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CONTENTS

"GRUESOME LOGIC": THE TUCSON NO MORE DEATHS PROSECUTIONS AND RELIGIOUS LIBERTY*

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Every year, hundreds of migrants die crossing the desert in the American Southwest on their journey to safety in the United States.[1] In response, groups of humanitarian volunteers of faith and conscience – united by the belief that "humanitarian aid is never a crime"– came forward to provide lifesaving water, shelter, food, and medical aid to those in need of assistance in the desert.[2] Instead of being lauded for their life-saving actions, humanitarian volunteers were threatened, harassed, and in the most extreme cases, criminally prosecuted by the federal government for harboring undocumented immigrants.[3]

In this Article, I review the recent criminal alien smuggling prosecutions of humanitarian volunteers for the Arizona nonprofit organization, No More Deaths, also known as No Más Muertes. In Part I, I will provide a brief history of No More Deaths, a humanitarian organization in southern Arizona dedicated to ensuring that no more lives are needlessly lost in the Arizona desert. In Part II, I will describe the hostile environment No More Deaths faced during the years of the

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1. *See* Jeff Gammage, *Hundreds of migrants die every year trying to cross the southwest border into the U.S.,* PHILADELPHIA INQUIRER (Oct. 29, 2019), https://www.inquirer.com/news/southwest-border-deaths-desert-heat-20191029.html.

2. *See About No More Deaths*, NO MORE DEATHS/NO MÁS MUERTES, https://nomoredeaths.org/about-no-more-deaths/.

3. *Id.*; *Legal Defense campaign*, NO MORE DEATHS/NO MÁS MUERTAS, https://nomoredeaths.org/legal-defense-campaign/ ("Since the election of Donald Trump, we have seen the resurgence of government efforts to criminalize the lifesaving aid No More Deaths provides to migrants in the southwest borderlands. In June of 2017, our humanitarian aid camp on the outskirts of Arivaca, Arizona was raided by Border Patrol and four patients receiving care were arrested. Since then, federal misdemeanor charges have been filed against nine No More Deaths volunteers for our work in the West Desert. In January of 2018, a second raid occurred, this time on our humanitarian aid base in Ajo, Arizona, and Border Patrol arrested two individuals receiving humanitarian aid and No More Deaths volunteer Scott Warren. The targeting of our work is part of a larger governmental push to punish and abuse migrants and those who stand in solidarity with them.") (last visited Mar. 19, 2025).

George W. Bush and Donald J. Trump Presidential Administrations, in which federal agents actively harassed and threatened members attempting to provide humanitarian aid to suffering migrants. In Part III, I will discuss the two federal criminal trials of Scott Warren for harboring undocumented migrants in Tucson, Arizona in 2019. In Part IV, I discuss the reversal of the criminal convictions of four other No More Deaths volunteers in 2019 on the grounds that their prosecutions violated the Religious Freedom Restoration Act (RFRA) and argue that the decision to charge the No More Deaths volunteers for violating federal criminal statutes were politically motivated select prosecutions. Finally, I conclude the Article with suggestions regarding how concerned individuals of faith and conscience can continue to safely provide humanitarian aid to vulnerable migrants in need in the desert Southwest.

INTRODUCTION

> *Five men stumbled out of the mountain pass so sunstruck they didn't know their own names, couldn't remember where they'd come from, had forgotten how long they'd been lost. One of them wandered back up a peak. One of them was barefoot. They were burned nearly black, their lips huge and cracking, what paltry drool still available to them spuming from their mouths in a salty foam as they walked. Their eyes were cloudy with dust, almost too dry to blink up a tear. Their hair was hard and stiffened by old sweat, standing in crowns from their scalps, old sweat because their bodies were no longer sweating. They were drunk from having their brains baked in the pan, they were seeing God and devils, and they were dizzy from drinking their own urine, the poisons clogging their systems . . . . They were walking now for water, not salvation. Just a drink. They whispered it to each other as they staggered into parched pools of their own shadows, forever spilling downhill before them: "Just one drink, brothers. Water. Cold water! . . .* [4]

> *[E]very day in the border region migrants, refugees, people who are coming across the border, who are coming through the desert, who are suffering, who are at risk of dying, are knocking on people's doors, and they're in need of water, and they're in need of food. They're in need of basic medical care and basic necessities. And people all across the border region are continuing to respond by offering these folks a glass of water, by offering them some rest or some food.*[5]

As detailed in Luis Alberto Urrea's modern classic *The Devil's Highway*, 2001 was a particularly deadly year for migrants crossing the

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4. LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY 18–19 (2004).

5. *See No More Deaths: Scott Warren & Catherine Gaffney on How Humanitarian Aid Is Criminalized Near Border*, DEMOCRACY NOW! (May 29, 2019), https://www.democracynow.org/2019/5/29/no_more_deaths_scott_warren_speaks.

Arizona desert into the United States.[6] Nominated for a Pulitzer Prize in nonfiction, Urrea's book follows the lives – and in some cases, the deaths – of twenty-six men as they traveled from Mexico into southern Arizona in May of that year.[7] The catastrophic loss of life made headlines even before Urrea's book was published in 2004, due in part to the unfathomable cruelty of smugglers that led directly to the deaths of fourteen of the men profiled by Urrea.[8] As recounted in the media in an interview with Johnny Williams, then-director of the Immigration and Naturalization Service's (INS) western region, the group of migrants got lost in the desert and were presumably abandoned by their *coyotes* (smugglers). Searching for the lost migrants was a daunting task, as the desert in which the migrants were lost was approximately the size of Delaware.[9] Due to the high temperatures – well over 100 degrees Fahrenheit – Williams said that "the men who died suffered a 'grisly' death from dehydration,"[10] as survival in such conditions would require an individual to carry at least five gallons (or forty pounds) of water with them.[11]

The discovery of the twenty-six abandoned migrants[12] in May 2001 was, at the time, "the deadliest immigrant smuggling incident ever in Arizona."[13] Law enforcement stated that they "were sharing

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6. The Southwest Border Sectors of the United States Border Patrol reported 340 deaths for fiscal year 2001. *See Southwest Border Deaths by Fiscal Year*, U.S. BORDER PATROL, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf (last visited Mar. 19, 2025).

7. *See* URREA, *supra* note 4.

8. *See* James Sterngold, *Devastating Picture of Immigrants Dead in Arizona Desert,* NEW YORK TIMES (May 25, 2001), https://www.nytimes.com/2001/05/25/us/devastating-picture-of-immigrants-dead-in-arizona-desert.html.

9. *See Cross-border manhunt seeks smugglers linked to 14 migrant deaths*, CNN (May 24, 2001), http://archives.cnn.com/2001/US/05/24/border.deaths.02/ [https://web.archive.org/web/20080103110128/http://archives.cnn.com/2001/US/05/24/border.deaths.02/].

10. *Id.*

11. *Id.*

12. *See* Sterngold, *supra* note 8 ("The initial sighting was about 10 a.m. Wednesday, about 30 miles north of the border. Four men were found badly dehydrated, and they told agents that 22 others were behind them.").

13. *Id.* ("Though dozens die every year trying to cross illegally into Arizona from Mexico, this was the area's worst single incident in memory."). Unfortunately, this death toll was surpassed just two years later. On May 14, 2003, 19 people died in Victoria, Texas after being smuggled in the back of a trailer and left to die. The Victoria deaths remain the deadliest immigrant smuggling incident to date in the United States. *See Trucker in deadly Texas migrant case given life sentences*, REUTERS (Apr. 20, 2019),

information regarding [the] incident in order to bring justice,"[14] and an arrest for smuggling the men was made by the Immigration and Naturalization Service (INS) shortly thereafter.[15] However, the smuggling of migrants through the dangerous terrain of the Arizona desert continues unabated, and the death toll continues to climb.[16] Between 1998 and 2004, more than 7,000 migrants died in the borderlands attempting to cross into the United States from Mexico.[17]

In this Article, I review the recent criminal alien smuggling prosecutions of humanitarian volunteers for the Arizona nonprofit organization, No More Deaths (NMD), also known as No Más Muertes. Part I summarizes the history of NMD, a humanitarian organization in southern Arizona dedicated to saving the lives of migrants in the Arizona desert. Part II describes the hostile environment NMD faced in recent years in their attempt to provide humanitarian aid to suffering migrants. Part III discusses the criminal trials of Scott Warren for harboring undocumented migrants in 2019, and Part IV details the subsequent reversal of the criminal convictions of four other NMD volunteers on the grounds that their prosecutions violated the Religious Freedom Restoration Act (RFRA). I conclude the Article with some suggestions for regarding how concerned individuals may continue to provide humanitarian aid to vulnerable migrants in need in the desert Southwest.

