly applied step one of *Chevron* nor determined whether the Federal Reserve's interpretation of the ECOA was rational or appropriately balanced.[182] Instead, the Eighth Circuit narrowly construed the ECOA and ignored the Federal Reserve's extensive experience dealing with gender-based credit discrimination. Thus, the Federal Reserve Board's broadened interpretation of the definition of applicant under the ECOA should be controlling.

VI. Conclusion

Gender and marital status-based credit discrimination are still prevalent in the marketplace today. Consequently, the Spouse-Guarantor Rule under Regulation B of the ECOA should be liberally construed to effectively disincentivize gender-related credit discrimination that remains widespread in the credit markets. The Supreme Court should not adopt the Eighth Circuit's restrictive interpretation of the ECOA, because it runs afoul of the underlying purpose of the ECOA. The Supreme Court has acknowledged that a statute must not necessarily be construed in its natural meaning but should instead be construed by its legislative history, including its underlying purpose.[183] The Supreme Court has also acknowledged that principal deference should be granted to administrative interpretations, unless discernibly irrational.[184] Accordingly, although the natural meaning of the term applicant under the ECOA does not expressly include guarantors, the meaning of the term in the context of prohibiting gender and marital status-based credit discrimination supports the broadened meaning under Regulation B. The danger of not granting deference to the Federal Reserve's broadened definition of applicant under the ECOA includes, but is not limited to, lenders using spouse-guarantors as a proxy for securing credit by unlawful means, which emasculates the legislative intent of the ECOA. Creditors will be more inclined to violate the ECOA because they are aware that a spouse-guarantor will no longer be able to seek protection and remedies under

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interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision.").

[181] *Ford Motor Credit Co.* 444 U.S. at 568.

[182] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014).

[183] *See* Gen. Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 593 (2004) (describing how to interpret legislation).

[184] *Ford Motor Credit Co.* 444 U.S. at 565.

the ECOA in particular jurisdictions. Additional protection is required to effectively combat the widespread gender and marital status-based credit discrimination existing in the credit markets.

Extending Meaningful Assistance to Misdemeanor Defendants

Soolean Choy*

I. INTRODUCTION

Misdemeanor cases make up a significant portion of federal and state criminal cases. In fact, most convictions in the United States are

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misdemeanors: while approximately one million felony convictions are handed down yearly, ten times as many misdemeanor cases are filed annually. 'flooding lower courts, jails, probation offices, and public defender offices.'[1] In California, the state with the largest court system in the world—serving a population of more than 38 million people—misdemeanor filings in superior courts totaled 926,169 for fiscal year 2012–2013.[2] Due to issues with underreporting, the national statistics are likely to be lower than the reality.[3] but misdemeanor cases still comprise a significantly larger portion of the criminal caseload than felony cases.

Yet misdemeanor cases are given inadequate attention, despite their frequency and quantity. 'Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel.'[4] Even in cases where counsel is provided to misdemeanants, often times the defenders' overwhelming workloads and competing responsibilities make it difficult for them to commit sufficient time and adequate attention to provide effective representation in the misdemeanor dispute.[5] Because

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[1] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 tbl.1.1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting 1,132,290 state court felony convictions in 2006) [http://perma.cc/GE2W-N7MG]; *see also* R. LAFOUNTAIN ET AL., NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [http://perma.cc/J58R-UAJZ] (showing percentage breakdown of criminal caseload by case type in 17 states). In New York City alone, "the total number of misdemeanor arrests expanded almost fourfold between 1980 and 2011, from about 65,000 a year to over 250,000 a year." Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639 (2014). "Misdemeanor arrests have recently declined for the first time in years[, but t]his phenomenon is driven almost exclusively by decreases in marijuana and trespass arrests[,] [perhaps] due to the significant amount of public pressure, media attention, and litigation around marijuana arrests, stop-and-frisk tactics, vertical sweeps in public housing, and the Clean Halls program, which collectively produced the majority of the marijuana and trespass arrests." *Id.* at 639 n.76.

[2] JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE CASELOAD TRENDS: 2003–2004 THROUGH 2012–2013 xv–xvi (2014), http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf [http://perma.cc/B8AD-Z4YV]. The criminal case category is made up of felonies, misdemeanors, and infractions. *Id.* The total filings for the individual case types are as follows: felony filings totaled 260,461 cases; misdemeanor filings totaled 926,169 cases; and infraction filings totaled 5,050,151 cases. *Id.*

[3] The exact number of misdemeanor cases is unknown, particularly because 'states differ in whether and how they count the number of misdemeanor cases processed each year.' ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf [http://perma.cc/VWY5-GSMX]; *see also*, Natapoff, *supra* note 1, at 1320–21 ("Unlike felony cases and convictions, misdemeanor cases are radically under-documented. Nationally, prosecutors report only about half of all misdemeanor case resolutions to statewide data repositories.").

[4] Natapoff, *supra* note 1, at 1315.

[5] "[M]isdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution. BORUCHOWITZ ET AL., *supra* note 3, at 7. "Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented, leaving constitutional obligations unmet and resulting in a waste of

misdemeanor courts often do not make significant differentiations between the legal treatment of one defendant and another,[6] these courts have metaphorically been referred to as an 'assembly line'

> On this view, everyone who is arrested pursuant to low-level policing priorities is mechanically convicted and punished, even if the sanctions are minor. Prosecutors indiscriminately charge all cases and reflexively seek convictions, and courts robotically convict and issue standard sentences without regard to individual characteristics of cases or defendants.[7]

Thus convictions are often generated in bulk, without meaningful scrutiny of the legitimacy of the convictions being processed and whether the misdemeanant's due process rights are sufficiently protected.[8]

The assembly-line nature of misdemeanor arraignments is evident in the courtroom. In New York City, an estimated 100 to 200 cases are arraigned during a single shift of approximately six hours.[9] Prosecutors often review the paperwork for less than five minutes before designing a plea offer, and defense attorneys often first meet their clients at arraignment.[10] Such meetings usually take place 'either in a small, caged-in interview room [attached to] the holding cells or in the hallway.'[11] It is during these meetings, which last for about ten to fifteen minutes, that lawyers meet with their clients to discuss how they will approach the bench.

In the Manhattan Criminal Court, arraignments are held from 9 a.m. to 1 a.m. each day.[12] I attended an evening arraignment session at the Manhattan Criminal Court. The court's attitude towards individual mis-

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taxpayers' money. *Id.* "Legal representation for misdemeanants is absent in many cases[, and even w]hen an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients" because '[c]ounsel is unable to spend adequate time on each case, and often lacks necessary resources, such as access to investigators, experts, and online research tools.' *Id.* *see also* Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172–74 (2004) (describing a lack of due process in New York's lower court system).

[6] The lack of such individualized treatment has caused some to describe lower courts as processing, rather than adjudicating, cases. *See, e.g.* Weinstein, *supra* note 5, at 1162 ("The structural features which make lower courts process, rather than adjudicate, cases have received significant policy and doctrinal encouragement in recent years.").

[7] Kohler-Hausmann, *supra* note 1, at 622. But the author's point is that though '[t]his version of assembly-line justice may exist in some places, [it] certainly [does] not in New York City.' *Id.*

[8] *See* Weinstein, *supra* note 5, at 1159–60 (arguing that "we [should] aspire to improve how we adjudicate minor cases" in misdemeanor courts which "account for most of Americans' direct exposure to the judicial aspects of the criminal justice system[, and that despite] hav[ing] been the focus of renewed attention in recent years the high volume, rapid-fire, misdemeanor court persists").

[9] Kohler-Hausmann, *supra* note 1, at 654.

[10] *Id.* at 655.

[11] *Id.*

[12] New York State Unified Court System, New York City Criminal Court: Court Information by County, NYCOURTS.GOV, https://www.nycourts.gov/courts/nyc/criminal/generalinfo.shtml [http://perma.cc/6QR9-V4AK].

demeanor cases was jarring. There was one misdemeanor defendant who was slow to move off to the side after his arraignment hearing because he was asking for clarification on his next court appearance date. As the defendant hesitated out of confusion, the moderating court officer yelled at him, 'You've got to step out! We've got other cases. Because the arraignment calendar seemed particularly light on the night of my visit, that such an abrasive encounter had occurred was demonstrative of the proceeding's essential focus on speed—on pushing defendants through as quickly as possible—rather than on providing adequate individualized attention to each defendant. The Supreme Court's warning in *Argersinger v. Hamlin*,[13] that '[t]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result,'[14] has come to fruition.

This form of mass misdemeanor processing yields consequential challenges for defense lawyers and for the misdemeanor defendants themselves. One result is that public defenders are forced to handle enormous caseloads far above the nationally recommended standard of 400 misdemeanor cases per year.[15] In at least three major cities—Chicago, Atlanta, and Miami—defenders each handle over 2,000 misdemeanor cases per year.[16] A typical defender is equipped with scarce resources and is required to perform numerous investigative and core tasks, such as interviewing the client, talking with the prosecutor, reading police reports and other relevant discovery. conducting legal research and factual investigation, preparing for court, writing motions and memoranda, and attending court hearings. Yet the performance of these tasks is compromised when a defender's caseload is excessive, and the defender is unable to provide effective representation that the misdemeanant needs.[17] Of

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[13] 407 U.S. 25 (1972).

[14] *Id.* at 34.

[15] *See* BORUCHOWITZ ET AL., *supra* note 3, at 21–22 (reporting that although the American Council of Chief Defenders "recommend[s] that defenders handle no more than 400 misdemeanors per year," statistics from several states and major cities reveal defenders handling far in excess of this recommendation).

[16] *Id.* Survey responses and reports indicated that misdemeanor defenders handled the following number of cases: part-time defenders in New Orleans were reported to be "handling the equivalent of almost 19,000 cases per year per attorney," limiting them to "seven minutes per case" misdemeanor attorneys in Arizona handle 1,000 cases per year; misdemeanor defenders in Dallas, Texas handle 1,200 per year; the average misdemeanor caseload per attorney at a Tennessee defender's office was 1,500 per year, and "two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards." *Id.* at 21–22.

[17] *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011) (bemoaning that misdemeanor defenders "have few resources to investigate and perform the core tasks for their clients' cases[,] practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they may have just met[, and t]heir potential clients often face pressure to waive the right to counsel in order to enter a guilty plea"); *see also* BORUCHOWITZ ET AL., *supra* note 3, at 21 ("The caseload standards also assume appropriate levels of support services. In

even greater concern is the number of misdemeanants who are pushed through the system without any counsel at all.[18] With defense lawyers already handling cases at maximum capacity, and with no other meaningful assistance available to misdemeanor defendants, many of these defendants are forced to proceed through the system alone and without critical guidance, resulting in serious and far-reaching consequences for the misdemeanants and their families.

Currently, there are no legal or professional standards for effective representation specific to the misdemeanor practice.[19] The Supreme Court has never applied the two-pronged ineffective assistance of counsel test announced in *Strickland v. Washington*[20] to misdemeanor cases.[21] And those lower court decisions that have applied the *Strickland* test have not tackled 'the difficult question of what differences there are, if any, between effective representation in felony and misdemeanor cases.'[22] Further, '[p]rofessional standards do not consider the specific issues and problems relating to misdemeanor advocacy.'[23] The problem, therefore, is that 'there are no standards against which to judge the critical failures of [effective] representation [for misdemeanor defendants] in the lower criminal courts.'[24]

The high-volume misdemeanor system is producing a critical mass of misdemeanor defendants in need of attorneys, and the current number of defenders and existing resources are not sufficient to meet the demand. Not only are there many misdemeanor defendants without counsel, even those with counsel do not receive adequate assistance. Through this paper, I will take a closer look at the current situation of misdemeanor representation and propose a more sustainable solution to address the challenges facing defenders and appropriating effective assistance of counsel to unrepresented and ineffectively represented misdemeanor defendants. In Part II, I will explain the constitutional right to

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other words, they assume that the attorney has access to secretarial assistance, paralegal assistance, basic workplace technology, legal research, and investigatory services. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be approximately one paralegal, one secretary, and one investigator for every four attorneys. Offices that do not maintain the recommended ratios of support staff to attorneys must reduce their workload expectations for attorneys. For these reasons, the ACCD further recommended that each jurisdiction review its situation and amend the standards as necessary, noting that 'the increased complexity of practice in many areas will require lower caseload ceilings. Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case.") (footnotes omitted).

[18] *See, e.g.* Natapoff, *supra* note 1, at 1315 ("While these individuals are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts often without counsel.").

[19] Roberts, *supra* note 17, at 283.

[20] 466 U.S. 668 (1984).

[21] Roberts, *supra* note 17, at 283.

[22] *Id.*

[23] *Id.*

[24] *Id.*

counsel for certain misdemeanor defendants. I will then proceed to examine a few states that report a noticeable number of misdemeanor defendants who remain unrepresented in state court proceedings and discuss potential reasons for why states are drawing the line for providing misdemeanor representation below the constitutionally mandated requirement. In Part III, I will discuss why effective assistance of counsel is crucial for misdemeanor defendants and why there is an urgent need for redressing ineffective representation. In Part IV I will propose the introduction of a source of non-lawyer helpers ("juris case workers") to alleviate the burden on lawyers and to better meet the existing needs of misdemeanor defendants. I will follow with a discussion of the possibility of expanding existing law school and college program offerings to provide training and certification for juris case workers, and then I will discuss potential concerns associated with the introduction of this new pool of legal professionals.

II. The Constitutional Right to Counsel in Misdemeanor Cases

a. Drawing the Constitutional Line

Unlike felony defendants,[25] misdemeanor defendants are not always legally entitled to counsel. In *Argersinger v. Hamlin*, the United States Supreme Court expanded the scope of the Sixth Amendment by extending the right to counsel to misdemeanor defendants who were sentenced to any term of incarceration in addition to any defendant facing felony charges.[26] The Supreme Court announced that 'no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.'[27] However, the Court did not address the question of the right to counsel with sentences that could, but do not immediately, result in incarceration. This issue was later addressed in *Alabama v. Shelton*.[28] The Supreme Court held that

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[25] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court interpreted this right to require states to provide counsel to a defendant charged with a felony who could not afford to hire his own counsel. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963). The Court stated, "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. *Id.* at 344.

[26] 407 U.S. at 36–37.

[27] *Id.* at 37.

[28] 535 U.S. 654 (2002).

'defendants sentenced to suspended terms of imprisonment have a right to counsel, unless either (1) the state offers an opportunity to re-litigate guilt or innocence at any later revocation proceeding or (2) the defendant is sentenced to probation that cannot trigger incarceration.'[29] In practice, *Shelton* guarantees the right to appointed counsel for 'all misdemeanor defendants sentenced either to probation or incarceration.'[30] But importantly, *Shelton* did not extend the federal constitutional right to representation to any 'other misdemeanor or petty offense defendants, including those who could have been sentenced to incarceration but instead received only a fine.'[31]

Although *Shelton* extended protection to defendants facing the possibility of incarceration through a suspended sentence,[32] a defendant who is not sentenced to an immediate or suspended incarceration is not absolved of the risk of being incarcerated in the future. The financial pressures and economic instability that result from the burden of having to make fine payments are significant consequences of non-incarceral punishment that harm the defendant. Upon evaluation of the defendant's ability to pay, if a court determines that the defendant failed to meet his obligations, the defendant may at that time be incarcerated for non-payment.[33] However, per *Shelton*, a defendant who is subsequently incarcerated for non-payment does not have a right to counsel. A defendant who is incarcerated six months after his sentencing phase for defaulting on his payment schedule or a defendant who is incarcerated for non-payment of his remaining balance faces the same risks that the *Shelton* Court cautioned of. Yet both are in effect imprisoned without being afforded the right to representation. Defendants who are not within *Shelton*'s constitutional protections are left without the right to counsel and could end up facing the same realities as their protected counterparts.

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[29] Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1022 (2013) (citing *Shelton*, 535 U.S. at 655–57).

[30] *Id.*

[31] *Id.*

[32] *Shelton*, 535 U.S. at 658. In *Shelton*, the Court reasoned that defendants facing "a suspended sentence that may end up in the actual deprivation of a person's liberty" in the sentencing phase must be provided counsel. *Id.* Otherwise, "[d]eprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing. *Id.* at 667 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

[33] *See, e.g.* Bearden v. Georgia, 461 U.S. 660, 672 (1983) (holding that "[i]f the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority."). Thus, it is unconstitutional to jail indigent defendants for non-payment of a fine unless it is *willful* or the defendant failed to make a *bona fide effort* to pay. *Id.* '[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. Tate v. Short, 401 U.S. 395, 398 (1971). In the event that a defendant is brought to court for failure to pay his fine and costs, the defendant should be entitled to a hearing as to his ability to pay, during which a Court will evaluate whether the defendant had the resources to pay.

The right to counsel for many misdemeanor defendants so entitled under *Argersinger* and *Shelton* has not been enforced with the same standard compared to that of felony defendants.[34] Current doctrine regarding the constitutional guarantee of the right to counsel leaves a sizeable number of unrepresented misdemeanor defendants, which leads to serious consequences for them. Perhaps of even greater concern is the problem of non-compliance in several states with the minimum constitutional requirements mandated by *Argersinger* and *Shelton*, as discussed in the following section.

b. Misdemeanor Representation in States

A nationwide database with information on state court misdemeanor cases does not exist.[35] The limited data that is available is from the few states that make information gathered from surveys of jail inmates publicly available.[36] This absence of nationwide data 'stems both from the [Bureau of Justice Statistic's (BJS)] failure to collect data on misdemeanor defendants and from the difficulty of ascertaining which misdemeanor defendants are entitled to representation.'[37] Furthermore, unlike in felony cases, the right to counsel in misdemeanor cases depends upon the sentence that the defendant ultimately receives. Thus, 'even if data on misdemeanor representation rates were available, that data would not necessarily reflect the extent to which defendants constitutionally entitled to counsel remain unrepresented.'[38] This data asymmetry makes it difficult to assess whether misdemeanor defendants, on a nationwide basis, are receiving counsel and how many defendants actually fall within the doctrinal sweep of *Shelton* and *Argersinger*. However, the publicly available state data discussed in the following section indicate that even defendants constitutionally entitled to counsel largely remain unrepresented in state court proceedings.

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[34] Hashimoto, *supra* note 29, at 1023.
[35] *Id.* at 1025.
[36] *Id.*
[37] *Id.* 'Although the BJS maintains data (including representation rates) on felony defendants prosecuted in state courts in the seventy-five largest counties in the country, it does not collect similar data on misdemeanor defendants.' *Id.*
[38] *Id.* at 1025–26.