I. HUMANITARIAN AID IS NOT A CRIME: A LOCAL RESPONSE TO AN INTERNATIONAL TRAGEDY

NMD's mission is "to end the death and suffering of migrants on the US–Mexico border by mobilizing people of conscience to uphold

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https://www.reuters.com/article/us-texas-bodies-migrants/trucker-in- deadly-texas-migrant-case-given-life-sentences-idUSKBN1HR35A ("The driver of a truck packed with migrants, 10 of whom died due to sweltering Texas heat in July, was sentenced on Friday to life in prison without parole after pleading guilty in October to federal human smuggling charges. James Bradley, 61, could have faced the death penalty in the case, considered one of the deadliest human smuggling incidents in modern U.S. history.").

14. CNN, *supra* note 9.

15. *See Arrest in Border Deaths*, CBSNEWS.COM (May 24, 2001), https://www.cbsnews.com/news/arrest-in-border-deaths/.

16. *See* U.S. BORDER PATROL, *Southwest Border Deaths by Fiscal Year*, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf (last visited Nov. 29, 2024).

17. *Id.*

fundamental human rights."[18] NMD is "an autonomous project, and since 2008, has been an official ministry of the Unitarian Universalist Church of Tucson.[19] Since the beginning, NMD has been guided by the first faith-based principle for immigration reform – "the failed militarized border enforcement strategy."[20] Since its inception, NMD volunteers have focused on providing humanitarian aid to individuals suffering and dying in the Arizona desert and to bring to light the tragic consequences of the United States border enforcement policy.

The goals of No More Deaths 2004 were to provide water, food, and medical assistance to migrants walking through the Arizona desert; to monitor US operations on the border and work to change US policy to resolve the "war zone" crisis on the border; and to bring the plight of migrants to public attention. These goals were implemented by recruiting aid programs as well as supporting already existing ones, by interfaith, humanitarian, peaceful, solidarity-building events, and by establishing camps for assistance, outreach and border monitoring. Under the No More Deaths umbrella, participating groups—staffed by volunteers--abided by clear medical and legal protocols and worked in concert to save human lives.[21]

A. *Arks of Covenant*

Arks of the Covenant (Ark)–permanent humanitarian rescue sites where volunteers worked year-round, including during the blistering hot summer months–were central to NMD's founding.[22] NMD volunteers traverse the desert terrain, both by foot and vehicle, looking for persons

18. *No More Deaths/No Más Muertas,* IDEALIST, https://www.idealist.org/en/nonprofit/3763dbc04c604d2b80e09bb9b8c942d6-no-more-deathsno-mas-muertes-tucson (last visited Mar. 19, 2025) (elaborating that their work "includes providing aid in the desert, providing aid in Mexico, documenting and denouncing abuse, searching for the disappeared, helping get belongings back, running a biweekly legal clinic for undocumented community members, and alliances with border communities.").

19. *History and Mission of No More Deaths,* NO MORE DEATHS/NO MÁS MUERTAS, http://nomoredeaths.org/index.php/Information/history-and-mission-of-no-more-deaths.html [https://web.archive.org/web/20100611195214/http://nomoredeaths.org/index.php/Information/history-and-mission-of-no-more-deaths.html] (last visited Mar. 19, 2025).

20. *Id.*

21. *Id.*

22. *Id.*

attempting to cross into the United States in need of humanitarian assistance.[23]

In 2004, NMD volunteers working at the Ark sites also participated in a seventy-five-mile walk from Sasabe, Sonora, Mexico, to the U.S. Border Patrol headquarters in Tucson to draw attention to the humanitarian crisis occurring in the desert.[24]

NMD's activism helped draw worldwide attention to the immediacy of the humanitarian crisis at the border. As the organization grew, it quickly became apparent that a more formal organization of the rescue mission was necessary. Thus, NMD's partnered with the Unitarian Universalist Church (UCC) of Tucson in 2008.[25]

B. *Ministry of the Unitarian Universalist Church of Tucson*

In July 2008, pursuant to the growing scope of the organization, NMD officially became a ministry of the UCC.[26] This allowed NMD to transform from a loosely organized group of concerned citizens to a charity with tax-deductible status.[27] Additionally, NMD could also continue its support of creating diverse congregations and working toward creating a worldwide culture of justice and compassion.[28]

NMD's guiding philosophy centers on faith-based principles for immigration reform.[29] The principles preamble states that:

> We come together as communities of faith and people of conscience to express our indignation and sadness over the continued death of hundreds of migrants attempting to cross the US–Mexico border each year. We believe that such death and suffering diminish us all. We share a faith and a moral imperative that transcends borders, celebrates the contributions immigrant peoples bring, and compels

23. *Id.*
24. *Id.*
25. *About No More Deaths*, No More Deaths/No Más Muertas, https://nomoredeaths.org/about-no-more-deaths/ (last visited Mar. 19, 2025) ("Since 2008 we have been an official ministry of the Unitarian Universalist Church of Tucson.").
26. *Id.*
27. *Id.*
28. *Id.*
29. *See Faith Based Principles for Reform*, NO MORE DEATHS/NO MÁS MUERTAS, https://nomoredeaths.org/about-no-more-deaths/faith-based-principles-for-immigration-reform/ (last visited Mar. 19, 2025).

> us to build relationships that are grounded in justice and love. As religious leaders from numerous and diverse faith traditions, we set forth the following principles by which immigration policy is to be comprehensively reformed. We believe that using these principles—listed from the most imminent threat to life to the deepest systemic policy problems—will significantly reduce, if not eliminate, deaths in the desert borderlands.[30]

NMD has five faith-based principles for immigration reform that guide their work.[31] Briefly, the five principles are: 1) criticism of militarized border enforcement policy; 2) regulating the status of undocumented persons currently in the United States; 3) emphasizing family unity and reunification in immigration law and policy; 4) permitting workers to live and work safely in the United States through an employment-based immigration program; and 5) acknowledgement that the "root causes of migration lie in environmental, economic, and trade inequities."[32] Since its inception, NMD activism and advocacy has been primarily dedicated to its first principle[33]–"the current Militarized Border Enforcement Strategy is an ill-conceived policy."[34] NMD contends that, while nations have the right to control their own borders, militarized borders do not stop people from migrating.[35] Thus, they argue that enforcement of immigration laws must be applied in a humane and proportionate way the protects both the people and the land.[36]

Out of this commitment to ending a militarized border, NMD focuses on providing "civilian, non-governmental, nonviolent, voluntary, and community-based" work.[37] They emphasize that their work "is humanitarian relief, which includes the provision of water, food, respite, medical care, family reunification, search, and rescue/recovery services, emotional first aid, legal resources, and other necessities that prevent exposure to further harm."[38] From the very beginning, NMD has been

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. No More Deaths, *supra* note 2.
38. *Id.*

clear that their work is faith-based, mission-driven, and non-partisan; their work is an act of conscience.[39]

C. *The Foundations of Borderland Humanitarian Relief and Increasingly Activist Ministry of NMD*

The efforts of NMD, in partnership with other humanitarian aid groups in Arizona,[40] led to the establishment of a document entitled "Foundations of Borderland Humanitarian Relief."[41] The Foundations of Borderland Humanitarian Relief document came out of a collaboration between the Ajo Samaritans, NMD, and People Helping People in the Border Zone.[42] The document squarely blames the U.S. government for the refugee crisis, alleging that the humanitarian crisis on the Southwest border is due to U.S. government policies.[43] In particular, the humanitarian groups allege that the militarization of the U.S.–Mexico border has led to "tens of thousands of documented deaths and disappearances over the last twenty years."[44]

This bold and unequivocal placement of blame on the U.S. government's actions and inactions almost certainly put NMD in its crosshairs. As discussed later in Section III, it almost defies logic that in the United States – a nation founded in large part on the principle of religious freedom – that a non-violent, faith-based humanitarian organization such as NMD would be subjected to the intense scrutiny, retaliation, and persecution that its members have suffered over the last two decades in its efforts to save human lives through charitable acts of mercy.[45] Rather than accepting that the members of NMD and other

39. *Id.* ("The mission of No More Deaths is to end death and suffering in the Mexico–US borderlands through civil initiative: people of conscience working openly and in community to uphold fundamental human rights.")