Florida

Analysis of the misdemeanor sentencing statistics in Florida raises 'concerns that the patterns of appointment of counsel have shifted away from appointments in misdemeanor cases in the wake of *Shelton*.'[39] In Florida before *Shelton* was decided, 'if the trial judge 'filed a statement in writing that the defendant will not be imprisoned if convicted, appointment of counsel to a misdemeanor defendant was not required.[40] Recognizing that this rule could deprive *Shelton* defendants of their right to counsel, the Florida Supreme Court amended Florida's Rules of Criminal Procedure to 'require representation in misdemeanor cases unless the trial judge filed a written order 'certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation revocation.'[41] Because *Shelton* created a new category of Florida defendants entitled to appointment of counsel, it was expected that the number of misdemeanor cases in which counsel would be appointed would significantly increase.[42] Contrary to this expectation, survey data from 1999 and 2007 suggested that there was in fact a reduction in the relative proportion of misdemeanor cases handled by indigent defense offices post-*Shelton*.[43] These survey findings were also confirmed by data provided by indigent defenders in various counties concerning how many misdemeanor and felony cases they handled.[44] While recognizing the limitations of the available data, 'the proportional drop in misdemeanor representation in Florida rais[ed] grave concerns that a significant percentage of misdemeanor defendants who are constitutionally entitled to counsel remain[ed] unrepresented in Florida.'[45]

New York

In 2006, the Commission on the Future of Indigent Defense Services issued a Final Report to the Chief Judge of the State of New York, reporting that 'New York's current fragmented system of county-oper-

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[39] *Id.* at 1029.
[40] *Id.* at 1029 (quoting Amendments to Fla. R. Crim. P. 3.111(b)(1), 837 So. 2d 924, 927 (Fla. 2002)).
[41] *Id.*
[42] *Id.* at 1030 ("[O]ne would have expected the proportion of misdemeanor to felony cases to rise after Shelton and the associated Florida rule change.").
[43] *Id.* at 1029–30.
[44] *See id.* at 1030 (reporting a reduction from 1723 misdemeanor cases handled per 1000 felony cases handled to 1066 misdemeanors per 1000 felonies).
[45] *Id.* at 1031.

ated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.'[46]

In New York, city, town, and village courts serve as 'local criminal courts' and have trial jurisdiction over misdemeanors, violations, and traffic infractions.'[47] The Commission reported 'that the deprivation of indigent defendants' right to counsel was widespread in town and village courts.'[48] It reported that many indigent defendants had 'significant delays in the appointment of counsel' and had to 'negotiate pleas with the prosecution while unrepresented.'[49] Additionally, the Commission found that 'many justices themselves lacked a clear understanding as to which cases trigger the right to counsel, and 'often counsel for indigent defendants were not available to attend the numerous Town and Village Courts.'[50] The Commission's report emphasized concern 'that many indigent defendants in the town and village courts across the state are deprived of their state and federal right to effective assistance of counsel [because c]ounsel is either not present, not assigned in a timely manner, or not assigned at all.'[51] Furthermore, while the right to appeal a decision by a local judge may exist, in practice, defendants whose right to counsel is violated in town and village courts often have a difficult time exercising their right to appeal 'because town and village courts are not required to be courts of record'—such proceedings 'are not held in a public place and fail to ensure full public access and open procedures.'[52]

The Commission's report called into question the quality of justice provided to those with the assistance of court-appointed counsel. Commentary attached to the report noted that by 2000, New York City's 18-B attorneys[53] 'were disposing of 69 percent of all misdemeanor cases at arraignment.'[54] Commentators raised concerns regarding the 'alarmingly high disposition rate' and called for a searching inquiry into the 'frequency of guilty pleas and the corresponding lack of litigation.'[55] The

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[46] COMM'N ON THE FUTURE OF INDIGENT DEF. SERV. FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (2006).
[47] *Id.* at 21–22.
[48] *Id.* at 22.
[49] *Id.*
[50] *Id.*
[51] *Id.* (quotation marks and footnotes omitted).
[52] *Id.*
[53] 18-B is in reference to Article 18-B of the New York County Law, "which allowed localities to choose among several options but required each county and the City of New York to establish a plan for the provision of counsel to indigent defendants for investigative, expert and other services necessary for an adequate defense." *Id.* at 6–7.
[54] *Id.* add. Additional Commentary of Commission Member Steven Zeidman at 2.
[55] *Id.* In additional commentary by Steven Zeidman in which Hon. Penelope Clute, Hon. Patricia Marks, Laurie Shanks, and Hon. Elaine Jackson Stack join, in response to the Commission's report, Zeidman raised questions as to why "the plea rate [is] so high, whether "indigent defenders are in some form coercing or subtly influencing their clients into pleading guilty," and whether "defense

Commission's report also highlighted how overwhelming the caseloads of New York public defenders were.[56]

Texas

In Texas, the Texas Fair Defense Project (TFDP) filed a class action lawsuit on behalf of all individuals in Williamson County who face possible jail time on a misdemeanor charge and cannot afford to hire a lawyer. The lawsuit alleged that Williamson County was 'engaged in a systematic and deliberate scheme to deprive misdemeanor defendants' of the right to counsel.[57] The named plaintiffs each faced misdemeanor charges in Williamson County that could result in up to a year in prison. They claimed to be unable to afford legal representation and further alleged that they were denied their right to court-appointed counsel. One of the named plaintiffs, Kerry Heckman, a seasonal farmworker, was unemployed at the time charges were filed against him. Despite having no income, bank accounts, or any other assets, his request for an attorney in Williamson County was denied. The court ordered him to bring a retained attorney to his next appearance.[58] Two other named plaintiffs with disabilities that prevent them from working requested appointed counsel. Both were denied. A Williamson County judge stated that they looked as though they could work.[59] The class-action complaint further alleged that the Williamson County courts failed to provide basic information to de-

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lawyers are failing to listen to their clients and/or to value the benefits to their clients of actively contesting the charges." *Id.* Zeidman demanded a "clarion call for defense lawyers to actively investigate and litigate." *Id.*

[56] *Id.* at 17. As evidence that public defenders lack "adequate staff to cover all Town and Village Courts in a given jurisdiction and that requests for additional funds to keep pace with ever growing caseloads are not granted, the report noted that '[i]n one country, despite average misdemeanor caseloads of 1,000 cases per attorney and 175 felony cases per attorney per year, the chief public defender annually is required to submit to the county a proposal as to how he would operate his office with a 10 to 12 percent budget cut.' *Id.* at 17–18.

[57] Press Release, Texas Fair Def. Project, Texas Fair Defense Project Files Lawsuit Against Williamson County and Local Judges for Failure to Appoint Counsel (July 12, 2006), http://www.fairdefense.org/resource/texas-fair-defense-project-files-lawsuit-williamson-county-local-judges-failure-appoint-counsel/ [http://perma.cc/YAT5-D7J6].

[58] "Heckman claims that at his first court appearance, he was not told about his right to a court-appointed attorney or the standards for determining eligibility for court-appointed counsel, or told how to apply for one. He asserts that he requested a court-appointed attorney, informed the court that he could not afford one on his own, and provided proof of his indigency; in response, the court allegedly implied that Heckman did not look like he would qualify for court-appointed counsel because he looked healthy enough to work and was wearing nice clothes. Heckman claims that the court did not ask him any questions about his ability to pay for an attorney. The court allegedly threatened Heckman that it would raise his bond if he did not have an attorney at his next appearance. Notwithstanding his request, at the time of filing Heckman had not been appointed an attorney and the charges against him were still pending. Defendants did not offer any evidence to refute these jurisdictional facts." Heckman v. Williamson Cty. 369 S.W.3d 137, 156–57 (Tex. 2012).

[59] Press Release, Texas Fair Def. Project, *supra* note 57.

fendants about their right to a lawyer and failed to appoint counsel in cases that require appointment.[60]

According to the Texas Criminal Justice Coalition (TCJC), which has been monitoring Williamson County courts for over a year, 'hundreds of misdemeanor defendants' had been 'unwittingly stripped of their right to an attorney.'[61] The TCJC stated that 'the Williamson county courts completely fail[ed] to meet public expectations of how a fair and impartial court system should work.'[62] If the pattern of underrepresentation in Williamson County is widespread, the number of misdemeanor defendants in Texas who are denied the right to counsel is significant.

The data from Florida, New York, and Texas tracking the experiences of misdemeanor defendants paints a concerning picture. A significant number of misdemeanor defendants are stripped of their basic constitutional entitlement to adequate legal representation. Many states continue to fall short of this requirement.

c. Funding as a Barrier to Indigent Defense Services

Inadequate funding for indigent defenders continues to be the most significant barrier to providing adequate defense for misdemeanor defendants.[63] Although funding of indigent defense has increased, it is still woefully insufficient. The failure of states to provide adequate representation to indigent defendants is still at the forefront of the problems that exist today, more than four decades since the Supreme Court's landmark decision in *Gideon*, which required states to provide counsel to indigent defendants charged with a felony.[64]

Although the Supreme Court mandated that state governments provide counsel to indigent defendants, it did not define how such systems should be created and funded. In implementing the right to counsel, state and local governments are free to decide the type of indigent defense

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Even over 35 years ago, inadequate funding of defense systems was identified as "the greatest problem faced by defender systems." NAT'L LEGAL AID AND DEF. ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 8 (1976).

[64] Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [http://perma.cc/5X3N-MMFU] ("Despite the progress since Gideon, there is still an urgent need for fundamental reform.").

systems to employ and how to fund them.[65] As a result, some local governments bear the brunt of the financial burden within the funding model adopted by its respective state, resulting in inequities among the locally funded system.[66]

In competition for state funds, indigent defense is often a low priority. As a result, special funds and other revenue sources are often the primary funding mechanism for these programs. Since these sources of revenue are unpredictable and often fall short of providing adequate representation, such a funding system undermines the goal of adequate indigent defense.[67] For example, in 2004, Georgia's legislature voted to create additional fees and surcharges as a method to fund indigent defense representation.[68] These new fees and surcharges include 'additional fees in civil and criminal cases, surcharges on bail bonds, and application fees for indigent defendants.'[69] Despite this legislation, these new funds do not adequately cover the rising cost of indigent defense.[70]

Some states are beginning to recognize the importance of funding indigent defense. As a result, the burden on counties has decreased, in some cases, dramatically.[71] Even so, many states still face funding shortages that can create a risk of inadequate legal representation for indigent defendants.[72]

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[65] There are three primary models for implementing the right to counsel that state and local governments choose from: 1) the *public defender* model, where full- or part-time attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction; 2) the *contract* model, where "private attorneys are chosen by a jurisdiction—often after a bidding contest—and provide representation as provided by contractual terms"; and 3) the *assigned counsel* model, where "private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case" *Id.* at 53. While "most contracts are annual and require counsel to handle certain number of cases or a particular type of case (e.g., misdemeanors)," the assigned counsel model, is "typically used for cases when public defenders or contract counsel exist but cannot provide representation." *Id.*

[66] Urban counties are often overburdened in comparison to rural counties, which have far fewer cases. Simultaneously, "a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case." *Id.* at 55. But "even populous counties sometimes struggle when faced with the cost of defending capital or other complex cases." *Id.* at 54–55.

[67] *Id.* at 57.

[68] *Id.*

[69] *Id.*

[70] *Id.* 'Although the fund collected $45.5 million in fiscal year 2008, indigent defense [received] only $40.4 million in fiscal year 2009, with the remaining $5 million [returned] to Georgia's general fund. *Id.* at 57–58.

[71] For example, "between 1986 and 2005, Arkansas went from contributing nothing toward indigent defense to contributing 91% of the overall costs; Iowa went from contributing less than three percent to full state funding; and Minnesota went from 11% to 93% state funding." *Id.* at 55.

[72] *See id.* at 59 ("Between 2002 and 2005, *when adjusted for inflation*, many states that fully fund their indigent defense systems actually decreased their level of financial support, including Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin. Now, 37 states are facing mid-year budget shortfalls for fiscal year 2009, and 22 of these states fully fund their indigent defense systems. Obviously, when states reduce financial support for public defense, which is already underfunded, there is a substantially greater risk that accused persons will not receive adequate legal representation and that wrongful convictions will occur.").

Many states have experienced the pressure of budget cuts. In 2008, Maryland was forced to cut its budget by $432 million, costing the public defender agency $400,000 in support staff salaries.[73] In the same year, Kentucky's legislature reduced its budget for indigent defense by 6.4%, a decrease of $2.3 million.[74] The following year, the budget for Minnesota's Board of Public Defense was cut by $4 million, causing the public defender staff to be reduced by 13%.[75] This cut marked the largest reduction in staffing since 1995—when the state first began fully funding indigent defense.[76] Several counties in Florida also experienced severe budget cuts.[77] The privation was much the same in Georgia.[78]

Public defender offices across the country are underfunded, which disparately impacts misdemeanants. When funding is not adequate to staff both misdemeanor and felony cases, indigent defenders prioritize clients who are most in need—those facing the longest sentences or facing the death penalty.[79] Consequently, an attorney facing the decision of where to devote resources will likely choose a complex felony case over a misdemeanor case because of the higher stakes in a felony case.[80] Furthermore, in handling their assigned cases, lawyers defending misdemeanors in some jurisdiction have to move between multiple courtrooms, even between several towns.[81] This results in defense providers being stretched thin, diminishing the quality of misdemeanor representation. Thus, indigent defenders facing budget shortages often prioritize and allocate resources based on the stakes involved, to the detriment of misdemeanor defendants.

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[73] *Id.* at 59. Moreover, "as of October 2008, the [Maryland] Public Defender announced that it would cease to pay for private court-appointed attorneys in conflict cases, and consequentially, "the Chief Judge of Maryland's highest court has ordered the counties to pay the cost of attorneys who must be hired when the public defender has a conflict. At least one county had stated that it does not have the funds to pay those bills. *Id.* at 59–60.

[74] *Id.* at 60. "As a result, the Department of Public Advocacy announced that it will begin to refuse several categories of cases, including conflict of interest cases, some misdemeanors, and probation and parole violation cases." *Id.*

[75] *Id.*

[76] *Id.* A total of 23 public defenders were laid off, leading to expectations that public defender caseloads will increase from around 450 felony cases per attorney per year to approximately 550 such cases. *Id.*

[77] Orange-Osceola County, despite having among the state's busiest criminal courts, faced budget cuts of $3 million dollars to their prosecutor and public defender offices. *Id.* The public defender's office alone lost 40 positions overall, including 10 attorneys. *Id.* Some of the remaining costs were transferred to defendants in the form of special fees incurred upon conviction—$50 for misdemeanors and $200 for felonies. *Id.* Miami-Dade County faced a lawsuit challenging the excessiveness of its public defender's caseload due to lack of funding. *Id.* And public defender's in Broward and Palm Beach counties were on the verge of refusing case for want of funds. *Id.*

[78] By 2007 the Georgia Public Defender Standards Council "owed hundreds of thousands of dollars to attorneys representing indigent defendants in capital cases and was forced to lay off 41 employees" and in 2008 was forced to close a major office to cut cost. *Id.*

[79] BORUCHOWITZ ET AL., *supra* note 3, at 26–27.

[80] Roberts, *supra* note 17, at 296.

[81] *Id.* at 296.

This empirical lack of adequate funding for indigent defense seems to indicate that states are violating the constitutional requirements set forth in *Argersinger* and *Shelton*. Conversely, it could be that states are adjusting their practices—making changes to their charging decisions, sentencing procedures, waivers, etc.—within the constitutional bounds. One cost-effective way for states to comply with *Shelton* is to 'eliminate incarceration and probated sentences for low-level offenders.'[82] If states find that the cost of appointing counsel to all qualifying defendants is too high, they can alternatively choose to change the penalty structure—as long as the defendant is not facing immediate incarceration, the defendant is not constitutionally required to be appointed counsel. Such changes to the penalty structure 'provide[ ] states with a low-cost way to comply with the Constitution' that is 'infinitely preferable to coercing waiver of the right to counsel.'[83]

Either way, the reality is that the current resources made available in the form of attorneys and funding are not adequate to go around to all misdemeanor defendants in need of representation. The result is that states are practically drawing the line below the constitutionally mandated requirement. With competing demands for scarce resources from defendants charged with high-level crimes, and with the ongoing and constant struggle for adequate funding, the immediate and consequential needs of misdemeanor defendants are often overlooked and remain unaddressed.

III. Need for Change: Why Misdemeanor Defendants Need Assistance

In essence, there are two groups of misdemeanor defendants in need of systemic change: misdemeanants who have counsel yet are without adequate assistance, and misdemeanants who are left without any form of assistance from an attorney. And although the Supreme Court has not extended the right to counsel to all misdemeanor defendants, there is reason to think that all misdemeanants, regardless of the sentence they are facing, can benefit from *some* form of assistance.

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[82] Hashimoto, *supra* note 29, at 1042.
[83] *Id.*

a. Even misdemeanors can be complex, and require the assistance of a lawyer

That the law is not a fixed set of rules, but always affected by the individual circumstances of a case, is no less true of misdemeanors. As the United States Supreme Court stated in *Argersinger*:

> The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.[84]

When a number of factors could mean the difference between innocence and guilt, misdemeanants need lawyers to sort through the facts of a case to assess what is legally important.

Misdemeanor defendants need lawyers to translate and explain the technicalities of relevant rules and to navigate complex court proceedings. Technical rules of evidence, pleading, and procedure are complicated and can be difficult to navigate for even a trained lawyer. Defendants have a right to understand the technicalities of the charges they are facing and need lawyers to translate the meaning of relevant provisions (e.g. what the statutory minimum and maximum penalties are) in layperson terms. Lawyers are also in a unique position to ensure that prosecutors comply with statutory and constitutional obligations to provide essential information to defense through discovery procedures.[85]

Lawyers are needed to provide assistance with investigative, forensic, and administrative support. Assistance with preserving evidence, locating witnesses, and gathering facts to prove factual innocence or mitigating factors would strengthen a defendant's case. Misdemeanor defendants often lack 'thorough research into the facts surrounding the crime as well as the defendant's background, family. upbringing, mental

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[84] Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). At the time of the *Argersinger* decision, annual caseloads across the country were estimated at between four and five million court cases. *Id.* at 34 n.4. *Argersinger*'s estimation is approximately half of the estimated annual caseload today. *See* Natapoff, *supra* note 1, at 1314–15 ("[A]n estimated ten million misdemeanor cases are filed annually.").

[85] *See* LAURENCE A. BRENNER, AMERICAN CONSTITUTION SOC'Y FOR LAW AND POLICY, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 6 (2011), https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf [http://perma.cc/N2J5-8ZJW] ("An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (Brady evidence) and delayed providing even routine information to which the defense is entitled in discovery.").

health, and character' that prove effective in defending more serious criminal cases.[86]

Effective assistance of counsel is particularly important in misdemeanor cases as their high volume 'results in pressure for speedy disposition, making it more likely for prosecutors to overlook key factual issues.[87] Judges and prosecutors also have an 'enormous incentive to pursue early guilty pleas—as early as the initial arraignment in some jurisdictions.'[88] In New York City, 57% of all misdemeanor and violation cases reach a disposition at arraignment.[89] Early and rapid disposition is an established feature of misdemeanor justice in New York City.[90] Misdemeanor defendants need lawyers to sort out the implications of a plea bargain offered by a prosecutor and also to avoid over-punishment from within a sentence range and collateral consequences that could be associated with the crime.

b. Consequences of a Misdemeanor Conviction

Contrary to the misconception that misdemeanor convictions do not truly affect a person, the consequences of a misdemeanor conviction can be dire. As the United States Supreme Court noted in *Argersinger*, 'the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and reputation.'[91]

Even a fine-only sentence can have a large toll on the defendant, which is manifested in the form of financial pressures and economic instability. This is particularly the case if the defendant is already having trouble making ends meet. Further, there is also the lingering risk of incarceration in cases where the defendant defaults on his payments or is ultimately unable to pay off the amount due.[92] In fact, every day defendants are sent to jail for failure to pay their court debts.[93] The alternative

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[86] Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 971 (2012).

[87] BORUCHOWITZ ET AL., *supra* note 3, at 12.

[88] Roberts, *supra* note 17, at 306–7; *see also* JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 13 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf [http://perma.cc/6UL5-CB4L] ("In many jurisdictions across the country defenders meet their clients minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client.").

[89] Kohler-Hausmann, *supra* note 1, at 654.

[90] *Id.* Over the past thirteen years, the percentage of sub-felony cases with a disposition at arraignment has fluctuated between a high of 65.5% and a low of 57.9%. *Id.*

[91] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[92] *See supra* Part II.a.

[93] For example, in Benton County, Washington, jail records covering a four-month period in 2013 revealed "that on a typical day, a quarter of the people who were in jail for misdemeanor offenses

punishment to immediate incarceration of a misdemeanor conviction can be just as burdensome as, if not more so than, a jail sentence.

In addition to direct consequences, misdemeanor defendants are vulnerable to a myriad of collateral consequences. It is '[a] common misperception' that punishment for a misdemeanor charge involves no more than 'going through the process culminating in dismissal, deferred adjudication, or a quick guilty plea with community service, a fine, or perhaps a small amount of jail time.'[94] What this misperception overlooks is that the consequences of even the most 'minor' misdemeanor conviction can be far-reaching and severe. There no longer exists the proverbial 'slap on the wrist,' as a long list of collateral consequences result even from conviction for the most minor charges.[95] A misdemeanor defendant can face deportation,[96] denial of employment, or denial of access to various professional licenses.[97] A student convicted of a

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were there because they had failed to pay their court fines and fees. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [http://perma.cc/5B5F-TBQC]. Stephen Papa, a homeless veteran, was sentenced to 22 days in jail for failure to pay what "he owed in restitution, fines and court fees. *Id.* Another example of the "court-debt-prison cycle" is James Robert Nason, who, "when he was 18, pleaded guilty to second-degree burglary in Spokane, Washington. He was sentenced to 30 days in jail, community service, and ordered to pay $735 in court costs, attorney fees and restitution. The debt began to accrue 12 percent annual interest from the day of his sentencing. [Because] Nason didn't finish the community service, and didn't keep up with the payments he served more than 120 days behind bars over several years, despite arguing that he could not afford to pay [because] he was both homeless and unemployed. Lisa Riordan Seville & Hannah Rappleye, *Sentenced to Debt: Some Tossed in Prison over Unpaid Fines*, NBC NEWS (May 27, 2013), http://www.nbcnews.com/feature/in-plain-sight/sentenced-debt-some-tossed-prison-over-unpaid-fines-v18380470 [http://perma.cc/ME44-Z5WT].

[94] Roberts, *supra* note 17, at 277.

[95] *See, e.g.*, Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1126 (2013) (acknowledging such consequences "rang[e] from the loss of public housing and federal student loans to the inability to find work because the majority of employers now run criminal background checks on prospective employees").

[96] Laws concerning criminal convictions and deportation may vary per state. For a summary of New York law on deportation, *see e.g.*, Manuel D. Vargas, *Immigration Consequences of New York Criminal Convictions*, FOUR CS: COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES, COLUMBIA LAW SCHOOL, http://blogs.law.columbia.edu/4cs/immigration/ [http://perma.cc/D9WM-6SCS]. Numerous misdemeanor drug convictions can lead to automatic deportation for non-citizens, because '[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less or marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2012). *See also* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 261 (2002) ("Deportation is a particularly significant collateral consequence imposed on non-citizens who are convicted of drug offenses.").

[97] *E.g.* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting employment requiring professional licenses from which ex-offenders can be "formally excluded range from lawyer to bartender, from nurse to barber, from plumber to beautician' despite no connection "between the prior offense and the employment"); Clyde Haberman, *NYC; Ex-Inmate Denied Chair (and Clippers)*, N.Y. TIMES Feb. 25, 2003, http://www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html [http://perma.cc/9T5S-WE29] (reporting on an inmate who was planning for parole being denied certification as a barber's apprentice due to his criminal record,

misdemeanor may be ineligible for student loans.[98] A misdemeanant on public support may lose 'public housing and access to food assistance, negatively impacting the misdemeanant's family as well.[99] Financial costs resulting from conviction are often rendered without considering the defendant's ability to pay.[100] Thus, no criminal conviction should be regarded as minor or unimportant.

Misdemeanor convictions can also create a snowballing effect for future criminal charges faced by the misdemeanant. Even a minor conviction can hinder a misdemeanant's ability to dismiss a more severe prior conviction.[101] Furthermore, misdemeanor convictions can adversely affect a person in future sentencing proceedings and result in increased punishment or minimize the chance to reduce a sentence.[102] For example, a defendant with a prior misdemeanor conviction may not 'utilize the controlled substances 'safety valve' statute and related provision in the federal sentencing guidelines.'[103] Additionally, a defendant with a prior misdemeanor conviction carrying a sentence of thirty or more days of jail time or over a year of probation 'who later faces a federal drug crime charge is ineligible' for a reduced sentence, despite a provision that grants federal judges discretion to issue sentences below the statutory mandatory minimum.[104]

Misdemeanor defendants face additional difficulties resulting from technological advancement and the increased use of electronically stored data. Misdemeanants exit the criminal justice system 'with a permanent, easily accessible electronic record that can affect future employment, housing, and many other basic facets of daily life.'[105] This huge change has taken effect within the past few years. Previously, one had to make a trip to the local courthouse, or multiple courthouses, to retrieve an individual's criminal record.[106] However, because criminal records are now

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which the licensing authorities at the Department of State decided "indicates lack of good moral character and trustworthiness required for licensure").

[98] *See* Editorial, *Marijuana and College Aid*, N.Y. TIMES Nov. 2, 2007, http://www.nytimes.com/2007/11/02/opinion/02fri4.html [http://perma.cc/3WR7-DU2W] (describing "a law that barred even minor drug offenders from receiving federal education aid" that "affects students who commit crimes while actually receiving aid").

[99] BORUCHOWITZ ET AL., *supra* note 3, at 12; *see also* Columbia Law School, *Overview and Mission Statement*, FOUR CS: COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES, http://www2.law.columbia.edu/fourcs/ [http://perma.cc/C6DS-Q5YU] (identifying most collateral consequences of New York state and local law).

[100] *See, e.g.*, Heckman v. Williamson County, 369 S.W.3d 137, 156–57 (Tex. 2012) ("Heckman claims that the court did not ask him any questions about his ability to pay for an attorney."); Press Release, Texas Fair Def. Project, *supra* note 57 (announcing a class action complaint alleging misdemeanor defendants being denied the right to appointed counsel despite an inability to pay).

[101] BORUCHOWITZ ET AL., *supra* note 3, at 13.

[102] *Id.*

[103] *Id.* at 15 (citing 18 U.S.C. 3553(f) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (U.S. SENTENCING COMM'N 2016)).

[104] *Id.*

[105] Roberts, *supra* note 95, at 1090.

[106] Roberts, *supra* note 17, at 287.

widely available electronically, potential employers and landlords can more readily access and view them.[107] This information accessibility makes it easier for hiring managers to avoid offering employment to anyone with a conviction, although the type of work and conviction may be unrelated. The permanency of these records creates an additional problem: even if a charge ultimately results in a dismissal, the charge can still be connected to the individual. In several states, such cases 'remain publicly available and may require the individual to affirmatively file, and sometimes pay. for expungement' of the records.[108] Thus widely available criminal records have made the information semi-permanent; once a charge is filed, it is extremely difficult to erase from one's public record.

All criminal convictions, irrespective of the sentence imposed, 'can have significant life-altering consequences for defendants' and their families.[109] It is largely because of such significant collateral consequences that it is even more crucial for misdemeanor defendants to have counsel to inform them of the possibilities:

> It is one thing to say that an individual pleading guilty to disorderly conduct does not necessarily need counsel to be assured a non-jail sentence. It is quite another to say that individual does not need counsel to understand that she will lose her public-school-system job and her public housing if she pleads guilty. Similarly, it is one thing to say a person does not need a lawyer to keep him out of jail on a public urination case. It is quite another to say he does not need serious counseling, from his own lawyer, about how. if he is in California, pleading guilty to public urination leads to lifelong sex offender registration. These are only a few brief examples; legislators continue to add to the lengthy list of collateral consequences of criminal convictions at the federal, state, and local level.[110]

Such consequences potentially impact the defendant at least to the same extent as—and arguably to a greater extent than—probation or a short incarceration.[111]

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[107] *Id.*
[108] *Id.*
[109] Hashimoto, *supra* note 29, at 1041.
[110] Roberts, *supra* note 95, at 1127–28 (footnotes omitted).
[111] Hashimoto, *supra* note 29, at 1041.

c. Information and advocacy can make a difference

Misdemeanants also need the assistance of lawyers as advocates and their knowledge to strategically alter court proceedings. Lawyers, who have 'skill in the science of law, are able to 'change the nature of proceedings by making them slower and more complex.'[112] Better advocacy for misdemeanor defendants can also prevent defendants from facing wrongful conviction and over-punishment for the crime:

> What often stands between an individual and an unnecessary misdemeanor conviction is a good lawyer. The quality of representation that an individual gets in a misdemeanor case is significant on many levels, including substantive justice for that individual, public perception of justice, and public safety
>
> An effective lawyer will advance sentencing arguments that help avoid unnecessary incarceration in appropriate cases, whereas the absence of such advocacy can lead to unjust sentences. In addition, the potential for wrongful convictions and the troubling phenomenon of innocent people pleading guilty is great in low-level cases.[113]

In some cases, convictions can be avoided all together. 'For example, first misdemeanor arrests in New York City often result in an offer for an Adjudication in Contemplation of Dismissal (ACD) which allows for the expungement of the arrest from a person's record if they do not get arrested again within 6 months.'[114] Especially in high-volume jurisdictions, misdemeanors are often dismissed altogether, or put on a diversion track, and then ultimately dismissed. Lawyers can advocate for a defendant to reject a plea offer, in the hopes of differed adjudication or an ACD—the issuance of which would potentially help the defendant to avoid a record.[115]

Lawyers can also advocate on behalf of misdemeanor defendants to negotiate the ultimate fine amount and payment schedule. And lowering the fine amount and establishing a manageable payment schedule helps

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[112] Barton & Bibas, *supra* note 86, at 983. And '[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer's] right but may be his duty.' *Id.* (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985)). Therefore, 'lawyers in criminal courts are necessities, not luxuries.' *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963)).

[113] Roberts, *supra* note 17, at 285.

[114] Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 376 n.112 (2012); *see also* Kohler-Hausmann, *supra* note 1, at 645 (presenting data showing New York City prosecutors "declined to prosecute between approximately 17,000 and 30,500 [misdemeanor arrests] in each of the previous five years").

[115] Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G REP. 6, 6 (2009) ("Successful participants in deferred adjudication programs see the charges against them dismissed and their arrest record expunged.").

alleviate the risk of incarceration the defendant may face in lieu of paying the fine amount.

Additionally, lawyers make a difference in initial stages, such as the arraignment proceeding when the bail amount is set. A defendant may be released on his own recognizance or receive a lower bail amount if a lawyer is able to skillfully advocate on the defendant's behalf. This is particularly true if the defendant has an extensive criminal record or other aggravating circumstances.

Yet attorneys available to misdemeanor defendants are overburdened by overwhelming caseloads and are often incentivized to provide speedy, rather than quality, representation. Thus, they may not be positioned to deliver the zealous representation that misdemeanor defendants—facing serious direct and collateral consequences—need.

d. Need for Change

'The proliferation of criminal records and the related phenomenon of an explosion in collateral consequences for minor criminal convictions"[116] creates an urgent need to find a solution for providing quality representation to the increasing number of misdemeanor defendants who are processed through the system. Regardless of whether they are facing immediate incarceration, misdemeanor defendants need effective counsel to learn about the numerous consequences that result from a misdemeanor conviction and to skillfully navigate the legal process. Lawyers assist defendants in understanding the discretion a prosecutor has in charging and plea decisions and the discretion courts have in picking a fine amount from a range. And misdemeanants and their lawyers can explore the option of making payments in installments to accommodate a defendant's personal financial situation. Assistance with evaluating these options are within a misdemeanant's statutory right, and because of the far-reaching potential consequences of the resulting proceeding and outcome, ensuring effective assistance to minimize consequences for the defendant is of utmost importance.

IV. Solutions

While it would be ideal to assign an attorney to every misdemeanor defendant, resource constraints and other difficulties that prevent defend-

[116] Roberts, *supra* note 17, at 287.

ers from providing adequate assistance make it highly unlikely that such an ideal outcome can be achieved. The next best solution is to solicit the aid of non-lawyer helpers. Non-lawyer helpers can support lawyers in improving the quality of assistance provided to misdemeanor defendants and would provide a much needed source of assistance for those misdemeanants who do not have counsel.

a. Value of non-lawyer helpers

Soliciting the assistance of those who are knowledgeable about the law but are not necessarily trained in the law may be a cost-effective solution to fill the current gap between the inadequate supply of defenders and the pressing need for assistance among misdemeanants. In fact, many court disputes can be resolved without the involvement of a lawyer and 'neither litigants nor society can afford lawyers for [every] dispute.'[117] Such non-lawyer helpers, whom I will call 'juris case workers, could be professional assistants whose fees would be lower than that of lawyers who offer limited legal advice and can be of help to more misdemeanants. Juris case workers would partner with under-funded, understaffed defenders to help prepare for and alleviate their misdemeanor caseload. By taking ownership of certain tasks that do not necessarily need to be performed by a lawyer—tasks that could be performed by someone without a Juris Doctor degree—juris case workers could potentially perform the same work for a lower fee. And by helping to cut down costs yet providing the manpower to perform the work to be done, they could become key players in providing more effective assistance to the many misdemeanor defendants who are without legal aid.[118]

b. Drawing from the social-worker model

Social workers are at the forefront of discussions regarding the need for non-lawyer legal services.[119] Social work has been characterized by

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[117] Barton & Bibas, *supra* note 86, at 988.

[118] In certain situations, it may be more efficient and effective to have the assistance of a non-lawyer than the help of a lawyer. *See e.g. id.* at 992 (reporting that "because procedures are simpler and the stakes are lower [for misdemeanor cases], lawyers simply have much less to do"); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 496 (2007) ("[T]he data suggest that the value added by counsel is lower in misdemeanor cases than in felony cases.").

[119] *See, e.g.*, Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 16, 19 (1998) (presenting "a theoretical justification of the notion that social work is the appropriate profession to assist" "poor persons with simple legal problems" and

sociologist Andrew Abbott as 'the profession of interstitiality. the profession whose job was to mediate between all the others. [T]he heart of what [social workers] did was to broker between doctors, lawyers, and psychiatrists on the one hand, and patients, institution, and, sometimes, family on the other. '[120] Such discussions propose that social workers are prime candidates to engage in non-lawyer work, such as 'identify[ing] the character of the legal problem, mak[ing] contacts, prepar[ing] papers, resolv[ing] routine issues, and referring clients to legal aid or private lawyers when the case involves complex, multifaceted issues.[121] This proposal advocates for giving social workers sufficient training to recognize legal issues, provide guidance for pro se hearings, offer referrals to relevant legal services, and advocate for clients in non-adversarial hearings.[122] The proposed tasks do not include what would be considered more substantive legal work, such as performing legal research or representing clients at court proceedings.[123]

One of the main arguments in support of using social workers as a medium to provide non-lawyer legal services is that social workers are already strategically placed in key stations to provide these necessary services.[124] Although the use of such non-lawyers in the justice system has been criticized in other contexts (e.g. community courts),[125] the social worker model serves as a springboard for expanding the traditionally-defined law profession.

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proposing an expansion of the role of "social workers at community centers [to] assist both new and experienced lawyers in more effectively meeting the needs of poor clients").

[120] Andrew Abbott, *Boundaries of Social Work or Social Work of Boundaries?*. 69 Soc. Serv. Rev. 545, 549 (1995). "Probably the vast majority of what people with the title 'social worker' actually do in the United States is indeed connecting together services provided largely by other professions and other institutions. *Id.* at 559. '[E]ven within the profession of interstitiality, sub-professions such as medical social work and the proposed 'judicial social worker' designations can be carved out in consonance with developments in law." Bertelli, *supra* note 119, at 27, (citing Rufus Sylvester Lynch & Edward Allan Brawley, *Social Workers and the Judicial System: Looking for a Better Fit*, 10 J. Teaching in Soc. Work 65, 72 (1994)).

[121] Bertelli, *supra* note 119, at 20.

[122] *Id.* at 20. Further, '[t]he long-term educational goal of the program would be to integrate a more practical legal component to the continuing education, baccalaureate, and master's level training of social workers, including "legally significant topics commonly encountered by social workers in community practice," and developing "procedures for intake and consultation with clients on legal issues. *Id.* at 20–21.

[123] *See id.* at 20 n.35 (indicating that such social workers' "main reference materials would be legal handbooks, rather than primary sources, such as case law and statutes").

[124] *See, e.g. id.* at 16 ("Many social workers, such as those working at settlement houses and community centers, are well-positioned to assist poor persons with simple legal problems.").

[125] *See, e.g.* Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 Fordham Urb. L.J. 897 (2003).

c. Juris Case Workers in practice

Among the myriad needs of misdemeanor defendants that are not currently being met, there are many tasks that a juris case worker can assist with. A case worker's first task would be to make a judgment call: is the misdemeanant's need one that the juris case worker could resolve or one that requires a lawyer. In the latter case, the case worker would then make informed referrals to services the defendant may need.

One key aspect of a juris case worker's role would be *information delivery*. They would serve as the first point of contact from within the legal system. Based on the misdemeanants' citation, the juris case worker could provide an overview of the process and inform misdemeanants of their general legal rights (e.g. right to counsel or to a speedy trial[126]). The case worker could review the complaint with the client, and explain the statute that was violated and the minimum and maximum penalties associated with the violation in layman's terms.[127] This will ensure that the defendants are not left in the dark, have the chance to ask any initial questions, and can make a thoughtful decision as to whether they need a lawyer's assistance.

Juris case workers can also conduct intake interviews and instigate an informed inquiry into the defendant's background and individual circumstances. Assisting with gathering facts, preserving evidence, locating witnesses, researching the defendant's background, family situation, and upbringing, and conducting a mental health and character evaluation would be of tremendous help to lawyers. These crucial tasks often go unattended due to time and resource constraints. Such tasks are not only suitable for a juris case worker to perform but are key to discovering any mitigating evidence that should be presented to the court.