40. No More Deaths routinely cooperates with the humanitarian organizations Ajo Samaritans and People Helping People in the Border Zone to provide aid to migrants in the Arizona desert. *See id.* ("All actions taken under the auspices of the Ajo Samaritans, No More Deaths, and People Helping People in the Border Zone are with concern for the lives, well-being, and dignity of all people in the borderlands.").

41. *Foundations of Borderland Humanitarian Relief,* NO MORE DEATHS/NO MÁS MUERTAS, 1 https://nomoredeaths.org/wp-content/uploads/2019/08/Foundations-English.pdf (last visited Nov. 10, 2024).

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* Ryan Deveraux, *Bodies in the Borderlands,* INTERCEPT (May 4, 2019), https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/.

borderland humanitarian aid groups were motivated by their faith and conscience to critique and combat federal immigration law and policy, the U.S. government chose to cast their activism as criminal activity that violated federal laws prohibiting the smuggling and harboring of undocumented immigrants.[46] The U.S. government's interpretation of the federal smuggling and harboring statutes, INA § 275 and INA § 276 (also known as 8 U.S.C. § 1325 and § 1326), stretched credulity as applied to the NMD and other border aid groups' humanitarian work.[47]

Further, the U.S. government has a complete inability or unwillingness to accept that the call to save the lives of human beings dying in the desert in their attempt to cross into the United States without documentation is a valid expression of faith. Both the U.S. government's interpretation of the harboring statutes and their inability to accept a valid expression of faith are examples of the dangerous narrow-minded focus on enforcement that has influenced that immigration law and policy in recent years, and which reached a fever pitch during the Trump Administration.[48] Given the fact that Trump is once again be in White House as of 2025, humanitarian groups like NMD are facing the real threat that their efforts will once again be stymied by vigorous law enforcement tactics on the border.

The Foundations of Borderlands Humanitarian Relief are unapologetically based on the NMD founders' faith and their sincerely held belief in their duty to provide humanitarian aid to those in need of

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46. *See id.* ("The change went into effect July 1. By the time Warren and No More Deaths met with the U.S. Attorney's Office days later, Slone was already looking to have humanitarian volunteers charged with crimes. That same day, he sent a letter to a Bureau of Land Management official stating that his office was 'pursuing legal action against' Warren for driving on designated wilderness. In the field, Cabeza Prieta rangers documented their removal of food and water left by No More Deaths. Slone, meanwhile, began creating blacklists of people who were banned from the refuge—comprised entirely of No More Deaths volunteers.").

47. 8 U.S.C. §§ 1325, 1326.

48. *See* Deveraux, *supra* note 45 ("Border Patrol enthusiasm for candidate Trump was evident on the hills surrounding Byrd Camp, where volunteers say Border Patrol agents used their megaphones to urge them to 'vote Trump!' Once in office, the president's anti-immigrant brain trust wasted no time. In April 2017, Sessions, who had become the most powerful law enforcement official in the country, flew to Arizona to announce a new prong of the administration's immigration enforcement strategy. Standing in the sun on the Arizona side of Ambos Nogales, the attorney general described the region as a war zone was directing his prosecutors to prioritize. The first among them: transportation and harboring of aliens. 'This a new era,' Sessions warned, his excitement building as he gripped the lectern with two hands. 'This is the Trump era.'").

rescue.[49] They also reaffirm that international human rights are at the heart of their humanitarian actions in the borderlands: "we recognize that all people who cross the southern border are human beings deserving of basic dignity. We work to support the right to life, liberty, and security of persons as guaranteed by the Universal Declaration of Human Rights."[50] NMD also clarifies that the immigration status of individuals in need of rescue is irrelevant to their ministry:

> We recognize that those we serve often do not have legal immigration status or authorization to enter the country. Some may have a pathway to gain status, while others would have their claims denied by the immigration legal system. We reject the notion that some people are "less deserving" of care based on their motivations for crossing or vulnerabilities.[51]

This dedication to saving lives and providing aid to individuals in need, without regard to immigration status, is a duty that has been embraced for decades in southern Arizona by those in the borderland's humanitarian rescue movement.[52] Chief among the movements that inspired the ministry of NMD was the Sanctuary Movement of the 1980s, which has its origins in the Southside Presbyterian Church of Tucson.[53]

1. Civil Initiative

"Civil initiative" is a term that was coined by philosopher and activist Jim Corbett as part of the Tucson Sanctuary Movement in the early 1980s.[54] Tucson Southside Presbyterian Church is considered by

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49. *Foundations of Borderland Humanitarian Relief,* NO MORE DEATHS 1 https://nomoredeaths.org/wp-content/uploads/2019/08/Foundations-English.pdf (last visited Nov. 10, 2024).

50. *Id.*

51. *Id.* at 2.

52. *See* Deveraux, *supra* note 45 (explaining how many people in Arizona volunteer to provide assistance to immigrants. There are also many groups in the state committed to this king of volunteer work, including faith-based humanitarian groups.).

53. *See Civil Initiative*, NO MORE DEATHS/NO MÁS MUERTES, https://nomoredeaths.org/about-no-more-deaths/civil-initiative/ (last visited on Nov. 8, 2024) (*"*No More Deaths operates according to the principles of civil initiative, a term coined by Jim Corbett in the context of the Sanctuary Movement.").

54. *Id.*

some to be the birthplace of the modern sanctuary movement in the 1980s.[55] During that time, Southside Presbyterian provided aid and shelter to more than 13,000 refugees fleeing the civil wars in Central and South America.[56] Corbett stated that "our responsibility for protecting the persecuted must be balanced by our accountability to the legal order. As formed by accountability, civil initiative is non-violent, truthful, universal, dialogical, germane, volunteer-based and community-centered."[57] Quaker activist John Stephens has described the civil initiative as peace building, grounded in the "exercise of natural rights":[58] Stephens also emphasizes that civil initiative is distinct from civil disobedience in that it is rooted in community action.[59]

As Stephens asserts, civil initiative is distinguishable from other forms of protest, such as civil disobedience, because it actively resists social injustice.[60] Unlike civil disobedience, civil initiative is not passive resistance to the law.[61] To the contrary, civil initiative is "community action that brings recognized rights into social norms and legal practice."[62]

This type of radical action refuses to simply protest social injustice but requires engagement by those opposed to inequality to peacefully – yet forcefully – demand that the systems sustaining and perpetuating injustice be changed.[63] Again, Stephens summarizes civil initiative as doing justice, not just resisting injustice.[64]

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55. *The Sanctuary Movement*, SOUTHSIDE PRESBYTERIAN CHURCH, https://www.southsidepresbyterian.org/the-sanctuary-movement.html (last visited Mar. 19, 2025).

56. *Id.*

57. *See* NO MORE DEATHS, *supra* note 53.

58. John Stephens, *About Civil Initiative*, DESIGN OPUS (Apr. 29, 2009), https://designop.us/wrote/about-civil-initiative.

59. *Id.*

60. *See id.* ("Civil initiative is designed to protect natural rights by incorporating them into accepted social standards. Instead of depending on government plans or international enforcement, civil initiative focuses on community powers and voluntary effort.").

61. *Id.* ("Indiscriminately fused with civil disobedience, civil initiative would become do-gooder vigilantism. Civil initiative means doing justice, not just resisting injustice.").

62. *Id.*

63. *Id.*

64. *Id.* (quoting Jim Corbett, *Sanctuary, Basic Rights, and Humanity's Fault Lines: A Personal Essay*, 5.1 WEBER J., (1988).

Quoting Jim Corbett's book *Goatwalking*,[65] Stephens also points out that "civil initiative is almost identical to the *satyagraha*[66] pioneered by Indian lawyer and non-violence activist Mohandas K. Gandhi:"[67]

> Civil initiative must be societal rather than organizational, nonviolent rather than injurious, truthful rather than deceitful, catholic rather than sectarian, dialogical rather than dogmatic, substantive rather than symbolic, volunteer-based rather than professionalized, and based on community powers rather than government powers.[68]

> As Presbyterian minister John Fife, one of the founders of the original movement in Tucson, said at the time: [W]e're not going to stop helping these people. We can't stop . . . As people of faith and conscience, with all of those poor hardworking God-fearing desperate migrants dying in the Sonora desert for no reason at all except for a failed border strategy, we've got to be out there providing whatever humanitarian aid we can.[69]

Ultimately, civil initiative can be summarized as "concrete action to meet the basic needs of victims—for security, subsistence, and liberty. This is bound up with accountability to civil order."[70] Unfortunately, this dedication to "integrate natural rights into social norms, with a focus on the needs of victims"[71] is what ultimately gained NMD and other borderlands humanitarian rescue organizations the attention of law enforcement. This resulted in the prosecution of several members of

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65. *See generally* JIM CORBETT, GOATWALKING: A GUIDE TO WILDLAND LIVING, A QUEST FOR THE PEACEABLE KINGDOM (Viking Adult, 1991).

66. *Satyagraha*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/satyagraha.

67. SOUTHSIDE PRESBYTERIAN CHURCH, *supra* note 55.

68. No More Deaths, *supra* note 54.

69. ASSOCIATED PRESS, *Volunteers Fight Arrests for Aiding Illegals*, DESERET NEWS (Apr. 2, 2006), https://www.deseret.com/2006/4/2/19946256/volunteers-fight-arrests-for-aiding-illegals/; *see* SOUTHSIDE PRESBYTERIAN CHURCH, *supra* note 55.

70. Stephens, *supra* note 58.

71. *Id*.

NMD, and the persecution of individuals committing acts of mercy on account of their beliefs.[72]

II. PERSECUTION AND PROSECUTION

Since the inception of NMD, critics have been skeptical that the humanitarian motivations of the organization are legitimate expressions of religious convictions.[73] They argue that NMD volunteers are merely politically motivated individuals who are not only breaking federal law with their rescue missions, but that their activities also pose a threat to national security.[74]

The targeting of NMD members for criminal prosecution, began in 2005 with the prosecution of two humanitarian aid workers, Daniel Strauss and Shanti Sellz.[75] Prosecutions reached a crescendo in 2019 with the trials of Scott Warren, a NMD volunteer whose prosecution for providing humanitarian aid to migrants in the Arizona desert gained international attention.[76] Strauss and Sellz were the first NMD members to be criminally prosecuted for their works of mercy.[77] However, they were not the first individuals to be prosecuted by the federal government for providing humanitarian aid to migrants fleeing to the United States. In the 1980s, the U.S. government notoriously prosecuted people who provided humanitarian aid to Central American refugees in a sting

72. *See* Deveraux, *supra* note 45.

73. *See* ASSOCIATED PRESS, *supra* note 69.

74. *See, e.g.*, Ellis Freilich, *The No More Deaths Case: Humanitarian Aid or Crime on the U.S.-Mexico Border?*, MEUB ASSOCIATES, PLC (Mar. 16, 2019), https://www.yourvtlawyer.com/post/humanitarian-aid-on-u-s-mexico-border [https://web.archive.org/web/20200814232807/]. ("*No More Deaths* and some of their activists are facing a host of legal problems related to their work in the Arizona desert. Are the members of this organization breaking federal law? Do they pose a threat to our country? Or are they being targeted by local police because of their "pro-immigrant" stance? . . . It's unfortunate that this case is an example of the law being used to further an agenda, rather than promote what the rules say and maintain fair and equal order. Let's hope that in the future, fewer cases involve the political game and more cases that support the greater good come to courts.").

75. *USA: Amnesty International's Concerns About Criminal Charges Filed Against Two Human Rights Activists Who Assisted Migrants in the Desert*, AMNESTY INT'L (Dec. 13, 2005), https://www.amnesty.org/en/wp-content/uploads/2021/08/amr512012005en.pdf.

76. *See* Ryan Deveraux, *Criminalizing Compassion: The Unraveling of the Conspiracy Case Against No More Deaths Volunteer Scott Warren*, INTERCEPT (Aug. 10, 2019), https://theintercept.com/2019/08/10/scott-warren-trial/.

77. ASSOCIATED PRESS, *supra* note 69.

operation with the code name "Operation Sojourner."[78] Inspired by the first sanctuary movement,[79] NMD volunteers and members of the local community in southern Arizona gathered to save the lives of migrants dying in the desert, knowing full well that doing so could put them squarely in the federal government's crosshairs.[80]

A. *The 2005 Prosecutions of Daniel Strauss and Shanti Sellz*

Daniel Strauss and Shanti Sellz were the first NMD members targeted by the federal government, but they were certainly not the last.[81] On July 9, 2005, Border Patrol stopped Strauss and Sellz near Arivaca, Arizona with three severely dehydrated and very ill migrants in their vehicle.[82] It was undisputed that the condition of the individuals that Strauss and Sellz were accused of assisting were gravely ill and required immediate medical attention. The Associated Press described the scene as follows:

> Emil Hidalgo-Solis couldn't stop throwing up. His diarrhea was bloody. His feet blistered. He had staggered through the desert, stumbled across the border, gulped contaminated water from a slimy cattle trough . . . He collapsed in a ditch. He and two others among the 10 immigrants could go no farther.[83]

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78. *See* Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L. J. 474 (2017).

79. ASSOCIATED PRESS, *supra* note 69. ("The new activists were organized by some of the leaders of the earlier Sanctuary movement, and they say they are merely responding to a humanitarian emergency." We were seeing increasing numbers of people dying in our desert. We asked ourselves, 'What's our responsibility as people of faith?' " says Presbyterian pastor John Fife, who was among those convicted in 1986.").

80. *Id.* ("There had been indications that the Border Patrol might crack down on No More Deaths . . . [but e]ven local
government has chipped in, providing annual grants of $25,000 to Humane Borders. "It is a humanitarian issue where you have to draw on your own religious beliefs to try to prevent death," said Pima County Supervisor Richard El.").

81. *See id.* ("There had been indications that the Border Patrol might crack down on No More Deaths. In August 2004, Michael Nicely, a 25-year veteran agent, took over as chief of the Border Patrol's Tucson sector. Nicely warned organizers that his agents might keep watch over their aid camps, and that if they transported people, they risked arrest.").

82. *Id.*

83. *Id.*

Hidalgo-Solis and his fellow travelers faced certain death that day in the Arizona desert in July 2005.[84] However, their lives were saved when truck full of NMD members arrived in a truck bearing the word "Samaritan" on its side, offering them food, water, and medical care.[85]

When questioned by the agents, Strauss and Sellz explained that they were following NMD protocol and taking the migrants to a clinic for medical treatment.[86] They alleged that they had been told by NMD officials, which included attorneys and physicians, that "the [NMD] 'protocol' had been approved by Border Patrol and that the transportation for these medical purposes was not a violation of the law."[87] Thus, believing in good faith that their humanitarian actions were legal, Strauss and Sellz put Hidalgo and two other migrants in their vehicle so they could receive medical attention.[88] However, before they were able to deliver them to a nurse and a doctor waiting at a clinic set up by NMD, the group was intercepted by the Border Patrol, and all five were arrested.[89]

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84. *Id.*

85. *Id.*

86. *See* Craig Wiesner, "Good Samaritans Found Not Guilty!," MULTIFAITH VOICES FOR PEACE & JUSTICE, https://www.multifaithpeace.org/article.php/samaritans, ("On July 9th, 2005, a pair of Samaritans, named Daniel and Shanti, was wandering the desert when they came upon a group of travelers. The travelers were hungry, thirsty, and suffering from severe and crippling blisters. Desperate for water, some of them had drunk from a tepid cattle tank and were very sick, unable to hold down any liquids for several days as temperatures soared past 115 degrees. Three of the travelers were so ill, that the Samaritans called two physicians and a nurse for advice. "Get them to medical care" they were told. Even a lawyer was consulted, and he agreed that the Samaritans should get the three sick men to a doctor. So, the Samaritans loaded the men into their car, attached their organization insignia on the side of the car so that people would know they were transporting people in need of help, and began driving. Soon, a Border Patrol car came up behind them, followed them for a while, and eventually pulled them over. Perhaps it was the same Border Agent who had passed the other dying many by. And the agent asked them "Who are these neighbors you have in your car?" "We do not know" said the Samaritans, "but they are very ill and need medical care.").