Juris case workers with a working knowledge of the court process can also be a valuable resource for advising on compliance with court procedures. For example, the case worker can assist pro se litigants with preparing various legal forms in civil matters,[128] including ensuring compliance with administrative procedures.

By alleviating portions of lawyers' workloads, juris case workers can help lawyers focus their attention on performing the more substantive legal tasks. Upon reviewing the files prepared by the juris case

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[126] *See, e.g.* N.Y. PENAL LAW § 30.30 (McKinney 2003 & Supp. 2016) (setting forth speedy trial requirements and time limitations).

[127] In this way, the tasks of a juris case worker could be along the lines of what a clinical student or extern would perform under the supervision of a supervising attorney/professor. For example, students handling a misdemeanor weapons possession case in the Criminal Defense Clinic at Fordham University School of Law "reviewed the complaint with [the client], [took] his personal history, and advised him that he would very likely be released on his own recognizance once he appeared before the judge." Weinstein, *supra* note 5, at 1158.

[128] Bertelli, *supra* note 119, at 17.

workers with the preliminary factual, background, and personal information, lawyers can perform the more substantive legal tasks, such as conducting further legal research, making discovery requests to the prosecutor, writing motions and memoranda, and preparing for and attending court hearings with the client. This joint effort between juris case workers and lawyers is necessary to provide the effective assistance and representation that the misdemeanants need.

d. Source of Juris Case Workers

Because of the nature of the proposed work to be performed by juris case workers, it is logical for the case workers to become a subset of the law profession. Thus, law schools could explore expanding their degree offerings to include a degree specifically for juris case workers, e.g. a juris case work degree. Similar to a teaching certificate, case workers could graduate with a certificate and the training required of a professional case worker.

As an alternative to focusing on the graduate professional school level, another consideration could involve expanding existing pre-law programs at colleges and universities to create a 'juris case work' major. Undergraduates interested in pursuing this type of work could take clinical classes—perhaps offered at a coordinate law school—to gain hands-on experience, develop the necessary interpersonal skills, and learn about the most pertinent and high-level legal issues needed for the job. Such programs could be a great opportunity for students who are interested in client advocacy and the legal process but do not wish to pursue three years of legal education to obtain a juris doctor degree.

e. Employment structure of Juris Case Workers

There are several possible options for which institution should employ juris case workers. For example, public defender offices could employ the juris case workers, since they will be working closely with the defenders. Having the juris case workers physically present and accessible can smooth out the workflow and ensure greater efficiency in handling the cases that come through the office. Another option would be for juris case workers to be employed by the courts. Courts could maintain a list of available juris case workers and assign them to non-counsel-appointed misdemeanor cases as they come through the court docket. Fi-

nally, case workers could also be hired on a contract basis to assist local defenders in times of heavy caseloads.

f. Concerns

One concern is whether non-lawyer legal helpers can handle the complexity of misdemeanor cases.[129] Part of a juris case worker's task will be to delineate what services they can and cannot offer to the client. Juris case workers should be trained to recognize their own limits and to pass the case onto a public defender if it is outside the scope of their capability. And for the most serious misdemeanor cases, these case workers will be handling portions of the case in conjunction with the attorney assigned to the case.

As repeat players, juris case workers can be a valuable resource for pro se defendants who are encountering the judicial system for the first time. While the defendant's cooperation is necessary to put together a detailed case file, defendants themselves may not know which facts are key to establishing a certain defense or mitigating factor. Juris case workers will have knowledge and experience that the defendants themselves simply do not have in preparing their case.

Within the courtroom, defendants unfamiliar with the setting may not feel at ease when confronted with the power imbalance that is deliberately created by the solemnity of the courtroom. The power of the judge and the formalities of a court proceeding may make the defendant feel as if he cannot adequately represent himself, and juris case workers can be a resource to those who have questions or concerns prior to entering the courtroom.

One of the main benefits of obtaining the assistance of juris case workers is that their fees would be lower than that of a lawyer. A public defender office that needs to hire additional staff but that lacks adequate funds to hire full-time lawyers could benefit from hiring juris case workers who could support the existing staff at a lower cost.

Conversely, there is a concern that the prohibition against the unauthorized practice of law would bar the assistance of juris case workers. Many states forbid the practice of law by people not regularly licensed and admitted to practice in the state.[130] However, the definition of what

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[129] *See, e.g.* Roberts, *supra* note 17, at 303 (arguing that "[a]lthough misdemeanors are the usual training ground for new attorneys, they can also be just as complicated as typical felony cases").

[130] *See, e.g.* N.Y. JUD. LAW § 478 (McKinney 2016) ("It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself or herself in a court of record in this state or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer or equivalent terms in any language, in such manner as to convey the impression that he or she is a legal practitioner of law or

constitutes 'legal services' has been at the forefront of many disputes involving alternative business services, and concerns over the regulation of juris case workers likely fall within the same grey zone. In 1995, the American Bar Association (ABA) published recommendations on the connection between prohibitions against the unauthorized practice of law and the unmet needs of individuals with low incomes for legal services. The ABA urged that:

> [w]ith regard to the activities of all other nonlawyers, states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public.[131]

Recognizing that alone it 'cannot provide all required legal services, the ABA acknowledged 'the need for regulated non-lawyer practice.'[132] Along the same line of reasoning used by states to allow businesses to provide alternative services akin to legal services,[133] states should also interpret the definition of 'unauthorized practice of law' to allow the work of juris case workers.

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in any manner to advertise that he or she has, owns, conducts or maintains a law office or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."); N.Y. JUD. LAW § 484 (McKinney 2016) ("No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state.").

[131] AMERICAN BAR ASSOCIATION, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 161–62 (1995), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/non_lawyer_activity.authcheckdam.pdf [http://perma.cc/WTD9-BSQS].

[132] Bertelli, *supra* note 119, at 40; *see also* AMERICAN BAR ASSOCIATION, *supra* note 131131, at 4–5 (recognizing that "lawyers are not always available at affordable rates" that for some claims "available fees may be too low for a lawyer to be able to undertake the work; that there are few too lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers' significant debt burdens and rising operating costs put lawyers under economic pressure to charge higher fees").

[133] *See, e.g.* Terry Carter, *LegalZoom Resolves $10.5M Antitrust Suit Against North Carolina State Bar*, ABA JOURNAL (October 23, 2015), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [http://perma.cc/U33N-XKPS] (describing that as part of the settlement the state bar agreed "to support proposed legislation that would clarify the definition of 'unauthorized practice of law' to "permit[ ] interactive legal-help websites" like LegalZoom to continue operating in North Carolina). Further, "[l]egal challenges [to LegalZoom's legality] in other states ha[ve] fallen away over the years. *Id.*

Despite these concerns, the value that juris case workers can contribute to the law profession and offer to misdemeanor defendants is significant. Allowing for such non-lawyer assistance is a practical solution for addressing the critical need that currently exists within the misdemeanor system.

V. Conclusion

The existing number of defenders and resources is not sufficient to meet the demands of the critical mass of misdemeanants produced by the high-volume misdemeanor system. Misdemeanor defendants who are without counsel because they do not fall within the constitutionally guaranteed line and those who *have* counsel but do not receive adequate assistance are equally in need of additional support. Because the collateral consequences of misdemeanor charges can be quite significant and severe, there is an urgent need to focus more attention on ensuring that those without counsel and those with inadequate counsel receive quality assistance with their cases. Over-burdened and under-funded, defenders currently lack the capacity and sufficient funds to provide adequate assistance to all misdemeanor defendants in need—there is currently no implemented sustainable solution for alleviating defenders' overwhelming workloads and competing responsibilities. As an alternative to the ideal yet unrealistic solution of assigning attorneys to every defendant's case, soliciting the assistance of non-lawyer helpers should be explored. The profession of juris case worker should be created to assist existing defenders with non-legal tasks for their misdemeanor caseload and to serve as a resource for those who do not qualify for an attorney. To this end, law schools could consider expanding their program offerings by creating a new track for those who are interested in performing the type of work envisioned above. At the very least, juris case workers assisting with non-legal tasks should not be problematic under existing unauthorized practice of law regulations. And depending on how states choose to define legal services and the unauthorized practice of law going forward, it seems unlikely that even assisting with what may be characterized as legal work would be prohibited by states. This new pipeline of helpers is exactly the change that the current misdemeanor system critically needs.

Stemming the Tide: Texas's Demographic Change, the Voting Rights Act, and the Emerging Importance of *Bartlett v. Strickland*

By Matthew Drecun*

INTRODUCTION

The population of Texas is growing rapidly, and nearly all of that growth is occurring in its cities and among its racial and ethnic minori-

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ties.[1] When the 2020 Census registers that growth, it will show the steady increase in minority groups in many of Texas's legislative districts.[2] This demographic change will challenge mapmakers seeking to preserve the partisan and racial structure of Texas's current district maps. However, those mapmakers will be able to go about their work after the 2020 Census with minimized interference from the Voting Rights Act (VRA).

Much discussion has centered on the Supreme Court's landmark decision in *Shelby County v. Holder*,[3] which lifted the requirement of Section 5 of the VRA that Texas submit its redistricting maps for the federal government's approval.[4] Another Supreme Court decision, *Bartlett v. Strickland*,[5] also warrants attention because it will impose important limits on the role played by Section 2 of the VRA.[6]

Bartlett held that Section 2 does not protect a minority group's voting strength unless and until its members can 'elect [a] candidate based on their own votes and without assistance from others.'[7] Previously, however, in *LULAC v. Perry*,[8] the Supreme Court held that Section 2 prohibited mapmakers from 'cracking' apart a minority group that was poised to become a controlling majority in its district.[9] Consequently, by 2020, minority groups in many of Texas's legislative districts are likely to find themselves in a no-man's-land—too small for *LULAC*'s protection but growing too large too quickly to be fairly dismissed under *Bartlett*. Under the apparent rule of *Bartlett*, they face the risk that state mapmakers will curtail the growth of their voting strength.[10] The redraw-

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[1] STEVE H. MURDOCK ET AL., CHANGING TEXAS: IMPLICATIONS OF ADDRESSING OR IGNORING THE TEXAS CHALLENGE 24 (2014).

[2] *See* TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, TEXAS POPULATION ESTIMATES AND PROJECTIONS PROGRAM OVERVIEW (2015), http://osd.texas.gov/Data/TPEPP/ [http://perma.cc/6HEL-HGLV]. Steve Murdock—see *supra* note 1—is the former State Demographer. His research center at Rice University, the Hobby Center for the Study of Texas, continues to collaborate with the Texas State Data Center. MURDOCK, *supra* note 1, at 20.

[3] 133 S. Ct. 2612 (2013).

[4] 52 U.S.C.A. § 10304 (West 2015) (Section 5 applied to specific jurisdictions identified in Section 4. Under Section 5, any change with respect to voting in a covered jurisdiction could not legally be enforced without a determination by a federal district court in D.C. or a submission to the U.S. Attorney General. This required proof that the proposed voting change would not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction were unable to prove the absence of such discrimination, the change would be legally unenforceable). *See, e.g.* Nicholas Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55 (2013).

[5] 556 U.S. 1 (2009).

[6] 52 U.S.C.A. § 10301 (West 2015); *infra*, Parts II–B and III.

[7] 556 U.S. at 14.

[8] 548 U.S. 399 (2006).

[9] *Id.* at 439–42; *see* Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986) (stating that dilution of racial minority group voting strength may be caused by the dispersal of a particular group into districts in which they constitute an ineffective minority of voters).

[10] In *Bartlett*, Justice Souter issued a prescient warning that this problem would emerge. 556 U.S. at 42 n.5 (Souter, J. dissenting) ("North Carolina could fracture and submerge in majority-dominated

ing of these districts after the 2020 Census will have an important impact on Texas's political landscape. With similar demographic changes occurring nationwide,[11] the ramifications of *Bartlett*'s holding will test the continuing vitality of the VRA.

Part I of this note, focusing on Texas's seats in the U.S. House of Representatives, identifies the existing districts subject to the pressures of demographic change and anticipates the parts of the state where new districts will be needed. Part II provides the background to *Bartlett* and analyzes its controlling opinion. Justice Kennedy's plurality opinion in *Bartlett* limited the VRA's mandate, departed from the Section 2 case law, and allowed the concerns about race-conscious districting expressed in *Shaw v. Reno*[12] and subsequent cases to control the interpretation of the VRA.[13] Part III then addresses two issues left in the wake of *Bartlett*: first, whether there is still a way for Section 2 to prevent the cracking of a minority group that is not yet a majority in its district but is nearing that point; and second, whether Section 2 applies to minority-coalition districts, in which two or more minority groups form a majority of the district's voting-age population.

I. The Demographic Tide

Texas has a 'rapidly growing, racially/ethnically diversifying, and aging population.'[14] Robust expansion is nothing new for Texas; it has outpaced the nationwide growth rate in every decade since it became a state.[15] In recent years, Texas's population increase has been particularly exceptional. The state had the largest growth in absolute terms of any state between 2000 and 2010, and between 2010 and 2012.[16]

Importantly, that growth is not uniformly distributed. In seventy-nine of the Texas's 254 counties, the population shrank between 2000 and 2010, and ninety-six shrunk between 2010 and 2012.[17] Meanwhile, its cities have expanded apace.[18] The state's growth has also not been uniformly distributed across racial and ethnic groups. The state was

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districts the 12 districts in which black voters constitute between 35% and 49% of the voting population without ever implicating § 2.").

[11] Murdock, *supra* note 1.

[12] 509 U.S. 630 (1993).

[13] *Bartlett*, 556 U.S. at 21.

[14] Murdock, *supra* note 1, at 28.

[15] *Id.* at 17.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 27.

60.6% non-Hispanic white in 1990, 52.4% in 2000, and 45.3% in 2010, and that number continues to fall.[19]

Part I–A explains how the map of Texas's congressional districts changed after the state's growth between 2000 and 2010 earned it four new U.S. House seats. Part I–B anticipates the effects of continuing demographic change on the state's existing districts. Part I–C identifies the regions of the state that should receive new seats after 2020.

A. Redistricting after the 2010 Census

Between 2000 and 2010, Texas added 4.3 million people.[20] Reflecting that population growth, the state was awarded four additional seats in the U.S. House.[21] The state's initial districting maps did not attain preclearance[22] under Section 5 of the VRA, leading to extensive litigation in the federal district court in Washington, D.C.[23] The Supreme Court's decision in *Shelby County v. Holder* mooted this litigation, because it invalidated the coverage formula that subjected Texas to the preclearance process.[24] Nevertheless, the litigation there and by private plaintiffs in the Western District of Texas prompted the adoption of interim maps in 2013.[25] Those interim maps still govern Texas's elections,[26] and as of this writing, litigation against both the interim and original maps continues.[27]

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[19] *Id.* at 17–18.

[20] TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, CENSUS BUREAU CUSTOM REDISTRICTING TABLES FOR TEXAS, Table 1 (2010), http://osd.texas.gov/Data/Decennial/2010/Redistricting [http://perma.cc/6554-SDTV].

[21] Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court at 3, Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2011) (No. 1:11-cv-01303-RMC-TBG-BAH).

[22] *See supra* note 4 and accompanying text.

[23] Texas v. United States, 887 F. Supp. 2d 133, 138 (D.D.C. 2011) (denying preclearance under Section 5 because Texas failed to show its redistricting plans would not have a retrogressive effect, were not enacted with discriminatory purpose, and did not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group).

[24] 133 S. Ct. 2612, 2619–21, 2631 (2013) (explaining that a jurisdiction would fall within the Section 4 "coverage formula" if the state or political subdivision of the state maintained on November 1, 1968, a "test or device" restricting the opportunity to register and vote, or if the jurisdiction had a voting test and less than 50 percent voter registration or turnout as of 1972); Texas v. United States, 133 S. Ct. 2885 (2013).

[25] Perez v. Texas, 970 F. Supp. 2d 593, 598 (W.D. Tex. 2013) (summarizing the legislative history of the interim plans' adoption during the 2013 legislative session).

[26] Order Denying Plaintiffs' Conditional Motion for Preliminary Injunction, Perez v. Texas, 970 F. Supp. 2d 593 (W.D. Tex. 2015) (No. 11-CA-360-OLG-JES-XR) (denying a motion by five plaintiff groups to enjoin the use of the interim maps while the litigation concerning their challenge to those maps continues).

[27] *See* Perez v. Perry, 26 F. Supp. 3d 612, 621–22 (W.D. Tex. 2014) (holding that the claims against the 2011 plans were not moot). It promises to continue for some time beyond 2016. *See* Order, *supra*

Just like its current growth, Texas's growth between 2000 and 2010 was concentrated in its metropolitan areas[28] and among its racial and ethnic minorities.[29] Nearly 2.8 million of the state's 4.3 million new residents were Hispanic, amounting to 65% of the growth.[30] The non-Hispanic black population grew by 522,000, and the non-Hispanic white population grew by only 464,000, accounting for 12% and 11% of the overall increase, respectively.[31]

Notwithstanding that distribution, three of Texas's four new seats in the U.S. House went to rural and suburban Congressional districts that have consistently elected white Republicans:[32] the Twenty-Fifth District ("the Twenty-Fifth"), held by Roger Williams; the Twenty-Seventh, held by Blake Farenthold; and the Thirty-Sixth, held by Brian Babin.[33] The white[34] voting-age population (VAP) in these new districts was 73.5%, 47.2%, and 69.5%, respectively.[35] The lone new minority opportunity

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note 26, at 1 (preserving the still-disputed interim maps for use in the 2016 election cycle). *See also* Non U.S. Plaintiffs' Joint Motion for Entry of Judgment at 1, Perez v. Texas, 26 F. Supp. 3d 612 (W.D. Tex. Dec. 30, 2016) (No. 5:11-cv-00360-OLG-JES-XR) (requesting that the court end its long delay by entering a final judgment as to the 2011 plans, in order to allow the possibility of relief by the 2018 elections).

[28] TEXAS STATE DATA CENTER, *supra* note 20 (reporting 206,512 additional people in Fort Worth, 182,761 in San Antonio, 145,820 in Houston, and 133,828 in Austin). Likewise, the counties containing each of these cities experienced substantial growth. In addition, suburban counties in these metro areas grew significantly, particularly Collin and Denton counties in the Dallas area, Fort Bend and Montgomery counties in the Houston area, and Williamson County near Austin.

[29] MURDOCK, *supra* note 1.

[30] TEXAS STATE DATA CENTER, *supra* note 20 at Table 2.

[31] *Id.*

[32] This naturally raises the issue of partisan gerrymandering, but that is not the focus here, because there is no agreement about how to adjudicate such claims. *See* Vieth v. Jubelirer, 541 U.S. 267, 307–08 (2004) (Kennedy, J. concurring) (holding, in a controlling concurrence, that partisan gerrymandering claims are justiciable but that no "clear, manageable, and politically neutral standards" have yet been found by which to evaluate them).

[33] These districts are "new" in the sense that they did not substantially replicate an existing district from the previous map; they cobbled together territory from several existing districts into a new configuration. The Thirty-Fourth and Thirty-Fifth are new in the sense only that they are higher-numbered. The Thirty-Fourth substantially replicates the old Twenty-Seventh (Cameron County and points north along the Gulf Coast), while the Thirty-Fifth replicates much of the old Twenty-Fifth. It covers the same population cluster in central and eastern Travis County, and it continues to be held by Lloyd Doggett. *Compare* Map of Texas Congressional Districts for the 115th Congress, TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS 115TH CONGRESS 2017–18 (2017), http://www.tlc.state.tx.us/redist/pdf/congress/map.pdf [http://perma.cc/G2AX-FQ6V], *with* Map of Texas Congressional Districts for the 110th Congress, TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS, 110TH CONGRESS PLAN 01440C (2006), http://www.tlc.state.tx.us/redist/pdf/chronology_plans/PLAN01440C.pdf [http://perma.cc/F4XH-M94S]. For election winners, see the Race Summary Reports at OFFICE OF THE SECRETARY OF STATE, http://elections.sos.state.tx.us/index.htm [http://perma.cc/YAU8-8DJG].

[34] The Texas State Data Center uses 'Anglo,' rather than "White.' Many data sources also use Hispanic and Latino interchangeably. In the course of this discussion, the terms are used according to the source on which the discussion is then drawing.

[35] TEXAS LEGISLATIVE COUNCIL, POPULATION AND VOTER DATA WITH VOTER REGISTRATION COMPARISON: CONGRESSIONAL DISTRICTS 2 (2015), ftp://ftpgis1.tlc.state.tx.us/DistrictViewer/Congress/PlanC235r202.pdf [http://perma.cc/AG2H-MPF9].

district[36] was the Thirty-Third, which links central Dallas to central Fort Worth and is held by Marc Veasey, a black Democrat.[37]

Before and after the 2011 redistricting, the Twenty-Seventh has had its core in Nueces County, which contains the city of Corpus Christi.[38] The previous district had stretched down the Gulf Coast to Cameron County, where Brownsville is located, coupling predominantly white Nueces County with predominantly Hispanic areas. Consequently, it was represented by Solomon Ortiz, a Hispanic Democrat, for thirteen consecutive terms.[39] However, Farenthold narrowly defeated Ortiz in 2010 to take over the previous Twenty-Seventh.[40] State mapmakers then reoriented the district, combining Nueces County with whiter, rural areas to the north and northwest drawn from the previous Fourteenth, Fifteenth, and Twenty-Fifth Districts.[41]

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[36] This is one term for a district in which a racial minority constitutes a majority of the voting-age population, also known as "majority-minority" districts. They are sometimes also described as "ability districts. *See, e.g.* Texas v. United States, 831 F. Supp. 2d 244, 253 n.7 (D.D.C. 2011) (explaining the term's origins in the statutory text of Section 5). Not everyone accepts the use of the term "opportunity district." *See, e.g.* Transcript of Oral Argument at 5, Bush v. Vera, 517 U.S. 952 (1996) (No. 94-805) (Scalia, J. "Why don't we just call them majority minority districts? I mean, you're entitled to use whatever terminology you can call them, you know, motherhood apple pie districts if you like, but you will be insulting my intelligence every time you say it."), https://www.oyez.org/cases/1995/94-805 [http://perma.cc/ZE8C-5J7P].

[37] Office of the Secretary of State, *supra* note 33.

[38] *See infra* Figure 1.

[39] Texas State Directory Online, Solomon P. Ortiz, Sr. (2015), http://www.txdirectory.com/online/person/?id=17390 [http://perma.cc/V2HE-HTJ4].

[40] Office of the Secretary of State, Race Summary Report: 2010 General Election (2010), http://elections.sos.state.tx.us/elchist154_state.htm [http://perma.cc/8H6Z-3E8V].

[41] Texas Legislative Council, *supra* note 33.

FIGURE 1. THE TWENTY-SEVENTH DISTRICT

Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/ Individual%20Districts/map_C235_25-36.pdf [http://perma.cc/2W4J-RZM5].

Williams's Twenty-Fifth and Babin's Thirty-Sixth Districts were carved out of solidly Republican areas in the central and southeastern parts of the state, respectively.[42] The Twenty-Fifth, starting in western Hays and Travis Counties and running northward almost to Fort Worth, was assembled from portions of the old Eleventh, Seventeenth, and Thirty-First Districts.[43] Only in western Travis County does the new Twenty-Fifth share any territory with the previous district.[44] Similarly, the Thirty-Sixth, running from eastern Harris County east and northeast to the Louisiana border, borrows from the old Second, Eighth, and Fourteenth Districts.[45]

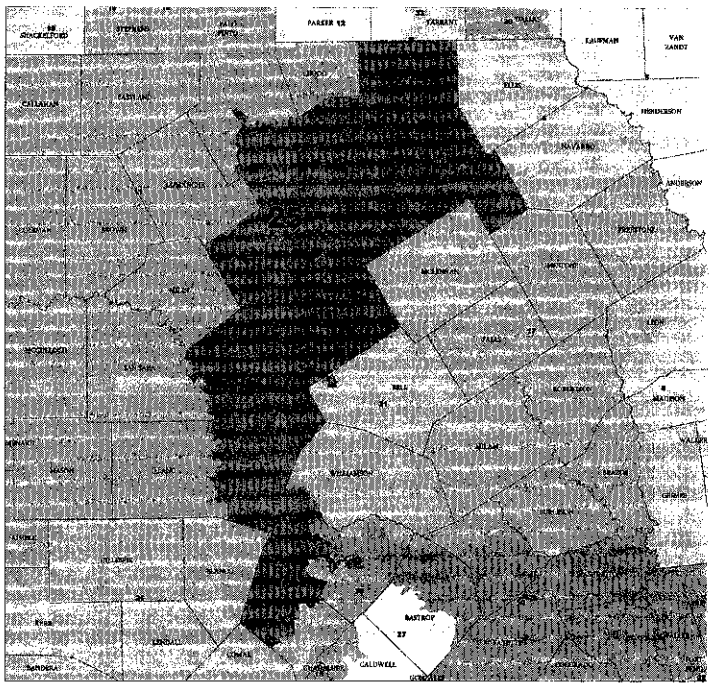
[42] *Id.*

[43] *See infra* Figure 2.

[44] *Id.*

[45] *See infra* Figure 3.

FIGURE 2. THE TWENTY-FIFTH DISTRICT



ADAPTED FROM TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/ Individual%20Districts/map_C235_25-36.pdf [http://perma.cc/2W4J-RZM5].

Mapmakers were able to create these rural and suburban districts due to the continued growth of suburban counties. For example, Williamson County, north of Austin, added 173,000 people between 2000 and 2010,[46] which allowed the Thirty-First to cede its northern counties to the new Twenty-Fifth.[47] Likewise, the growth in suburban Brazoria and Galveston Counties,[48] near Houston, allowed the Fourteenth to cede its southwestern counties to Farenthold's new Twenty-Seventh.[49] Through these changes, the growth of minority groups in Texas's metropolitan areas served to increase Republican representation of rural and suburban Texans.

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[46] TEXAS STATE DATA CENTER, *supra* note 20.

[47] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (state maps) (showing the contraction of the Thirty-First to Bell and Williamson Counties, with Coryell, Hamilton, and Erath Counties shifting to the Twenty-Fifth).

[48] TEXAS STATE DATA CENTER, *supra* note 20.

[49] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (state maps) (showing the shift of Matagorda, Wharton, Jackson, Calhoun, Victoria, and Aransas Counties from the Fourteenth District to the new Twenty-Seventh).

B. Effects of Demographic Change on Existing Districts

After the 2020 Census, the state's mapmakers will have to re-draw the state's congressional districts because U.S. House districts must have precisely equal overall populations.[50] That requirement—coupled with the state's demographic change—will create challenges for mapmakers seeking to preserve the partisan and racial advantages of the current map. In each district discussed below, Republicans will have an incentive to shift minority residents to adjoining districts. Shifting populations in this way will run the risk of claims under Section 2 if large minority communities are "cracked apart"[51] or if minority groups are unduly "packed" into a small handful of districts.[52]

The Office of the State Demographer produces county-level population projections that can help to identify the current districts likely to experience meaningful change by 2020.[53] The discussion below focuses on districts in which Hispanic residents could form a majority of the district's voting-age population (VAP) in 2020, either alone or in a coalition with other minority groups.[54] The State Demographer makes three sets of estimates, based on different projected growth rates: zero migration, migration at half the rate as between 2000 and 2010, and migration at the same rate as between 2000 and 2010.[55] The middle-of-the-road estimate is used below in order to avoid overstating expectations[56] and to

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[50] U.S. CONST. art. I, § 2. *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964) (holding that states with multiple seats in the U.S. House must equalize the overall population of each district).

[51] *See, e.g.*, LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

[52] *See* Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (defining the "packing" variety of vote dilution as "the concentration of [a racial minority] into districts where they constitute an excessive majority") (quoting Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986)). *See, e.g.*, Bone Shirt v. Hazeltine, 461 F.3d 1011, 1016 (8th Cir. 2006) (finding a Section 2 violation where a legislative plan heavily concentrated Native Americans in two districts, leaving an adjoining district with a thirty percent Native American population that could never elect its preferred candidate). A new map could also be challenged on equal protection grounds as a "racial gerrymander" if evidence shows that race was the "predominant factor" in mapmakers' line-drawing decisions but that compliance with the VRA did not justify the particular use of race. *See* Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015) (articulating the standard for racial gerrymandering claims); *id.* at 1273–74 (allowing that legislators may use race to draw districts when there is a "strong basis in evidence" that compliance with the VRA is thereby achieved). Racial gerrymandering claims are not the focus of this note, though the intersection of the racial gerrymandering and Section 2 bodies of jurisprudence is considered at length, *infra*, Part II–B.

[53] MURDOCK, *supra* note 2.

[54] The focus of this discussion is on voting-age population, not total population, because successful claims of minority vote dilution under Section 2 of the VRA require the demonstration that a compact group of minority voters could form a majority in a single-member district. Bartlett v. Strickland, 556 U.S. 1, 11–14 (2009); *Gingles*, 478 U.S. at 50.

[55] The three key variables in population projections are fertility, mortality, and migration. Migration forecasting engenders the most uncertainty; hence, the three different scenarios. MURDOCK, *supra* note 1, at 20.

[56] Slowing Hispanic population growth since 2007, relative to the preceding seven years, suggests that a somewhat more conservative estimate is the wise course. RENEE STEPLER & MARK HUGO LOPEZ, PEW RESEARCH CENTER, U.S. LATINO POPULATION GROWTH AND DISPERSION HAS SLOWED

account for the fact that foreign-born individuals lacking citizenship account for much of Texas's population increase.[57]

Demographic change in Harris County will affect the Second and Seventh Districts, currently held by Republicans Ted Poe and John Culberson, respectively.[58] The Second runs from the county's northeast corner along its northern edge and down the northwest side of Houston, while the Seventh starts on Houston's west side and curls up to the northwest to meet the Second.[59] In 2010, the Second's VAP was 27.3% Hispanic and 9.6% black, forming a combined 36.5%.[60] The Seventh's VAP was comparable: 27.0% Hispanic and 11.6% black, making up 38.1%.[61] Through 2020, the white population of Harris County is projected to shrink, while its minority populations will grow substantially.[62] Depending on the location of these changes, a coalition of black and Hispanic residents could approach a majority in both districts.

SINCE ONSET OF THE GREAT RECESSION 5 (2016), http://www.pewhispanic.org/files/2016/09/PH_2016.09.08_Geography.pdf [http://perma.cc/22J6-UNTL].

[57] *See* Kaiser Family Foundation, *State Health Facts: Population Distribution by Citizenship Status*, THE KAISER FAM. FOUND. (2015), http://kff.org/other/state-indicator/distribution-by-citizenship-status/ [http://perma.cc/ETQ5-P2T7] (estimating that non-citizens comprised 11% of Texas's population in 2015); RANDY CAPPS ET AL., MIGRATION POLICY INSTITUTE, A PROFILE OF IMMIGRANTS IN HOUSTON, THE NATION'S MOST DIVERSE METROPOLITAN AREA 7 (2015), http://www.migrationpolicy.org/sites/default/files/publications/HoustonProfile.pdf [http://perma.cc/Z5H7-WLRS] (explaining that the "low citizenship rate of Houston's immigrants—and of Latinos in particular—reduces their political power and civic participation").

[58] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).

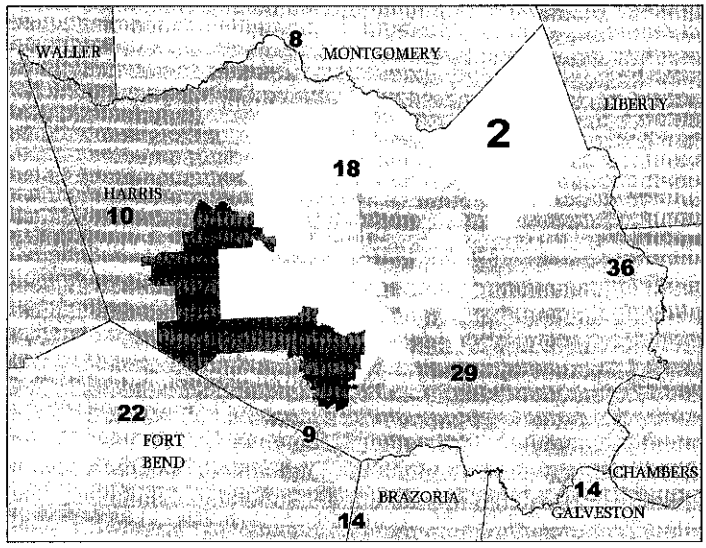
[59] *See infra* Figure 4.

[60] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1. The combined black and Hispanic percentage of the population is slightly less than the sum of the two groups' separate percentages, because some individuals identify as both black and Hispanic. TEXAS LEGISLATIVE COUNCIL, DATA FOR 2011 REDISTRICTING IN TEXAS 3 (2011), http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf [http://perma.cc/FLX9-FVQB].

[61] *Id.*

[62] TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by county, comparing 2010 and 2020, based on "1/2 2000–2010" migration rate, for ages 18–85+, all races and ethnicities selected). All population projections in this section come from this tool.

FIGURE 3. THE SECOND AND SEVENTH DISTRICTS



Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/PlanC235_MapPacket_Legal-Sized.pdf [http://perma.cc/XZN3-6KAZ].

TABLE 1. VOTING-AGE POPULATION GROWTH BY RACE (HARRIS COUNTY)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth
Harris	2,944,624	3,464,177	519,553	-20,459	81,264	384,159

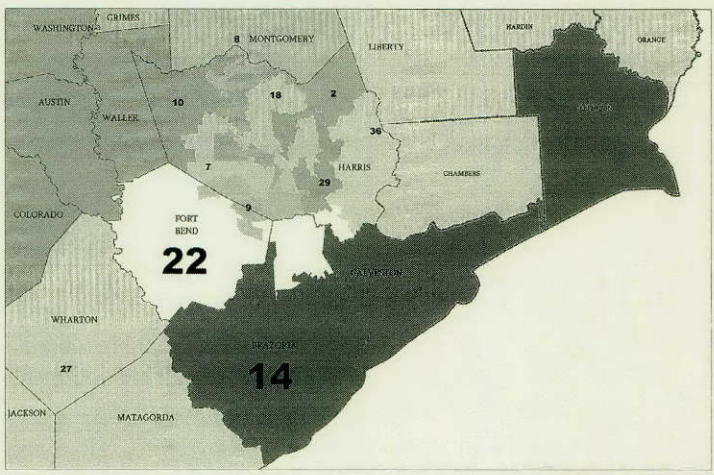
Data obtained from TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by county, comparing 2010 and 2020, based on "1/2 2000–2010" migration rate, for ages 18–85+, all races and ethnicities selected). Data from Tables 2–5 also comes from this source using this method.

To protect the Second, mapmakers could shift the growing Hispanic population into the adjoining Eighth or Thirty-Sixth, where the 2010 VAP's were only 16.7% and 18.0% Hispanic, respectively.[63] Shifting Hispanic residents to the adjoining Twenty-Ninth, held by Gene Green, is unlikely because that district's VAP was already 72.7% Hispanic in 2010.[64] This would be vulnerable to a "packing" claim under Section 2. Likewise, protecting the Seventh will be difficult. Shifting black or Hispanic residents to Al Green's Ninth or Sheila Jackson Lee's Eighteenth will also risk a "packing" claim, while the adjoining Republican seats—the Second, Tenth, and Twenty-Second—also have growing minority populations.[65]

[63] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.
[64] *Id.*
[65] *See id.*

The Fourteenth District, represented by Republican Randy Weber, encompasses all of Jefferson and Galveston Counties and most of Brazoria County.[66] Based on figures from the 2010 Census, the Fourteenth's VAP was 20.3% black and 19.2% Hispanic, forming a combined 39.2% of the VAP.[67] All three counties in the Fourteenth project considerable black and Hispanic population increases but stagnant white growth, which could give minority groups nearly half the district's VAP by 2020.[68]

FIGURE 4. THE FOURTEENTH AND TWENTY-SECOND DISTRICTS



Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/%20Districts/_C235_13-24.pdf [http://perma.cc/CYJ5-JAZY].

TABLE 2. VOTING-AGE POPULATION GROWTH BY RACE (BRAZORIA, GALVESTON, JEFFERSON COUNTIES)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth
Brazoria	226,181	276,882	50,701	8,371	9,869	24,086
Galveston	217,142	245,579	28,437	7,559	7,559	14,422
Jefferson	191,875	203,429	11,554	-6,407	4,917	10,335
TOTAL			**90,692**	**9,523**	**22,345**	**48,843**

[66] *See infra* Figure 5.

[67] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[68] *See id.*

TABLE 3. VOTING-AGE POPULATION GROWTH BY RACE (FORT BEND COUNTY)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth	Other Groups
Fort Bend	411,540	563,035	151,495	26,448	34,171	49,379	41,497

As with the Second and Seventh, the Fourteenth will be difficult to protect. Its growing minority populations cannot be shifted to the adjoining Twenty-Second or Twenty-Seventh, which are experiencing the same pattern of growth.[69] Mapmakers will likely have to expand the Fourteenth eastward, into the Thirty-Sixth.

The Twenty-Second, held by Pete Olson, contains most of Fort Bend County and small portions of northern Brazoria County and southern Harris County.[70] The 2010 Census reported the district's VAP as 22.3% Hispanic and 12.7% black, making up 34.6% altogether.[71] Because most of the district is in Fort Bend County, that county's demographic shifts will have a much larger impact on the Twenty-Second than the changes in Harris and Brazoria Counties, which are presented in the tables above. The growth of Fort Bend County's other minority groups has also been robust.[72]

Mapmakers will again struggle to protect this district, given the districts that adjoin the Twenty-Second. Shifting minority populations to Al Green's Ninth will risk a "packing" claim under Section 2, while shifting those populations to the adjoining Seventh, Tenth, Fourteenth, or Twenty-Seventh Districts will be counterproductive to the mapmakers' efforts to preserve those as safe Republican seats.