87. *See infra,* note 97.

88. *See* ASSOCIATED PRESS, *supra,* note 69.

89. *See id.* ("The officers trailed them for maybe 13 miles before pulling them over . . . The officer asked, 'Are your three passengers illegal?' 'I don't know,' Strauss said. Then, Sellz recalls, the officer poked his head into the car and asked the passengers: 'Do you guys speak English?' No one answered. The officer turned to us and said, 'Those guys are illegal and you know it.' . . . They arrested Hidalgo-Solis and his companions. But they also arrested Strauss and Sellz.").

It was clear to Strauss and Sellz that the migrants were sick and dying and urgently needed to receive medical attention.[90] Despite their good faith belief that they were seeking humanitarian aid for migrants in distress in accordance with the law, Strauss and Sellz were later indicted by a grand jury for conspiring to transport and transporting undocumented migrants.[91] If convicted of this crime – a felony[92] – Straus and Sellz faced up to fifteen years in federal prison.[93]

The position that the Border Patrol took against humanitarian aid workers such as Strauss and Sellz was crystal clear – the aid workers were smugglers. Johnny Bernal, a Border Patrol supervisory agent in Tucson states at time of Strauss and Sellz's prosecutions in 2005 that "[i]t doesn't matter who you are, humanitarian, Minuteman or just a citizen if you're transporting an illegal alien then you're breaking the law. You're smuggling an illegal alien."[94] Yet despite this hard line, NMD volunteers and their supporters – including Strauss and Sellz – remained adamant that they were not going to stop providing humanitarian aid, even in the face of potential criminal consequences.

Ultimately, the charges against both Strauss and Sellz were dismissed in September 2006 by United States District Judge Raner Collins.[95] Judge Collins found that in the case of Strauss and Sellz, whose argument boiled down to the NMD slogan that humanitarian aid is not a crime,[96] "further prosecution would violate the Defendant's due process rights."[97] Judge Collins reasoned that, in addition to NMD having shared their activities with Border Patrol for several years, "the conduct of people similar to those now charged in this case had been, at least

90. *Id.* ("'They insist that in transporting sick people, they were not in any way breaking the law.' 'Are you really arresting me?' Sellz recalls asking, in amazement. 'I know you guys are good people but what you're doing is illegal,' she was told.").

91. *Id.*

92. 8 U.S.C. § 1324(a)(1)(A).

93. *Id.* at § 1324(a)(1)(B).

94. *Id.*

95. Bob Ortega, *Trial Begins for No More Deaths Volunteer Who Aided Migrants*, CNN: INVESTIGATES (June 3, 2019, 6:30 AM), https://www.cnn.com/2019/06/03/us/trial-scott-warren-no-more-deaths-volunteer-migrants-arizona-invs/index.html.

96. *Id.* ("Shanti Sellz, a vegetable farmer in eastern Iowa. Sellz was a college student and visiting summer volunteer at No More Deaths in 2005 when she and another volunteer, Daniel Strauss, were arrested by Border Patrol agents while driving three dangerously ill undocumented immigrants to a hospital in Tucson. They spent three days in federal custody and were charged with conspiracy and transporting illegal aliens, both felonies. 'We argued that humanitarian aid is never a crime,' Sellz said by phone.").

97. United States v. Strauss, CR 05-1499-TUC-RCC at 6 (D. Ariz. Sept. 1, 2006).

tacitly, approved by the Border Patrol."[98] Thus, for a time, it seemed as if organizations such as NMD could provide humanitarian assistance to migrants in the Arizona desert without worrying about fear of prosecution.[99] However, that time came to an end in 2010, with the prosecution of Daniel Millis for felony littering in a national park.[100]

B. *The 2010 Prosecution of Daniel Millis*

The prosecution of Daniel Millis in 2010, stemming from his humanitarian aid activities as part of his association with NMD,[101] received a fair amount of notoriety due to Millis successful appeal of his criminal conviction.[102]

In 2008, while serving as a volunteer with NMD, Millis was found guilty of "disposal of waste" pursuant to 50 C.F.R. § 27.94(a), in the United States District Court for the District of Arizona.[103] The statute under which Millis was convicted prohibited littering in a national wildlife refuge.[104] Millis was performing activities for NMD, including driving a car with other volunteers and placing water in the desert to be used by migrants on their journey to the United States.[105] Although unsuccessful at the trial level, Millis' mounted the same defense as Strauss and Sells the motto for NMD – "humanitarian aid is never a crime."[106] Millis contended that because the water NMD volunteers left in the desert was for the express purpose of saving lives, his conduct could not be criminalized.[107] Notwithstanding these arguments, Judge Cindy K. Jorgenson held that Millis' disposal of the water violated the federal anti-littering statute, and he was convicted.[108]

In 2010, the United States Court of Appeals for the Ninth Circuit heard Millis' appeal, and a three-judge panel reversed his conviction. The

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98. *Id.* at 5.

99. *See* Deveraux, *supra* note 45.

100. U.S. v. Millis, 621 F.3d 914 (9th Cir. 2010).

101. *Id.*

102. *See, e.g.,* Mark Carlson, *Court reverses conviction for migrant littering*, NBC NEWS (Sept. 2, 2010), https://www.nbcnews.com/id/wbna38980085.

103. United States v. Millis, No. CR 08-1211-TUC-CKJ, 2009 WL 806731, *6 (D. Ariz. Mar. 20, 2009).

104. 50 C.F.R. § 27.94(a) (2025).

105. *Millis*, 2009 WL 806731 at *6.

106. *See id.* at *5.

107. *Id.*

108. *Id.* at *6.

panel applied the rule of lenity[109] to find that the water left in the desert by Millis and the other NMD volunteers was not properly included in the federal statute.[110] Thus, despite not prevailing on his original defense of "humanitarian aid is never a crime" Millis nonetheless scored a victory for the humanitarian immigrant rights movement when his conviction was overturned, and the retaliatory prosecutions of NMD members was, for a time, halted. That is, until the prosecutions of Scott Warren, a longtime NMD volunteer, began in 2018.

III. THE 2019 PROSECUTIONS OF SCOTT WARREN

In 2018, a 35-year-old volunteer for NMD, Dr. Scott Warren, was arrested by the federal government and prosecuted for allegedly committing several crimes while providing humanitarian assistance to migrants crossing the Arizona desert.[111] On January 17, 2018, Warren was arrested in Ajo, Arizona, small community in southern Arizona close to the Mexican border.[112] Warren was "accused of providing 23-year-old Kristian Perez-Villanueva, of El Salvador, and 20-year-old José Sacaria-Goday, of Honduras, with food, water, and a place to sleep over three days."[113] Warren's arrest came the same day that NMD published a scathing report about the Border Patrol's systemic destruction of life-saving water left in the desert for migrants over the course of several years.[114] The report, "*Interference with Humanitarian Aid: Death and Disappearance on the U.S.-Mexico Border*," documented in painstaking detail the destruction of and obstruction of the provision of humanitarian

109. *Legal Information Institute (LII)*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/rule_of_lenity ("The rule of lenity is a principle used in criminal law, also called rule of strict construction, stating that when a law is unclear or ambiguous, the court should apply it in the way that is most favorable to the defendant, or to construe the statute against the state.").

110. United States v. Millis, 621 F.3d 914, 917 ("We next turn to the language of the regulation. When construing a word, we generally construe the term in accordance with its 'ordinary, contemporary, common meaning.' (citation omitted) . . . Applying those definitions in the present context, the text of [50 C.F.R.] § 27.94(a) is ambiguous as to whether purified water in a sealed bottle intended for human consumption meets the definition of 'garbage.'"

111. *See* Deveraux, *supra* note 76.

112. Ryan Deveraux, *Nine Humanitarian Activists Face Federal Charges After Leaving Water for Migrants in the Arizona Desert*, INTERCEPT, Jan. 23, 2018, https://theintercept.com/2018/01/23/no-more-deaths-arizona-border-littering-charges-immigration/.