Farther afield from Houston, the Twenty-Seventh[73] is likely to see its Hispanic residents become a clear majority. The 2010 Census recorded the district's VAP as 45.1% Hispanic and 5.6% black, for a combined 50.4%.[74] Nueces County's white population is projected to shrink, while its Hispanic population is projected to grow substantially.[75] This is also true of the district's other population clusters: modest white growth in Caldwell and Bastrop Counties will be outstripped by Hispanic growth

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[69] *See id.*

[70] *See supra* Figure 5.

[71] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[72] The vast diversity of Fort Bend County in terms of race, ethnicity, and national origin is well known and much discussed. *See, e.g.*, Leah Binkovitz, *Fort Bend County's Diversity Confirmed by Survey*, HOUSTON CHRONICLE, May 1, 2015, http://www.chron.com////-County-still-the-most-diverse-in-6236118.php [http://perma.cc/CQ5U-QSUK]; Corrie McLaggan, *What Ethnic Diversity Looks Like: Fort Bend*, N.Y. TIMES, Nov. 23, 2013, http://www.nytimes.com///24/us/what-ethnic-diversity-looks-like-fort-bend.html [http://perma.cc/B75T-9XLS].

[73] *See supra* Figure 1.

[74] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[75] *Id.*

there.[76] Any efforts by mapmakers to counteract the growing Hispanic population in this district will yield a credible "cracking" claim under Section 2.

TABLE 4. VOTING-AGE POPULATION GROWTH BY RACE (BASTROP, CALDWELL, MATAGORDA, NUECES, SAN PATRICIO, VICTORIA, WHARTON COUNTIES)

County	2010 VAP	2020 VAP	Total Growth	Anglo Growth	Black Growth	Hispanic Growth
Bastrop	54,719	67,776	13,057	3,183	826	8,566
Caldwell	28,008	34,386	6,378	1,180	339	4,706
Matagorda	27,031	29,649	2,618	-179	248	2,347
Nueces	251,968	281,357	29,389	-4,593	681	31,066
San Patricio	46,529	51,146	4,617	-256	106	4,532
Victoria	63,616	69,807	6,191	-705	574	5,824
Wharton	30,208	32,604	2,396	-272	219	2,381
TOTAL			**64,646**	**-1,642**	**2,993**	**59,422**

Further west, the Twenty-Third[77]—the subject of lengthy litigation[78] and intense electoral competition[79]—will be under pressure from demographic change at its edges. The VAP was already 65.8% Hispanic in 2010,[80] and that percentage will increase.[81] To the west, the adjoining Sixteenth will not be able to absorb all of El Paso County's population growth. Likewise, to the east, the adjoining Twenty-Eighth cannot absorb all the growth in Webb and Bexar Counties, which include Laredo and San Antonio, respectively.[82]

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[76] *See id.*

[77] *See infra* Figure 6.

[78] *See* LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

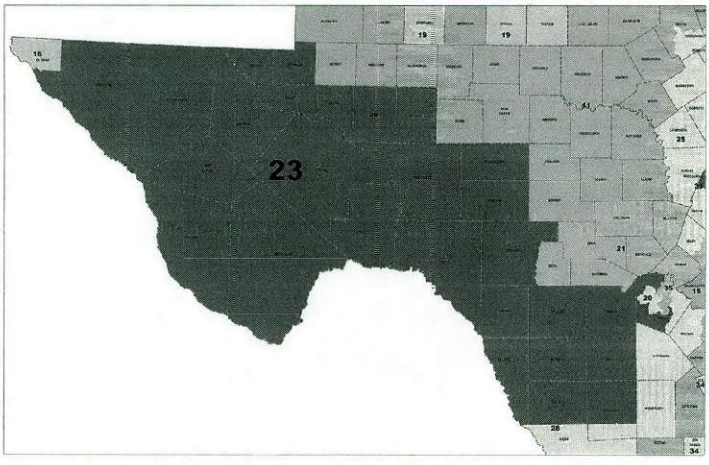
[79] Patrick Svitek & Abby Livingston, *Trump Haunts Hurd, Gallego Congressional Rematch*, THE TEXAS TRIBUNE (Aug. 16, 2016), https://www.texastribune.org/2016/08/16/will-hurd-pete-gallego-ready-fall-battle/ [http://perma.cc/4LEJ-L3FA].

[80] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[81] TEXAS STATE DATA CENTER, *supra* note 2.

[82] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).

FIGURE 5. THE TWENTY-THIRD DISTRICT



Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/%20Districts/_C235_13-24.pdf [http://perma.cc/CYJ5-JAZY].

TABLE 5. VOTING-AGE POPULATION GROWTH BY RACE (EL PASO, WEBB, BEXAR COUNTIES)

County	2010 VAP	2020 VAP	Growth	Anglo Growth	Black Growth	Hispanic Growth
El Paso	559,834	668,280	108,446	-5,709	1,655	109,108
Webb	162,146	208,690	46,544	488	113	45,587
Bexar	1,249,487	1,463,788	214,301	-2,386	14,455	182,009
TOTAL			**369,291**	**-7,607**	**16,223**	**336,704**

Mapmakers cannot shift any residents to the fast-growing Sixteenth and Twenty-Eighth or to Joaquin Castro's Twentieth, also a beneficiary of Bexar County's robust growth.[83] The Eleventh and Twenty-First, Republican seats with comparatively small minority populations,[84] are the logical destination for minority residents. However, efforts to curtail Hispanic residents' increasing dominance of the district's population will surely yield "cracking" claims under Section 2 once again.

Demographic change also has the potential to remake districts in central Texas (the Fifth, Tenth, Seventeenth, and Thirty-First), west Texas (the Eleventh and Nineteenth), and the Dallas–Fort Worth area (the Sixth, the Twenty-Fourth, and the Thirty-Second). In each, the black and Hispanic residents combined to form at least 30% of the VAP in

[83] *Id.*

[84] *See* TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

2010,[85] so there is the potential for a minority coalition to comprise a majority of the VAP, if not in 2020, then soon thereafter.

C. Projecting New Districts

Midway through the decade, Texas has continued to outpace the rest of the country in population growth,[86] maintaining its trajectory toward additional seats in the U.S. House after the 2020 Census.[87] The State Demographer's growth projections for metropolitan areas can help identify where additional representation will be warranted. In the preceding section, voting-age population was the focus because Section 2 claims, as explained below, concern numbers of potential voters, not overall population.[88] In this section, overall population growth is now the focus, because total population is the basis for apportioning U.S. House seats[89] and a state must draw its U.S. House districts with strictly equal populations.[90]

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[85] *See id.*

[86] The Census Bureau estimates that Texas grew at 9.2%—around 2.3 million people—between 2010 and 2015, while the country as a whole grew only 4.1%. U.S. CENSUS, QUICKFACTS, http://www.census.gov/quickfacts/table/PST045214/00,48 [http://perma.cc/LD64-UJCL]. If such growth continues, Texas may well equal 2010's apportionment haul.

[87] One recent analysis predicts that Texas will gain three seats after the 2020 Census, increasing its total from thirty-six to thirty-nine seats in the U.S. House. *See* Sean Trende, *Census Data Shed Light on 2020 Redistricting*, REALCLEAR POLITICS (Dec. 22, 2016), http://www.realclearpolitics.com/articles/2016/12/22/census_data_shed_light_on_2020_redistricting__132623.html [http://perma.cc/4T4Q-57NX].

[88] *Infra*, Part II–A.

[89] For an explanation of the Census's apportionment of new seats based on population growth, see U.S. CENSUS, *Computing Reapportionment* (2013), https://www.census.gov/population/apportionment/about/computing.html [http://perma.cc/E8WX-XUTW].

[90] *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964).

TABLE 6. POPULATION GROWTH BY RACE (TEXAS METROPOLITAN AREAS)

Metro Area	2010 Pop.	2020 Pop.	Total	Anglo	Black	Hispanic
Houston–Woodlands–Sugar Land	5,920,416	6,897,952	**977,536**	58,544	132,260	632,049
Dallas–Fort Worth–Arlington	6,426,214	7,404,982	**978,768**	90,699	158,263	568,231
Austin–RoundRock	1,716,289	2,077,981	**361,692**	117,551	18,402	183,548
San Antonio–NewBraunfels	2,142,508	2,471,484	**328,976**	35,175	19,254	244,952
McAllen–Edinburg–Mission	774,769	948,305	**173,536**	-1,405	450	171,366
Brownsville–Harlingen	406,220	479,754	**73,534**	-3,918	160	76,187
Laredo	250,304	305,881	**55,577**	548	115	54,545

Data obtained from TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by Metro SA, comparing 2010 and 2020, based on '1/2 2000–2010" migration rate, for ages 0–85+, all races and ethnicities selected).

As the above table indicates, the Houston metropolitan area will add more than enough people for an entirely new district, as will Dallas–Fort Worth area.[91] Importantly, the vast majority of the population growth will be among racial minorities.[92] It will be a true challenge for mapmakers to create districts that are not minority opportunity districts. It will also be a challenge for mapmakers to address the population growth in central and south Texas. As the table shows, the combined population growth of San Antonio and Austin could almost support an entirely new district.[93] Alternatively, the growth in south Texas, combined with San Antonio, could sustain another district in south Texas—either another north-south district from the border to central Texas or a compact district in the Rio Grande Valley.[94]

The Panhandle, west Texas, and east Texas should not get a new district. Lubbock and Amarillo are projected to add only 29,000 and 26,000 people, respectively, and Midland and Odessa only 18,000 and 20,000, respectively.[95] Similarly, Tyler is expected to add only 22,000; Longview only 20,000; and Beaumont–Port Arthur only 25,000.[96] Such

[91] *See supra* Table 6.
[92] *See id.*
[93] *Id.*
[94] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).
[95] TEXAS STATE DATA CENTER, *supra* note 2.
[96] *Id.*

growth would merely allow the existing districts to keep pace with the rising population level of all U.S. House districts.

II. *BARTLETT V. STRICKLAND* AND ITS LIMITS ON SECTION 2

The demographic change in Texas between 2010 and 2020 will affect legislative districts in three distinct ways that could have significance under Section 2 of the VRA. First, a single racial minority group could become a majority or increase its existing majority. Such majority-minority districts are the likely outcome in Texas's Twenty-Seventh and Twenty-Third Districts, and the federal courts have dealt frequently with states' efforts to counteract the emergence of such districts.[97] Second, a single racial or ethnic minority group could comprise a substantial minority of a district's voting-age population and could thus control the district if combined with crossover white votes.[98] This was the situation presented in *Bartlett v. Strickland*, and according to that decision, such crossover districts are not protected by Section 2 if state mapmakers weaken the minority groups' voting strength by separating them into different districts.[99] Third, a coalition of minority groups could comprise a potentially controlling majority in a district. *Bartlett* expressly acknowledged this possibility without addressing it.[100] These minority-coalition districts are discussed in Part III.

As established in Part I, many congressional districts in Texas will have increasingly substantial Latino populations, and state mapmakers will likely try to curtail the threat that their increase will pose to partisan control of those districts. In *Bartlett*, the Supreme Court could have interpreted the VRA to preserve the developing voting strength of such minority groups. Instead, the Court did the opposite, drawing on the *Shaw v. Reno* line of cases to curtail the reach of Section 2.[101] Consequently, it issued a decision inviting mapmakers in Texas and other states

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[97] *See, e.g.* LULAC v. Perry, 548 U.S. 399, 439–42 (2006) (analyzing the 2003 redrawing of Texas's Twenty-Third District).

[98] So-called "crossover" districts are those "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate." Bartlett v. Strickland, 556 U.S. 1, 3 (2009).

[99] *Id.* at 14–15. The possible exception to that, suggested in dicta, is if there is evidence of intentional discrimination. *Id.* at 20.

[100] *Id.* at 13–14.

[101] *Infra*, Part II-B.

experiencing similar demographic change to weaken the voting strength of these growing minority communities.[102]

A. The Background to *Bartlett*

The dispute in *Bartlett* concerned the first of three requirements that the Supreme Court established in *Thornburg v. Gingles* to screen invalid or irremediable Section 2 claims—that the minority group be 'sufficiently large and geographically compact to constitute a majority in a single-member district. '[103] In *Gingles*, plaintiffs had alleged that North Carolina's use of multi-member districts for its state legislature prevented black residents of those districts from electing their preferred candidates, because they could not overcome the votes of the white majority.[104] Given that the plaintiffs' claim identified the scheme of multi-member districts as the specific cause of vote dilution,[105] the first *Gingles* requirement raised the fair and sensible question whether a single-member district scheme would produce different outcomes.[106]

Because all the plaintiffs in *Gingles* could satisfy the requirement of a sufficiently compact single-district majority.[107] there was no need for the Court to ask whether a smaller black population might nevertheless experience impermissible vote dilution. Accordingly, Justice Brennan's plurality opinion acknowledged that the Court was not considering whether the *Gingles* requirements were 'fully pertinent' to a vote dilution claim regarding single-member districts.[108] Justice Brennan further reserved the question that *Bartlett* would later decide—whether a racial minority group, accounting for less than half of a district's population, could bring a vote dilution claim.[109]

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[102] *Bartlett*, 556 U.S. at 42 n.5 (Souter, J. dissenting) ("North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population without ever implicating § 2.").

[103] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (also requiring the minority group "to show that it is politically cohesive" and that "the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate.").

[104] *Id.* at 34 (asking whether this sort of multi-member districting scheme "impair[ed] the opportunity of black voters 'to participate in the political process and to elect representatives of their choice. ") (quoting 42 U.S.C. § 1973 (1986), *amended by* Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134).

[105] *Id.* at 46.

[106] *Id.* at 50.

[107] *Id.* at 80. The Supreme Court did reverse the District Court's finding of vote dilution with regard to one district, but that was on other grounds (sustained black electoral success in that particular district). *Id.* at 77.

[108] *Id.* at 46 n.12.

[109] *Id.* Notably, in Justice O'Connor's concurrence—joined by Justices Powell and Rehnquist and Chief Justice Burger—she indicated her approval of such a vote dilution claim. *Id.* at 89 n.1 ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming to an extent that would enable the

In *Growe v. Emison*,[110] the Court adopted the three *Gingles* requirements in unaltered form to evaluate vote dilution in single-member districts.[111] Its application of the first *Gingles* requirement to single-member districts seems to have occurred without much thought, because a raft of other errors in the lower court's opinion occupied the Court's attention.[112] Nevertheless, the Court in *Growe* again reserved the question that *Bartlett* would later decide.[113]

The question then arose in *LULAC v. Perry* concerning Texas's Twenty–Fourth District, and the Court's disagreement there foreshadowed the result in *Bartlett*.[114] The citizen voting-age population (CVAP) of the Twenty-Fourth was 25.7% black, 20.8% Hispanic, and 49.8% Anglo at the time the district was dismantled, prior to which a multiracial coalition had repeatedly elected Democrat Martin Frost.[115] Justice Souter, in dissent, recognized that the Twenty-Fourth presented the question that had been reserved in *Gingles* and *Growe*.[116] Echoing Justice O'Connor's concurrence in *Gingles*,[117] Justice Souter viewed the vote dilution claim as valid, because the district's minority voters consistently united to elect Frost.[118] The dismantling of the district ended that run of electoral success, and in Justice Souter's view, no reason existed to deprive these voters of the VRA's protection.[119]

Justice Kennedy, who announced the Court's judgment, perceived that Justice Souter's reasoning would cause Section 2 claims to arise much more frequently.[120] Consequently, he concluded that there was no valid Section 2 claim against the 'cracking' of districts like Texas's Twenty-Fourth.[121] However, he reached this interpretation of the statute on curious, extra-textual grounds. First, Justice Kennedy noted that Frost

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election of the candidates its members prefer, that minority group would appear to have demonstrated that it would be able to elect some candidates of its choice.").

[110] 507 U.S. 25 (1993).

[111] *Id.* at 40.

[112] *Id.* at 41 (noting that the District Court had ignored the *Gingles* requirements altogether and that, if it had applied them, the second and third requirements would not have been met).

[113] *Id.* at 41 n.5. Likewise, in a subsequent case, the Supreme Court *arguendo* treated an "influence-dilution claim' as cognizable under Section 2. Voinovich v. Quilter, 507 U.S. 146, 154, 158 (1993).

[114] *Compare* LULAC v. Perry, 548 U.S. 399, 443–46 (2006) (Kennedy, J.) (finding that minority group must show that they constitute a sufficiently large population to elect their candidate of choice with the assistance of crossover votes), *with id.* at 484–91 (Souter, J., concurring in part and dissenting in part) (suggesting that a minority comprising 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage).

[115] *Id.* at 443.

[116] *Id.* at 484–85.

[117] *Id.* at 486 (quoting Thornburg v. Gingles, 478 U.S. 30, 89 n.1 (1986) (O'Connor, J. concurring); *see also supra* note 109.

[118] *Id.* at 489.

[119] *Id.* at 485, 489.

[120] *See id.* at 446 (Kennedy, J.) ("If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting.").

[121] *Id.* at 445.

consistently ran unopposed.[122] Because a choice was so rarely presented to voters, Justice Kennedy felt that it could not be concluded that Frost was minority voters' 'candidate of choice,'[123] even though he received their near-unanimous support.[124] Justice Kennedy thus drew a novel distinction—because Frost was only minority voters' preferred candidate, but not necessarily their candidate of choice, they could not sue under Section 2 to preserve the district that elected him.[125]

Second, Justice Kennedy expressed concern that recognizing a Section 2 claim in this situation would 'unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'[126] In support of that contention, he cited his concurrence in *Georgia v. Ashcroft*, where he had written that the state legislative map at issue was drawn with 'race [as] a predominant factor.'[127] Justice Kennedy thereby subtly drew on the concept of 'racial gerrymandering' developed in *Miller v. Johnson* and *Shaw v. Reno*.[128]

In *Miller v. Johnson*, a sharply divided court held that the government violated the Equal Protection Clause by 'us[ing] race as a basis for separating voters into districts absent [the] extraordinary justification' needed to use race consciously in policy- or law-making.[129] A government's districting choices aimed at compliance with the VRA might, if they went too far, contravene the government's obligation, imposed by *Miller*'s interpretation of the Equal Protection Clause, to 'treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'[130] According to *Miller*, such districting plans—despite good intentions to protect minority voting strength—relied on 'the offensive and demeaning assumption' that all voters of the same race think alike.[131]

One might ask whether the concerns in *Miller* are applicable to a Section 2 claim that satisfies the *Gingles* threshold requirement of a 'politically cohesive' plaintiff group.[132] If Section 2 plaintiffs demonstrate their political cohesion persuasively, this would do away with the con-

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[122] *Id.* at 444.

[123] *Id.* at 445 ("The opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.").

[124] *Id.* at 445–46.

[125] *Id.* For one explanation of Kennedy's thinking, see Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 798–99 (2008) (suggesting that black voters in the Twenty-Fourth did not feel they could safely challenge Frost for fear of losing the district altogether, which resulted in a lack of meaningful "democratic contestation" that troubled Kennedy).