113. Deveraux, *supra* note 45.

114. *Id.*

aid provided to migrants by NMD and other border humanitarian aid groups.[115]

At the time of his arrest in 2018, Warren[116] had been volunteering with NMD for ten years.[117] When he was arrested in January 2018, he was at a NMD volunteer gathering at a location known as "The Barn" in Ajo.[118] The border agents discovered The Barn's address by doing online research and surveilling the property.[119] The Border Patrol agents who arrested Warren were in plain clothes and did not present a warrant.[120] Despite Warren's request for them to leave, the Border Patrol agents arrested Warren, eight other NMD volunteers, and the migrants they provided with life-saving provisions; the migrants were held as material witnesses in the federal prosecution ultimately brought against the NMD volunteers.[121]

Although the federal government had already secured four criminal convictions against NMD volunteers for providing humanitarian aid to migrants, Warren's case, notably, was first one in which the federal government sought a felony conviction.[122] They made an example of Warren to send the message, loud and clear, that attempting to save the lives of desperate migrants by providing them with food, water, and

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115. *Part II: Interference with Humanitarian Aid: Death & Disappearance on the US-Mexico Border*, DISAPPEARED REPORT, 2 (2018) ("The second section [of the report] explores the vandalization of the water drops established by No More Deaths volunteers in the remote borderlands of Arizona. Drawing on data collected by volunteers over a three- year period, we use a Geographic Information Systems (GIS) analysis to provide evidence that Border Patrol agents are the most likely actor responsible for the destruction of water provisions. We also use GIS analyses to establish the potential consequences of these actions for border crossers. The third section documents the obstruction of humanitarian-aid efforts. Testimonies offered by No More Deaths volunteers reveal the extent to which law-enforcement agencies have targeted humanitarian volunteers, preventing border crossers from accessing lifesaving resources and medical aid in the remote regions of the borderlands.").

116. Warren is a geographer at Arizona State University (ASU). *See* Deveraux, *supra* note 45.

117. *Id.*

118. *Scott Warren Facing 20-Year Prison Sentence for Providing Humanitarian Aid,* FRONT LINE DEFENDERS, https://www.frontlinedefenders.org/en/case/scott-warren-facing-20-year-prison-sentence-providing-humanitarian-aid.

119. *See* Deveraux, *supra* note 45.

120. *Id.*

121. *Id.*

122. *See* Deveraux, *supra,* note 76 ("The prosecutors had won four convictions in those cases, but the punishments were relatively light — $250 fines plus probation. The felony case presented an opportunity to mete out real consequences: 20 years in prison if Warren was convicted and sentenced to consecutive terms.").

shelter was a federal crime and would be punished accordingly.[123] At trial, the federal government portrayed Warren as "an experienced and wily senior official in an organized, nonprofit human smuggling operation that uses humanitarian aid as a cover,"[124] and alleged that his and NMD's ultimate goal was a "borderless society."[125]

A. *Dr. Scott Warren's First Trial – June 2019*

Warren's first trial, which was held in June 2019, lasted nine days.[126] The trial began in an inauspicious manner. After opening arguments, in which the jurors learned that the majority of the witnesses called by the government to prove their case were Border Patrol agents, including members of the so-called "Disrupt Unit", or "Critical Border Patrol Incident Teams" (CBPITs)"[127] The government witnesses testified in support of the criminal conspiracy charge against Warren. They alleged that Warren and other immigrants' rights advocates – including an individual named Irineo Mujica, one of the leaders of the immigrant advocacy group Pueblo Sin Fronteras[128] – were working together to smuggle undocumented people into the United States.[129] However, much of the witness testimony was discredited when it was demonstrated on cross-examination that the communications between humanitarian groups were used for exactly what they claimed they

123. *Id.* ("A young prosecutor in a baggy suit approached the microphone. The American flag pin fixed to his lapel glinted in the light. 'This case is not about humanitarian aid," Nathaniel J. Walters declared in his first words to the jury. Instead, he said, it was about Scott Warren's decision to take part in a conspiracy to break the law and "shield two illegal aliens from law enforcement over the course of several days." Warren was a "high-ranking leader of an organization called No More Deaths," Walters told the jurors, but "No More Deaths is not on trial. Scott Warren is.'").

124. *Id.*

125. *Id.*

126. *Id.*

127. *FAQ on Border Patrol Cover Up Shadow Units,* S. BORDER CMTYS. COAL. (May 6, 2022), https://www.southernborder.org/faq_on_border_patrol_cover_up_shadow_units.

128. Devereaux, *supra* note 45. Pueblo Sin Fronteras ("People Without Borders") was an organizer and supporter of migrant caravans that journeyed to the U.S.-Mexico border in 2018, and was thus a "target[] in a sprawling intelligence-gathering operation" used to detain "activists, journalists, and immigration attorneys" working with caravan members. *Id.*

129. *Id.*

were – life-saving collaborations, rather than criminal alien smuggling.[130]

Warren took the stand in his own defense, testifying for two days about how and why he became involved with NMD.[131] Explaining how his academic work as a geographer dovetails with the live-saving mission of NMD, he also emphasized to the jurors that "humanitarian aid work is legal."[132] He explained: "my intention was to provide them some basic humanitarian aid" and to "treat them as I would any human being who showed up on my doorstep."[133] One of the most powerful arguments made by Warren during his testimony – which also encapsulates both the NMD motto of "humanitarian aid is not crime" and the act of conscience defense that people of faith turn to when welcoming the stranger – is that the people of southern Arizona, and Ajo in particular, have provided life-saving aid to migrants in their backyards for generations.[134] Reading aloud from an op-ed he wrote for the Washington Post, Warren explained:

> Local residents and volunteers organize hikes into this desert to offer humanitarian aid. We haul jugs of water and buckets filled with canned food, socks, electrolytes and basic first-aid supplies to a few sites along the mountain and canyon paths . . . Over the years, humanitarian groups and local residents navigated a coexistence with the Border Patrol. We would meet with agents and inform them of how and where we worked . . . In a town as small as Ajo, we're all neighbors, and everybody's kids go to the same school . . . In Ajo, my community has provided food and water to those traveling through the desert for decades – for generations. Whatever happens with my trial, the next day, someone will walk in from the desert and knock on someone's

130. *Id.* ("The emails were later shown to be part of an ongoing correspondence between Warren, Mujica, and other humanitarian volunteers, which included Warren providing tips on how to obtain useable information regarding where missing or dead migrants could be found.").

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

> door, and the person who answers will respond to the needs of that traveler.[135]

Warren's op-ed also forcefully criticized the Trump Administration's immigration enforcement policies as "seek[ing] to impose hardship and cruelty," and noted that "[f]or this strategy to work, it must also stamp out kindness."[136] While somewhat rhetorically asking "whether the government will take seriously its humanitarian obligations to the migrants and refugees who arrive at the border,"[137] Warren's op-ed concluded with this powerful proclamation: "if they are thirsty, we will offer them water; we will not ask for documents beforehand. The government should not make that a crime."

Ultimately, the jurors in Scott Warren's first trial did not reach a unanimous decision, and the judge declared a mistrial.[138] Unfortunately, however, that was not the end of the story for Warren. The government, undeterred by its loss at the first trial, decided to re-charge Warren and try him a second time.[139] What came next would, at last, be the final chapter in Warren's saga.

B. *Dr. Scott Warren's Second Trial – November 2019*

Shortly after the mistrial in Warren's first prosecution, on July 2, 2019, the government informed the court that while it would be dropping the conspiracy charge against Warren, it would prosecute him

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135. Scott Warren, *I gave water to migrants crossing the Arizona desert. They charged me with a felony.*, WASH. POST (May 28, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/05/28/i-gave-water-migrants-crossing-arizona-desert-they-charged-me-with-felony/.

136. *Id.*

137. *Id.*

138. *See* Isaac Stanley-Becker, *An activist faced 20 years in prison for helping migrants. But jurors wouldn't convict him.*, WASH. POST (June 12, 2019, 6:58 AM), https://www.washingtonpost.com/nation/2019/06/12/scott-warren-year-sentence-hung-jury-aiding-migrants/ ("Deciding who Warren is and what he did proved a task too tortuous for jurors, who said on Tuesday they remained deadlocked in their deliberations and could not reach a unanimous verdict.").

139. Ryan Devereaux, *A jury found Scott Warren not guilty in the government's second attempt to lock him up for providing humanitarian aid on the border in Arizona.*, INTERCEPT (Nov. 23, 2019, 11:30 AM), https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/.

for the two alien harboring charges he faced in his first trial.[140]

Despite criticism from human rights groups and humanitarian defenders around the world,[141] Warren once again found himself in the unenviable position of defending himself for acts that he asserts are rooted in "human kindness" and charity.[142]

Warren's second trial was again held in Tucson federal court in November 2019.[143] The government maintained that Warren intentionally "concealed and shielded" undocumented immigrants from Border Patrol detection while volunteering with NMD.[144] Once again, Warren took the stand in his own defense, explaining to the jurors that his intention in volunteering with NMD was to save human lives.[145] He also testified that he informed the migrants he encountered that "we don't hide people, we can't hide people, and we can't protect them from Border Patrol."[146]

On November 21, 2019, the jury found Warren not guilty of criminal alien harboring.[147] This time, the jury took less than three hours to acquit Warren.[148] After Warren's acquittal, his attorney said: "[the jury] decided that humanitarian aid is not always a crime the way

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140. *Id. See also Activist arrested for giving migrants food and shelter faces retrial*, GUARDIAN (July 2, 2019, 5:04 PM), https://www.theguardian.com/us-news/2019/jul/02/activist-helped-migrants-retrial-scott-warren.

141. *See, e.g.,* Jasmine Aguilera & Billy Perrigo, *They Tried to Save the Lives of Immigrants Fleeing Danger. Now They're Facing Prosecution*, TIME (Nov.11, 2019, 7:00 AM), https://time.com/5713732/scott-warren-retrial/ ("The arrest of Warren 'threw up several red flags,' says Brian Griffey of Amnesty International, which has used Warren's prosecution as a rallying cry for humanitarian workers worldwide as civil wars, persecution, and violence fuel a global migration surge unseen since World War II.").

142. *See* Devereaux, *supra* note 45.

143. *See* Rafael Carranza, *Arizona border aid worker Scott Warren takes stand in second trial against him*, REPUBLIC (Nov. 19, 2019, 2:52 PM), https://www.azcentral.com/story/news/politics/border-issues/2019/11/19/border-aid-worker-scott-warrentakes-stand-tucson-retrial/4240891002/.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Bobby Allyn and Michel Marizco, *Jury Acquits Aid Worker of Helping Border-Crossing Migrants in Arizona*, NPR, (Nov. 21, 2019, 2:59 PM), https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona.

148. *Id.* ("[Warren's] lawyers have argued for years that their work is not illegal because they are offering humanitarian assistance to desperate border crossers regardless of legal status, a perspective the jury affirmed in fewer than three hours of deliberations.").

the government wanted it to be . . . Instead, they decided that humanitarian aid is virtually never a crime."[149]

The government, however, was unpersuaded by the jury's verdict. After Warren's acquittal, Michael Bailey, the U.S. Attorney for the State of Arizona, said, "We won't distinguish between whether someone is harboring or trafficking for money or whether they're doing it out of a misguided sense of social justice or belief in open borders."[150]

The jury's acceptance of Warren's defense that "humanitarian aid is not a crime" was a victory for the members of NMD and other migrant advocates.[151] Even in the face of years-long persecution by the government, NMD volunteers were steadfast in their assertion that not that they had a constitutional right to provide such aid to migrants based on their faith and their conscience.[152]

After Warren's acquittal, Reverend Mary Katherine Morn of the Unitarian Universalist Service Committee said: "the verdict is a sharp and welcome rebuke to the administration's ongoing effort to criminalize compassion — and marks a major victory for all the humanitarian workers willing to risk their own lives to save those of others."[153] Previously, members of NMD that had been prosecuted for their humanitarian actions used a necessity defense, invoking their slogan "humanitarian aid is not a crime," with little success.[154] Despite this victory, however, Warren would not be last member of NMD to be prosecuted for providing humanitarian aid to migrants in the Arizona desert.[155] The next prosecution of NMD volunteers would raise a new and different legal defense – the right to provide humanitarian aid in the free exercise of religion pursuant to the Religious Freedom Restoration Act (RFRA).[156]

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149. *Id.*

150. *Id.*

151. *Id*.

152. *See* Devereaux, *supra* note 45.

153. Allyn & Marizco, *supra* note 147.

154. *See, e.g.,* Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 72 SYRACUSE L. REV. 79 (2012).

155. *See* United States v. Hoffman, 436 F.Supp. 3d 1272, 1276–77 (D.Ariz. Jan 31, 2020).

156. 42 U.S.C. §§ 2000bb–2000bb-3.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT AND THE NO MORE DEATHS PROSECUTIONS

The Religious Freedom Restoration Act (RFRA) became law on November 16, 1993.[157] The Act:

> [p]rohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[158]

RFRA codified the common law standard articulated by the United States Supreme Court for determining the constitutionality of a content-neutral restriction by the government pursuant to the Free Exercise Clause of the First Amendment.[159] RFRA recognizes that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[160] RFRA may also be used as an affirmative defense to criminal charges, should defendants claim that the government has substantially burdened a person's free exercise of religion in violation of the First Amendment.[161]

To succeed when raising the affirmative defense to criminal charges that a defendant's prosecution runs afoul of RFRA, the defendant must demonstrate that both that governmental action burdens a sincere "exercise of religion," and that the burden is "substantial."[162] If the individual claiming a violation of the RFRA is able to demonstrate that their criminal prosecution resulted in a substantial burden on their sincerely held religious beliefs, the burden then shifts to the government

157. Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. 1993–94, https://www.congress.gov/bill/103rd-congress/house-bill/1308.

158. *Id.*

159. *See* United States v. Christie, 825 F.3d 1048, 1055 (9th Cir. 2016).

160. *See* 42 U.S.C. § 2000bb(a)(2).

161. *See Christie*, 825 F.3d at 1065.

162. 42 U.S.C. § 2000bb-1(a).

to demonstrate both that the government action "furthers a compelling governmental interest" and "is the least restrictive means of furthering that compelling government interest."[163]

A. *United States v. Hoffman: "Sincere Religious Beliefs" under the RFRA and the Provision of Humanitarian Aid*

In the 2020 decision *United States v. Hoffman,*[164] United States District Judge for the District of Arizona, Rosemary Marquez overturned the misdemeanor convictions of NMD members Natalie Hoffman, Oona Holcomb, Madeline Huse, and Zaachila Orozco-McCormick.[165] The facts state that on August 13, 2017, the defendants "left bottles of water and cans of food at several pre-selected locations along foot trails used by people entering the United States unlawfully."[166] On December 6, 2017, the defendants "were charged by criminal information with entering the [Cabeza Prieta National Wildlife Refuge] without a permit in violation of 50 C.F.R. § 26.22(b) and abandoning property in violation of 50 C.F.R. § 27.93."[167] The defendants in *Hoffman* were convicted of "operating a motor vehicle in a wilderness area and entering a national wildlife refuge without a permit and abandoning property there."[168]

Although the defendants raised the violation of their constitutional rights under the RFRA in their initial trial before a magistrate judge in the District of Arizona,[169] Magistrate Judge Bernardo P. Velasco did not address this defense in his decision convicting the defendants on all counts.[170] The defendants appealed their conviction.[171] The Ninth Circuit Court of Appeals held that "'[w]hether application of a federal law violates RFRA is a question of statutory construction for the court' that is reviewed *de novo*."[172]

In a twenty-two-page decision issued on February 3, 2020, District Judge Marquez first held that the defendants in *Hoffman* provided

163. *Id.* § 2000bb-1(b).
164. United States v. Hoffman, 436 F. Supp. 3d 1272 (D. Ariz. Jan. 31, 2020).
165. *Id.* at 1272, 1289.
166. *Id.* at 1277.
167. *Id.* at 1278.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 1278 n. 3.
172. *Id.* at 1278.

humanitarian aid to migrants in the Arizona desert because of their "sincere religious beliefs." Judge Marquez explained that although the defendants did not claim to be members of mainstream or traditional congregations, their volunteer activities with NMD are exercises of sincerely held religious and spiritual beliefs.[173] Judge Marquez then engaged in lengthy exposition of defendants' provision of humanitarian aid and its relation to their sincere religious beliefs:

> [T]he fact that Defendants do not profess belief in any particular established religion does not bar their RFRA claim . . . The Court concludes that Defendants' beliefs, as described, are religious . . . Additionally, the nature of Defendants' conduct itself suggests sincerity. Defendants were convicted for activities that included hiking food and water into a rugged, unforgiving wilderness during Southern Arizona's extreme August heat . . . Defendants' willingness to suffer for their beliefs likewise suggests such sincerity.[174]

Judge Marquez's decision not only expands the interpretation of the RFRA, it lends credence to the mission statement of NMD – "humanitarian aid is not a crime."[175] In reversing their convictions, Judge Marquez held that the alleged crime committed by the defendants – "venturing into the Cabeza Prieta National Wildlife Refuge and leaving containers of water"[176] – was an expression of their "sincere religious beliefs" that is protected by RFRA.[177] Thus, their convictions were unconstitutional under the First Amendment because the government "failed to demonstrate that prosecuting Defendants is the least restrictive means of furthering any compelling governmental interest."[178]

The acquittal of NMD members due to their sincerely held religious beliefs under RFRA marked a turning point in the prosecution

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173. *Id.*

174. *Id.* at 1281, 1289.