[126] *LULAC*, 548 U.S. at 446 (citing Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J. concurring)).

[127] *Ashcroft*, 539 U.S. at 491 (citing Miller v. Johnson, 515 U.S. 900 (1995)).

[128] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 632 (1993), *infra* notes 168–670 and accompanying text.

[129] 515 U.S. at 911 (citing *Shaw*, 509 U.S. at 652).

[130] *Id.* (citations and quotations omitted).

[131] *Id.* at 911–12.

[132] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

cern that mapmakers are grouping racial minorities together based on groundless assumptions. Indeed, in the factual record of *LULAC*, the voting behavior of the Twenty-Fourth's black and Hispanic residents showed consistent, unified support for their representative.[133] But Justice Kennedy declined to construe the VRA to protect these voters' preference as revealed through years of voting behavior.[134] Instead, he relied on the concerns about race-conscious districting raised in the *Shaw–Miller* jurisprudence in order to place the Twenty-Fourth's minority voters outside the scope of Section 2's protection.[135] His opinion in *Bartlett* would replicate this logic.

B. The *Bartlett* Decision

The dispute in *Bartlett* concerned District 18 in the North Carolina House of Representatives.[136] Though its black residents had once comprised a majority of its VAP, their numbers had steadily decreased, falling to 39.3% by 2003, the year that the challenged district was drawn.[137] To maintain the population at that level, state mapmakers split Pender County, which violated the state constitution's requirement to preserve counties whole.[138] That county and its commissioners brought suit based on that state constitutional requirement.[139] State officials responded that Section 2 required them to split Pender County in order to keep enough minority voters together to elect their candidate of choice with the aid of crossover white votes.[140] If Section 2 so applied, it would supersede the state constitution and defeat the county officials' claim.[141]

Justice Kennedy's plurality opinion[142] rejected the state officials' argument, holding broadly that Section 2 is inert unless and until the minority group in question can 'elect [a] candidate based on their own votes and without assistance from others.'[143] Justice Kennedy assumed without evidence or argument that a minority group comprising less than half a district's population has 'no better or worse opportunity to elect a candidate than does any other group of voters with the same relative

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[133] LULAC v. Perry, 548 U.S. 399, 489 (2006).
[134] *Miller*, 515 U.S. at 912.
[135] *Id.* at 913–14.
[136] Bartlett v. Strickland, 556 U.S. 1, 7 (2009).
[137] *Id.* at 7–8.
[138] *Id.* at 8.
[139] *Id.*
[140] *Id.*
[141] *See* U.S. CONST. art. IV, cl. 2.
[142] *Bartlett*, 556 U.S. at 5. Justices Thomas and Scalia concurred in the judgment but would have held that Section 2 authorizes no vote dilution claim whatsoever. *Id.* at 26 (Thomas, J. concurring).
[143] *Id.* at 14 (plurality opinion).

voting strength.'[144] To reach this questionable conclusion, Justice Kennedy limited the VRA's mandate, altered the analytical framework of *Gingles*, and as in *LULAC*, used the *Shaw–Miller* jurisprudence to control the interpretation of the VRA.

1. Limiting the Voting Rights Act's "Mandate"

Justice Kennedy held that the state officials' understanding of Section 2 was 'contrary to the [law's] mandate.'[145] Those officials had faced a choice between preserving a minority group's voting strength and letting it wane. That Justice Kennedy perceived their decision to pursue the former as contrary to the law's mandate is a measure of how the Supreme Court's interpretation of the VRA has changed across time.

In its original affirmation of the VRA, the Court recognized that discrimination in voting was 'an insidious and pervasive evil' that required 'sterner and more elaborate measures' to defeat.[146] Later, confronting vote dilution through legislative districting, the Court recognized that districting schemes can 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population, so it interpreted Section 2 to prohibit schemes that had that effect.[147]

Admittedly, *Bartlett*'s facts did not suggest insidious evil or state action to cancel out minority voting strength. Instead, the conundrum of District 18 seemed to arise from populations' natural waxing and waning. Consequently, if the Supreme Court's majority felt that the case's facts did not really implicate the VRA, it could have resolved *Bartlett* narrowly, without lasting effects on Section 2. The Court could simply have ruled that the splitting of Pender County did not affect District 18's VAP meaningfully enough to implicate Section 2, given that its black VAP would only drop from 39.36% to 35.33% if the county were not split.[148] Whether Section 2 requires creating a majority-minority district on a given set of facts is an 'intensely local appraisal' that is 'peculiarly dependent upon the facts of each case.'[149] The Court could have held only that the facts before the North Carolina legislature did not make the case for a majority-minority district clearly enough to warrant the legisla-

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[144] *Id.*
[145] *Id.*
[146] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).
[147] Thornburg v. Gingles, 478 U.S. 30, 47–48 (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966)).
[148] *Bartlett*, 556 U.S. at 8. *See also* Richard Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 (2002) (suggesting that black voters should comprise 33% to 39% of a Southern district's registered-voter population in order to create winning coalitions with crossover white voters).
[149] *Gingles*, 478 U.S. at 79 (citations omitted).

ture's use of race in the drawing of the district. Such a ruling would not close the door to a post-enactment challenge if the new district in fact turned out to dilute the voting strength of the district's minority population.

Instead, Justice Kennedy issued a broad ruling. Though the facts here indicated a decreasing minority group population, Kennedy's ruling also appears to reach expanding minority groups that are not yet majorities in their districts.[150] The breadth of this ruling is somewhat surprising, given Justice Kennedy's previous recognition that state action to prevent a minority population from becoming a majority in a district would violate Section 2.[151] Because Justice Kennedy overlooked that possibility in *Bartlett*, it was his own understanding of Section 2—not that of the state officials—that ran contrary to Section 2's mandate as Justice Kennedy himself had previously formulated it.

2. Altering the *Gingles* Requirements

Likewise, Justice Kennedy's strict interpretation of the first *Gingles* requirement—that the minority group be 'sufficiently large and geographically compact to constitute a majority in a single-member district"[152]—was unnecessarily restrictive. Admittedly, the language from *Gingles* did call for a 'majority' in a single-member district, but the Court had repeatedly and expressly left open the question of whether a strict majority of 50% was really required.[153] Moreover, Justice Kennedy's interpretation neglected the role of the other *Gingles* threshold requirements and the totality-of-the-circumstances analysis that follows once plaintiffs have cleared the initial threshold.[154] Those parts of the *Gingles* framework serve to let through only valid and remediable claims, meaning that the profusion of Section 2 claims that loomed large in Justice Kennedy's imagination was unlikely to ever occur.[155]

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[150] *See Bartlett*, 556 U.S. at 19–20 (stating simply, "It remains the rule, however, that a party asserting § 2 liability must show by a preponderance of the evidence that the minority in the potential election district is greater than 50 percent.").

[151] LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

[152] *Gingles*, 478 U.S. at 50.

[153] *Supra*, Part II–A.

[154] *Bartlett*, 556 U.S. at 12, 16–17. For the three *Gingles* requirements, see *supra* note 104 and accompanying text. After the three threshold requirements are met, the trial court must consider whether, on the totality of the circumstances, "the political processes leading to nomination or election are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 43 (quoting 42 U.S.C. § 1973 (1986)).

[155] *Bartlett*, 556 U.S. at 22.

The second and third *Gingles* requirements—cohesive minority voting and majority bloc voting—are particularly important.[156] When voting is less racially polarized, a minority group's decrease from 39% to 35% of a district's population might not meaningfully diminish its ability to elect its preferred candidate.[157] When voting is more racially polarized, however, the situation is different. If the minority group's support for a candidate brings with it disproportionate opposition to that candidate, then the minority group's very expression of its preference erects an obstacle to the realization of that preference. It might make a crucial difference that the minority dropped from 39% to 35%, because the number of potential crossover votes would be so limited.

Similarly, where the Senate Report factors[158] are present, a racial minority's efforts to mobilize politically must overcome significant obstacles. Even a small reduction in the minority group's size might again make an important difference. Thus, when the other *Gingles* requirements are met and the factors in the totality-of-the-circumstances analysis are present, a minority group's voting strength deserves protection, whether it falls just above the 50% threshold or just below.

Justice Kennedy's neglect of both racially polarized voting and the Senate Report factors led him to say that '[n]othing in Section 2 grants 'special protection to a minority group's right to form political coalitions' and that 'minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.'[159] But these jabs are parrying straw men. When a minority group facing racial polarization and a history of discrimination brings a Section 2 claim, it does not seek 'immunity' from this obligation. Instead, it is showing that there are past and present obstacles to the interracial formation of common ground, and the existence of those obstacles should prohibit legislative mapmakers from making that task any harder than it already is.

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[156] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) (characterizing "the polarized voting inquiry as the heart of a vote dilution claim").

[157] *See* Pildes, *supra* note 148.

[158] In *Gingles*, when discussing the totality-of-the-circumstances analysis that follows once plaintiffs have satisfied the three threshold requirements, the Court highlighted the following factors from the Senate Report that accompanied the 1982 amendments to the VRA:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

478 U.S. at 44–45 (citing S. REP. No. 97-417, at 28–29 (1982)).

[159] *Bartlett*, 556 U.S. at 15 (quoting, for the second statement, Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994)).

Justice Kennedy then overstated both the difficulty of adjusting the *Gingles* framework to accommodate cases like *Bartlett* and the 'tension' that such cases would create with the *Gingles* requirement of racially polarized voting.[160] That tension is illusory. Section 2 plaintiffs whose position is analogous to District 18 should be required to show both that racially polarized voting exists and that the minority group comprises 'a sufficiently large minority population to elect candidates of its choice"[161] with the help of sufficient crossover votes. These two conditions would work effectively together to screen invalid Section 2 claims.[162]

Suppose, to consider an extreme hypothetical, that redistricting cuts a district's black VAP from 10% to 5%, and the remainder of the community is white. This community would not have a Section 2 claim on a crossover theory, because it would require nearly half the white residents to form a winning coalition. With such extensive white support, the requirement of racially polarized voting could clearly not be met.

Suppose, to consider a hypothetical closer to the facts of *Bartlett*, that the black VAP of District 18 continued to comprise 45% of the district, and 90% voted for the same candidate. The white residents, meanwhile, comprised 55% and voted 80% for the other candidate.[163] The black residents' preferred candidate would receive 51.5%, while the other candidate would receive 48.5%.[164] It would be difficult to deny with a straight face that this hypothetical district demonstrated racially polarized voting. Despite that polarization, and despite comprising less than the strict 50% of the population, the black voters would still be able to elect their candidate of choice. But if the black population were cut to 40% or below, and the white population increased accordingly, the black voters would fall short of controlling the district. Preserving that marginal 5% could make the difference for these voters. In addition, preserving minority voting strength under these circumstances could potentially

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[160] *Id.* at 16.

[161] An alternative formulation of the first *Gingles* factor. *See DeGrandy*, 512 U.S. at 1008. In *Bartlett*, Kennedy dismissed this formulation as dictum. 556 U.S. at 15.

[162] *Bartlett*, 556 U.S. at 33–34 (Souter, J., dissenting). *But see* Pildes, *supra* note 148, at 1554–56 (detailing the host of questions that this kind of functional approach would raise).

[163] The voting breakdowns in *Gingles* were in this range. *See* 478 U.S. at 59 ("In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%."). In *Bartlett*, Kennedy was skeptical that black residents of District 18 could show racial polarization, because they would need almost 20% of the white voters to support their candidate to win. 556 U.S. at 16. That proportion would be well within the range of racial polarization recognized in *Gingles*, which Kennedy neglected to mention. *Id.* at 15.

[164] *See* Pildes, *supra* note 148, at 1532–36, for empirical evidence of such outcomes. *See also* Ryan Haygood, *The Dim Side of the Bright Line: Minority Voting Opportunity After* Bartlett v. Strickland, HARV. C.R.-C.L. L. REV. AMICUS 9–10 (Feb. 25, 2010), http://harvardcrcl.org/the-dim-side-of-the-bright-line-minority-voting-opportunity-after-bartlett-v-strickland-by-ryan-p-haygood/ [http://perma.cc/MN57-LR7N].

bring about salutary social effects, because an incentive would exist to reach across the racial divide.[165]

If racial polarization decreased, plaintiffs would have a harder time satisfying the third *Gingles* requirement, but they would also have less need for the VRA's protection.[166] Instead, Justice Kennedy's ruling created a different dynamic. *Bartlett* permits the white majority to limit minority voting strength by preventing their populations from accumulating. Rather than an incentive to reach across racial lines, the incentive is to divide and conquer.[167]

The last element of Justice Kennedy's analysis was 'the need for workable standards and sound judicial and legislative administration.'[168] While this concern is important, it is a thin reed on which to base a substantial narrowing of Section 2's potential scope. Moreover, it is disingenuous. Kennedy worried that the Court would be 'in the untenable position of predicting many political variables and tying them to race-based assumptions.'[169] But the *Gingles* requirements already entailed that sort of analysis.[170] Of course, if plaintiffs cannot prove the requisite elements, they should not succeed, but that does not require foreclosing their claims altogether.

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[165] *Bartlett*, 556 U.S. at 34 (Souter, J. dissenting). *See also* Pildes, *supra* note 148, at 1548 ("Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution."); Haygood, *supra* note 164, at 11–12 (extolling the ancillary benefits of crossover districts). *But see* Kang, *supra* note 125, at 798–800 (criticizing coalition districts on the view that they require minority groups to adhere to strict intragroup cohesion).

[166] Suppose, instead, that racial polarization increased. This would put the minority population in an unfortunate position without redress from the VRA. However, that is the known and unavoidable drawback of the winner-take-all system. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1592 (1993).

[167] *See* Pildes, *supra* note 148, at 1573 (anticipating that a formal approach akin to Kennedy's in *Bartlett* would "abandon integrated electoral politics, even where effective, in favor of a system of monoracial dominated electoral politics, where the race that dominates in some places is white, in some black").

[168] *Bartlett*, 556 U.S. at 17. *See* Pildes, *supra* note 148, at 1520–21 (explaining that judges are attracted to bright-line rules in the voting-rights context due to the perception that such rules "appear to distance the courts from underlying struggles over political power").

[169] *Bartlett*, 556 U.S. at 17.

[170] *Id.* at 37, 39–40 (Souter, J. dissenting) (acknowledging the vagaries of voter registration levels, turnout, and so on, and the necessarily messy nature of Section 2 claims). Another reason Kennedy's administrability concern does not stand up to scrutiny is that one of the potentially difficult questions the Court would supposedly have to answer ("Were past crossover votes based on incumbency and did that depend on race?" *Id.* at 17 (majority opinion)) is a causation inquiry that *Gingles* expressly excluded from the analysis of racial polarization. 478 U.S. 30, 62–63 (1986). *See* Pildes, *supra* note 148, at 1566–67 (explaining the increasingly divergent views on the Court and among the lower courts on that issue).

3. Importing the *Shaw–Miller* Jurisprudence

Justice Kennedy's concern about the Court's 'untenable position' reveals that a key basis for his decision was the preference for color-blindness developed in the *Shaw–Miller* jurisprudence, just as it was in *LULAC*. For Kennedy, the 'moral imperative of racial neutrality is the driving force of the Equal Protection Clause.'[171] Again as in *LULAC*, Kennedy quoted one of his own opinions, this time from *Richmond v. J.A. Croson Co.* which concerned a city's requirement that a certain percentage of contracts go to minority-owned businesses.[172] Kennedy then quoted Justice O'Connor's worry in *Shaw v. Reno* that '[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.'[173]

By this point, Justice Kennedy had moved well beyond the facts at hand. In *Bartlett*, the parties had already stipulated to the presence of racial polarization.[174] Balkanization already existed. Instead, Justice Kennedy appealed to an imagined problem with imaginary effects. As a result, he failed to address properly the case's real issues and to accord fair consideration to crossover districts, a potential solution to the risk of racial factionalism that was his ostensible concern.

As in *LULAC*, the *Shaw–Miller* jurisprudence again came to the fore. In construing the Equal Protection Clause as a mandate to treat citizens as individuals and rarely, if ever, as members of groups,[175] those cases developed an 'increasingly individualistic, anti-essentialist vision of rights' that had 'coexisted uneasily' with the VRA.[176] Requiring gov-

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[171] *Bartlett*, 556 U.S. at 21 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 518–19 (1989) (Kennedy, J., concurring)). Kennedy's understanding of the Equal Protection Clause is not universally shared. For example:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J. dissenting) (quoting Judge John Minor Wisdom's famous passage in United States v. Jefferson Cty. Bd. of Educ. 372 F.2d 836, 876 (5th Cir. 1966), *aff'd on reh'g*, 380 F.2d 385 (5th Cir. 1967)).

[172] *Richmond*, 488 U.S. at 477–78.

[173] *Bartlett*, 556 U.S. at 21 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[174] 556 U.S. at 9.

[175] Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

[176] Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 (2001). The lead attorney responsible for *Shaw* and subsequent challenges was opposed to federal coercion of the states through the VRA, disapproved of the perceived use of racial stereotypes by legislative mapmakers, and feared for the efficacy of representation in districts that resulted from the purported racial gerrymander. TINSLEY E. YARBOROUGH, RACE AND REDISTRICTING: THE *Shaw–Cromartie* Cases 35–39, 61–62 (2002). *See also* Pildes, *supra* note 148, at 1542 (describing

ernments to see citizens only as individuals, and never as group members, is at odds with the nature of contested elections. Politics is based on groups, a view that Kennedy himself expressed in *Bartlett* when he described coalition-building as the effort 'to pull, haul, and trade to find political common ground.'[177] Moreover, for minority groups confronted with racially polarized voting and related obstacles,[178] the barriers to their political participation are fundamentally tied to their status as members of a disfavored group.[179] This is no less true if the black residents of North Carolina's District 18 are marginally greater than or marginally less than half of the district's VAP. The group-based remedies of Section 2 therefore are an appropriate protection for the group-based injuries that voters experience.

By importing the underlying principles of the *Shaw–Miller* jurisprudence, *Bartlett* instead subordinated the VRA and exposed minority voters to the probability of irremediable group-based injuries in the future. After 2001,[180] 'racial gerrymandering cases became far less frequent.'[181] Some observers even questioned the Court's continued commitment to the principles underlying the *Shaw–Miller* jurisprudence.[182] The role of that jurisprudence in Justice Kennedy's *LULAC* and *Bartlett* opinions shows that it continued to exert an important constraining force on the Supreme Court's interpretation of the VRA.

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the injury recognized in *Shaw* as an "expressive harm" suffered when officials convey the message that race matters in state decision-making).

[177] 556 U.S. at 15 (quoting Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994)).

[178] *See* Senate Report factors, *supra* note 158.

[179] Gerken uses the term "aggregate rights, as opposed to individual rights, to connote the group-based nature of the injuries and remedies in vote dilution cases. Gerken, *supra* note 176, at 1667.

[180] Easley v. Cromartie, 532 U.S. 234 (2001). *Easley* was the fourth case about racial gerrymandering to reach the Supreme Court from North Carolina in under a decade, following *Shaw*, *Miller*, and Hunt v. Cromartie, 526 U.S. 541 (1999). In *Easley*, North Carolina finally produced a map that the Court did not find to be an impermissible racial gerrymander. 532 U.S. at 258. It is beyond the scope of this piece, but it should be noted that the racial gerrymandering claim reemerged in Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015), reinvented as a tool to combat vote dilution. For analysis, see Rick Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365 (2015).

[181] Hasen, *supra* note 180, at 372.

[182] *See, e.g.*, STEVEN ANDREW LIGHT, "THE LAW IS GOOD" THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS 144–45 (2010) ("In upholding the North Carolina legislature's actions in *Easley*, however, the Supreme Court—including Justice O'Connor, who voted with the majority to uphold the revised Twelfth District—seemed to pull back somewhat from the *Shaw II Miller* standards.") (citing Easley v. Cromartie, 532 U.S. 234 (2001)); Gerken, *supra* note 176, at 1692 ("The *Shaw* majority appears to have backed away from [the original] explanations [of its logic] during the last six years."). *But see* Pildes, *supra* note 148, at 1540–41 (anticipating that *Shaw* and subsequent cases would have a significant influence on redistricting following the 2000 Census).

III. The Prospects for Future Plaintiffs under Section 2

If the redistricting cycle following the 2020 Census features the same problems of racial and partisan gerrymandering as past cycles, affected racial minority groups in Texas will face two challenging questions in the wake of *Bartlett v. Strickland*. First, is there any way to gain Section 2's protection against the 'cracking' of a minority population that is not yet a majority of a district but—unlike in North Carolina's House District 18—is growing to that level? Second, does Section 2 protect minority-coalition districts, in which two or more minority groups form a majority of the district's voting-age population?

A. The Middle Way between *LULAC* and *Bartlett*

Minority voters who do not yet represent a majority in their district but may represent such a majority in the near future should draw attention to the factual differences between Texas's Twenty-Third District as addressed in *LULAC*, which was protected by the VRA,[183] and North Carolina's House District 18 as addressed in *Bartlett*, which was not so protected.[184] In *LULAC*, Justice Kennedy was persuaded that the cracking of the Twenty-Third's Latino voters was a Section 2 violation because they were an 'increasingly powerful' presence in the district[185] and a looming threat to the Republican incumbent.[186] By replacing some of them with white voters elsewhere, 'the State took away the Latinos' opportunity because Latinos were about to exercise it.'[187] By contrast, the demographic trend of the black population of North Carolina's House District 18 was headed in the other direction.[188]

Plaintiffs nearing a majority of their district's population should liken themselves to the Twenty-Third's Latino voters and portray attempts to divide them as obstruction of their political success.[189] Under the apparent rule of *Bartlett*, Section 2's protection will not attach until they reach 50% of a district's VAP.[190] However, state action could pre-

[183] LULAC v. Perry, 548 U.S. 399, 423–42 (2006).
[184] Bartlett v. Strickland, 556 U.S. 1, 7–9 (2009).
[185] 548 U.S. at 423.
[186] *Id.* at 439.
[187] *Id.*
[188] *Bartlett*, 556 U.S. at 7–8.
[189] Kennedy did suggest that a showing of mapmakers' intent could win Section 2's protection for a minority group comprising less than half of its district's population. *Id.* at 20.
[190] *See* 556 U.S. at 26 ("Only when a geographically compact group of minority voters could form a majority in a single-member district has the *Gingles* requirement been met.").

vent them from reaching that threshold. It cannot be that the state mapmakers' discriminatory vote dilution against the Latino population in *LULAC* would have been permissible if they had simply done it several years earlier. Therefore, in keeping with *LULAC*'s protection of Texas's Twenty-Third, a minority group should have Section 2's protection as it nears a majority. because otherwise it would never reach 50%. To deny it that protection would not only defy the logic of *LULAC* but would also encourage invidious gerrymandering.

Plaintiffs could further argue that *Bartlett*'s holding is more limited than meets the eye. *Bartlett* did not present the conventional vote dilution scenario.[191] Voters alleging actual injury due to minority vote dilution were not parties to the case.[192] As such, the ordinarily voluminous factual record accompanying a Section 2 challenge was not before the Court. Rather, the actual question before the Court was only whether state officials had to preserve a minority group's percentage of its district's population when officials' best guess was that it would otherwise decrease. In this respect, adjudicating the state officials' preemptive line-drawing in *Bartlett* was akin to hearing a pre-enforcement challenge to a law. Little factual record had yet been developed, and effects could only be guessed. A typical challenge under Section 2, with voters demonstrating actual injury. would present a different question. By altering the requirements for injured voters to bring a Section 2 claim, and not just for state officials taking preemptive action, the discussion in Justice Kennedy's plurality opinion went further than necessary. It changed the law applicable to a scenario that the case did not actually present.

The law may remedy a harm inflicted in certain situations without requiring the extension of a preemptive benefit in other situations.[193] The Voting Rights Act can be a bulwark against minority vote dilution without, as Justice Kennedy feared, being implicated every time a population expands or contracts. By highlighting this distinction, and by analogizing to Texas's Twenty-Third in *LULAC*, plaintiffs may be able to carve a path around *Bartlett*'s holding.

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[191] *Id.* at 6.

[192] *Id.* at 8.

[193] *Cf.* Veasey v. Abbott, 830 F.3d 216, 277–78 (5th Cir. 2016) (Higginson, J. concurring) (noting, in the context of voter ID requirements, the "difference between making voting *harder* in ways that interact with historical and social conditions to disproportionately burden minorities and making voting *easier* in ways that may not benefit all demographics equally"). It may require "fact-specific and close distinctions" to identify the difference in practice, but that difficulty should not excuse courts from the work of protecting "the fundamental right to vote" that the VRA entrusts to them. *Id.* at 279–80.

B. Preserving Minority-Coalition Districts

Bartlett reserved the question of whether Section 2 protects against the 'cracking' of minority-coalition districts,[194] in which 'minority voters aggregated from two or more groups can collectively elect a candidate of their choice, even if no single minority group has such power individually.'[195] A few years after *Bartlett*, the Texas redistricting litigation spawned by the 2010 Census, *Perry v. Perez*, reached the Court.[196] A three-judge panel in the Western District of Texas had substantially redrawn the maps for Texas's seats in the U.S. House of Representatives and for the Texas Legislature.[197] Its Texas House map produced several of what the panel's dissenting judge charged were inappropriate coalition districts but what the panel majority insisted were merely the natural result of restoring the status quo ante.[198] In a per curiam opinion finding many faults with the panel's maps, the Supreme Court rejected an apparent coalition district in the U.S. House map, citing *Bartlett* and saying that the panel had 'no basis' for creating that district.[199] But in a curious omission, it did not mention any of the Texas House districts alleged by the panel dissent to be improper coalition districts.[200] With the Court's acknowledgment of the question in *Bartlett*, ambiguous treatment in *Perry v. Perez*,[201] and a continuing conflict among the lower courts,[202] the issue of coalition districts might soon be on the Supreme Court's docket.

Minority-coalition districts present different considerations than crossover districts, so the issue should not necessarily be settled by the logic of *Bartlett*. The sticking point in *Bartlett*—the threshold inquiry into the plaintiff group's size and compactness—would be no more difficult for a minority-coalition district than a majority-minority district.[203] Moreover, plaintiffs in Texas, unlike in some other states, have the bene-

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[194] *Bartlett*, 556 U.S. at 13–14.
[195] Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 428 (2015).
[196] Perry v. Perez, 132 S. Ct. 934, 939 (2012).
[197] Perez v. Perry, 835 F. Supp. 2d 209, 211–12 (W.D. Tex. 2011).
[198] *Id.* at 216 (panel majority); *id.* at 224–26 (Smith, J. dissenting).
[199] *Perry*, 132 S. Ct. at 944 (U.S. House District 33 in the Dallas area) (citing *Bartlett*, 556 U.S. at 13–15).
[200] *Id. see Perez*, 835 F. Supp. 2d. at 225–26 (Smith, J. dissenting) (discussing districts in Dallas County, Fort Bend County, and Bell County).
[201] Ho, *supra* note 195, at 429 (describing the Court's discussion as "difficult to discern' and not clearly interpretable as a statement of legal principle rather than as simply a ruling on the specific facts).
[202] *Id.* at 429–30 (cataloguing case law); Lauren R. Weinberg, *Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts Under Section 2 of the Voting Rights Act*, 91 WASH. U. L. REV. 411, 419–424 (2013) (contrasting the Fifth and Sixth Circuits' treatments of the issue).
[203] Ho, *supra* note 195, at 432.

fit of case law from the Fifth Circuit that recognizes the possibility of viable coalition districts under Section 2.[204] Even so, minority-coalition plaintiffs who decide to pursue coalition districts[205] will nevertheless have to strike a careful balance between clashing requirements created by the Supreme Court in *Bartlett* and *LULAC* and by the Fifth Circuit in its cases on coalition districts.

In *Bartlett*, Justice Kennedy was concerned about the difficult assumptions and predictions of voter behavior that courts would have to make in order to identify viable crossover districts.[206] Coalition districts present a somewhat similar challenge, in that courts must determine whether different minority groups will hold a coalition together.[207] Indeed, plaintiffs proposing coalition districts in the Fifth Circuit have often foundered on the second *Gingles* threshold requirement of minority political cohesion.[208]

Though not a formal requirement, statistical evidence of highly similar voting behavior is effectively a *sine qua non* of coalition claims.[209] In addition to that quantitative showing, plaintiffs should take guidance from the Supreme Court's rejection of Texas's proposed Twenty-Fifth District in *LULAC v. Perry*.[210] The Court held that the Twenty-Fifth, which stretched from the Rio Grande Valley to Austin 300 miles away. did not satisfy the *Gingles* requirements, because its enormous length impermissibly grouped populations with 'disparate needs and interests. '[211] Showing that the coalition's consistently similar political behavior is undergirded by shared needs and interests would help

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[204] *Compare* LULAC, Council No. 4434 v. Clements, 999 F.2d 831, 863–64 (5th Cir. 1993) (en banc) (treating "the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive"), *with* Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (holding that "the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose").

[205] Plaintiffs may not decide that coalition districts are in their interest. *See, e.g.* Ross Ramsey, *Redistricting Experts Struggle to Fix Maps, Elections*, KUT (Feb. 12, 2012) http://kut.org/post/redistricting-experts-struggle-fix-maps-elections/ [http://perma.cc/82PK-P2L9] (describing the "factions within factions on both sides of the courtroom" in an earlier stage of Texas's current litigation).

[206] Bartlett v. Strickland, 556 U.S. 1, 17–18 (2009).

[207] *See LULAC, Council No. 4434*, 999 F.2d at 864 (expressing suspicion that purported coalition districts are merely "transitory unions rooted in political expedience").

[208] *E.g.* Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205, 1216 n.21 (5th Cir. 1996) (approving the district court's finding that the statistical evidence did not show cohesion and that "[n]o concrete, reliable, or credible evidence was presented at trial that Hispanic and African-American communities work together to accomplish common goals"); Brewer v. Ham, 876 F.2d 448, 453 (5th Cir. 1989) (finding that black, Hispanic, and Asian plaintiffs' "lack of statistical evidence of inter-minority political cohesion' and of political cooperation doomed their Section 2 claim against the school board in Killeen, Texas).

[209] *See Rollins*, 89 F.3d at 1214–15 (finding that while not required under existing law, statistical analysis may be the only way to effectively compare the impact of bloc voting with other factors affecting voting in a geographic area); *Brewer*, 876 F.2d at 453–54. *See also* Campos v. City of Baytown, 840 F.2d 1240, 1245–48 (5th Cir. 1988) (finding that plaintiffs had won the battle of statistical experts on the issue of cohesion).

[210] 548 U.S. 399, 432–35 (2006).

[211] *Id.* at 435.

persuade courts that the coalition's voting cohesion is genuine and durable. Showing also that those common needs have yielded demonstrable cooperation in pursuit of common goals would be even more persuasive.[212]

Plaintiffs then can argue that Justice Kennedy's concern in *Bartlett* about the tension between the first and third *Gingles* requirements is not applicable to minority-coalition districts. It troubled Justice Kennedy that a minority group would rely on white support while claiming to be submerged in a polarized white majority.[213] Under a minority-coalition claim, each minority group would rely on the others, not necessarily on crossover white votes. It is entirely plausible that multiple minority groups could each face submergence by a majority voting bloc if they did not collaborate with one another.

After clearing the *Gingles* threshold requirements, plaintiffs will then have to pass the *Gingles* totality analysis, in which the trial court weighs the history of discrimination in the area, the material effects of past discrimination, and the presence of racial appeals, among other factors.[214] Evidence of analogous past and present discrimination will be especially important for minority-coalition plaintiffs, given Fifth Circuit suspicion that coalitions are mere 'ephemeral political alliances, not 'cohesive political units joined by a common disability of chronic bigotry.'[215] Showing comparable histories of discrimination and present effects might enable minority-coalition plaintiffs to defeat the suspicion that simple partisan expediency underlies their lawsuit.

Plaintiffs will be aided in this effort by the Fifth Circuit's recent finding that Texas's voter ID law has had a disparate impact on black and Latino voters due to similar histories of state-sponsored discrimination and the continuing effects thereof.[216] The Fifth Circuit also allowed that the record could support a finding of intentional discrimination against minority voters, and on remand, the district court might well make that determination.[217] Such a determination would lend considerable credence to a coalition district claim after the next census.

It is impossible to predict the composition of the Supreme Court by the time that a minority-coalition case arising from the 2020 Census

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[212] *Cf. Rollins*, 89 F.3d at 1216 n.21 (faulting plaintiffs for not demonstrating such cooperation).
[213] Bartlett v. Strickland, 556 U.S. 1, 16 (2009). *See supra* Part II–B (explaining the dubiousness of this concern).
[214] *See* Senate Report factors, *supra* note 158.
[215] LULAC, Council No. 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting), *withdrawn and aff'd on other grounds*, 829 F.2d 546 (5th Cir. 1987). *See also* LULAC, Council No. 4434 v. Clements, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (Higginbotham, J.) (reiterating those concerns but now in the majority opinion).
[216] Veasey v. Abbott, 830 F.3d 216, 250–51 (5th Cir. 2016) (similar disparate impact); *id.* at 259 (similar histories and legacies).
[217] *Id.* at 237–43.

would reach the Court, but in the absence of substantial changes to the Court's members and doctrine, plaintiffs will also need to allay the concern about simplistic race-based assumptions that drove Justice Kennedy's decisions in *LULAC* and *Bartlett*.[218] A careful showing that minority groups form an authentic and cohesive community of interest is needed to overcome the suspicion, now entrenched in precedent by the *Shaw–Miller* cases, that Section 2 claims arise from the offensive assumption that all minority groups 'think alike, share the same political interests, and will prefer the same candidates at the polls.'[219]

Plaintiffs can effectively rebut this concern and turn it in their favor by arguing that a blanket prohibition on minority-coalition claims would itself make impermissible race-related assumptions.[220] To bar minority-coalition claims categorically would be to assume that different minority groups could never form a community of interest or experience the same harms from discrimination.[221] That is, a categorical rule would hold that racial identification signifies immutable differences between minority groups.[222] This cannot be what the Constitution requires. Further, such a categorical rule would require minority groups to seek separation from one another in order to gain the protection of Section 2.[223] This also cannot be what the law requires.

The Supreme Court's interpretation of the VRA nevertheless puts potential coalition plaintiffs in a bind. One scholar suggested that the Court refused to preserve Texas's Twenty-Fourth District in *LULAC* because of a 'judicial preference for electoral competition under the VRA.'[224] On this view, the Court perceived that the black voters supporting Democrat Martin Frost did not feel free to challenge him in party primaries.[225] These black voters did not compete because they were cowed by the fear of losing the seat altogether.[226] Whatever one thinks of this theory.[227] if it is true that the lack of political contestation doomed the effort to preserve the Twenty-Fourth District, future plaintiffs should try to show robust contestation within the coalition of minority groups.

But such an effort would conflict both with the *Shaw–Miller* principles and with the Fifth Circuit case law on coalition claims. If it is suspected that the drawing of coalition districts depends on odious

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[218] *Supra*, Parts II–A and II–B.
[219] Ho, *supra* note 195, at 431 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).
[220] *Id.* at 434.
[221] *Id.*
[222] *Id.*
[223] *Id.* Haygood, *supra* note 164, at 15.
[224] Kang, *supra* note 125, at 738.
[225] *Id.* at 798–99.
[226] *Id.*
[227] The plurality opinion overlooked considerable evidence that the district's black voters were genuinely ardent supporters of Frost. LULAC v. Perry, 548 U.S. 399, 489 (2006) (Souter, J. concurring in part and dissenting in part).

assumptions that all minorities 'think alike, the necessary proof is that the minorities bringing the lawsuit do genuinely share experiences, needs, interests, and goals. Showings of intragroup dissension and debate, however nice a sign of 'political vibrancy.'[228] would be counterproductive to that aim. The grouping of meaningfully different people based on superficial similarity is flatly contrary to the *Shaw–Miller* principles and to *LULAC*'s invalidation of Texas's Twenty-Fifth District. Likewise, evidence of dissension and disagreement within the coalition has often inhibited the required showing of minority political cohesion in Fifth Circuit cases.[229]

As noted above, Section 2 plaintiffs will not always decide that it is in their interest to seek minority-coalition districts. To the extent that they do, the threshold requirements for Section 2 claims—shaped and constrained by the principles of the *Shaw–Miller* jurisprudence—necessitate a focus on commonality. As *LULAC*'s treatment of Texas's Twenty-Fourth demonstrates, even a persuasive showing of common history. preference, and behavior may not be enough. But it is likely the only course.

Conclusion

Through the many twists and turns in the life of the VRA, its scope and strength have varied. In *LULAC* and *Bartlett*, the concerns expressed in the *Shaw–Miller* jurisprudence exerted an important influence on the interpretation of the VRA, narrowing its scope and sapping its strength. As the Supreme Court's composition and the country's demographics change, it is difficult to predict the law's fate with much confidence. But under Section 2, as interpreted by *Bartlett* and *LULAC*, fewer plaintiffs can lay claim to Section 2's protection, and those plaintiffs will have to overcome the perception that offensive or simplistic racial assumptions underlie claims of minority vote dilution. Coalition plaintiffs in particular will have to demonstrate concretely and persuasively their common experience of discrimination and their shared needs and interests. If they cannot, Section 2 will continue to be curtailed, rendering minority groups vulnerable as inimical mapmakers try to stem the tide of demographic change and minority voting strength.

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[228] Kang, *supra* note 125, at 791.

[229] *Supra*, notes 207–09 and accompanying text. *See also* Overton v. City of Austin, 871 F.2d 529, 540 (5th Cir. 1989) (ruling that "ample evidence in the record supports the trial court's finding that the wide-open and vigorous Austin political system is not manipulated by any one group, and is certainly not manipulated for racial reasons"); *id.* at 544 (Jones, J. concurring) (arguing that despite evidence of cohesion among black voters and among Mexican-American voters, the record belied claims of cohesion between the two groups).