175. *See id.*

176. EJ Monti, Opinion, *Federal Judge Finds Our Lost Conscience, Rules That Saving Lives is NOT a Crime*, AZCENTRAL (Feb. 4, 2020, 2:55 PM), https://www.azcentral.com/story/opinion/op-ed/ej-montini/2020/02/04/federal-judge-rules-arizona-no-more-deaths-not-crime/4658979002/.

177. *Hoffman*, 436 F. Supp. 3d at 1289.

178. *Id.*

of members of humanitarian groups and other people of faith and conscience ministering to migrants in the borderlands. However, it is yet to be seen if the RFRA defense is raised again in future prosecutions – to say nothing of whether it would again be successful. In the meantime, humanitarian volunteers continue their works of mercy knowing full well that their actions could subject them to criminal prosecution notwithstanding their religious beliefs.

CONCLUSION

Unfortunately, the members of NMD are not the only people of faith and conscience who have faced persecution for taking humanitarian action on behalf of vulnerable migrants fleeing to the United States for safety.[179] Under the first Trump Administration, the number of prosecutions for harboring undocumented immigrants rose more than 25% between 2018 and 2019.[180] Before his acquittal, Warren wondered about the potential extent of the government's prosecution of humanitarian workers:

> You're buying food for your uncle who is undocumented, so now we're going to go prosecute you for harboring. You drive your kids or your family to the park for a picnic or something — is the government going to arrest you and say that you're smuggling or you're transporting?" he says. "That's the other fear that I have, that they will try to keep using these laws in new ways to target more people.[181]

The government acknowledges that its interpretation and application of the federal criminal statutes under which Warren was prosecuted were novel.[182] But contrary to what Warren and his defenders assert, the government contends that it has not singled out members of NMD and other humanitarian aid groups for prosecution because of their

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179. Olivia Marti & Chris Zepeda-Millán, *Criminalizing Humanitarian Aid at the U.S.-Mexico Border*, UCLA LATINO POL'Y & POLS. INITIATIVE 2 (Sept. 9, 2020), https://latino.ucla.edu/wp-content/uploads/2021/08/CZM-2-Facuty-Brief.pdf.

180. *See* Aguilera & Perrigo, *supra* note 142 ("It's impossible to say how many U.S. aid workers have been prosecuted since Donald Trump's election, though the Trump Administration made clear in a speech by then-Attorney General Jeff Sessions in April 2017 that it planned to step up its pursuit of anyone suspected of aiding undocumented migrants. A data-gathering organization based at Syracuse University says the number of people prosecuted in the United States for charges related to bringing in or harboring undocumented migrants was more than 5,200 in fiscal year 2019, a 25.6 percent increase over 2018.").

181. *Id.*

182. *See* Deveraux, *supra* note 46.

political activism.[183] As immigration policy continues to be fraught with emotion and used for political gain across party lines, it remains to be seen whether Warren's prosecution was the first – or the last – of its kind in response to the attempts to criminalize humanitarian aid. Given the reelection of Donald Trump in 2024, the chances that humanitarian aid workers will emerge from his presidency unscathed are small, as the vitriol and xenophobia toward migrants crossing the U.S.-Mexico border is at an all-time high.

183. *See* Paul Ingram, *Prosecutors Argue No More Deaths Volunteer Conspired to Protect 2 Men in Country Illegally*, TUCSON SENTINEL (May 29, 2019), https://www.tucsonsentinel.com/local/report/052919_warren_nmd_trial/prosecutors-argue-no-more-deaths-volunteer-conspired-protect-2-men-country-illegally/.

TITLE IX AND FINANCIAL ASSISTANCE IN THE NIL ERA*

BARBARA OSBORNE**

This article discusses the intersection of Title IX and Name, Image, and Likeness (NIL) related spending in college athletics. Title IX of the Education Amendments of 1972 is landmark civil rights legislation that prohibits sex discrimination in all programs or activities at educational institutions that receive federal funding. Name, image, and likeness are three components of the rights of publicity, which became a change agent in college athletics when the NCAA allowed student-athletes to monetize their ability to capitalize on their NIL without jeopardizing their athletics eligibility on July 1, 2021. Student-athletes immediately took advantage of the opportunities, with $917 million spent on NIL in the first year. However, that spending skewed heavily toward football and men's basketball players, with female athletes receiving less than 15% of NIL dollars. The Title IX regulations prohibit discrimination on the basis of sex, including in college athletics, and in providing financial assistance to student athletes. The financial assistance regulations specifically require schools to provide proportionate funding to student-athletes based on sex, with a disparity of less than 1% assumed to be compliant. The Title IX regulations also extend to third parties who provide financial assistance to student athletes with the assistance of the school or athletics department. Commercial sponsorship or endorsement contracts that are negotiated directly with student-athletes would not be subject to the Title IX regulations, but this type of NIL compensation is only about 20% of spending in the NIL marketplace. Most NIL funding or benefits are being provided by Collectives, which are organizations created by boosters or fans that are independent of the academic institution. However, these organizations are intrinsically tied to the athletics department, and, therefore, the Title IX financial assistance

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regulations apply to funding provided to student-athletes for their NIL and need to be equitable.

INTRODUCTION

On July 1, 2021, the National Collegiate Athletic Association (NCAA), the largest voluntary membership governing body for college athletics, revoked all rules prohibiting student-athletes from profiting from their name, image, and likeness (NIL), dramatically changing the intercollegiate sports landscape.[1] The announcement provided little guidance other than that members were to comply with the laws of their state or create institutional policies if their state did not have a law.[2] Cell phone carrier, Boost Mobile, announced the first endorsement deal that used NIL, with then Fresno State basketball players Hanna and Haley Cavinder by putting their images on a billboard in New York City Times Square.[3]

1. *Interim NIL Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

2. *See id.*

3. *Boost Mobile Announces the First Name, Image, and Likeness Deal, In Time Square*, BILLBOARD INSIDER (July 2, 2021, 12:05 AM), https://billboardinsider.com/55357-2/.

Name, image, and likeness are components of the right of publicity.[4] The right of publicity is generally defined as the right of an individual, especially a public figure or celebrity, to control the commercial value of their name, picture, or likeness and to prevent others from unfairly appropriating this value for commercial benefit.[5] This right is typically recognized through common law or state statutes; there is no federal right of publicity.[6] NIL is commonly used in reference to college athletes' rights.[7]

The sudden change in NCAA policy was precipitated by simmering public sentiment that some student-athletes, particularly football and men's basketball players, were not being treated fairly as NCAA rules limited their "compensation" to an athletics scholarship and prohibited them from monetizing their NIL through endorsements.[8] Athletes filed lawsuits challenging the NCAA rules as early as 2004 when Olympic skier and University of Colorado football player Jeremy Bloom lost his case to keep his skiing endorsements and sponsorships.[9] Years later, the NCAA compensation rules continued to make headlines with *In Re: NCAA Student-Athlete Name & Likeness Licensing Litigation* (2013).[10] This litigation was a consolidated case class action claiming that the NCAA misappropriated student-athletes NIL in the EA Sports NCAA football video games in violation of the statutory and common law rights of publicity under California law.[11] Defendants EA Sports and Collegiate Licensing Company settled for $40 million.[12]

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4. INTELLECTUAL PROPERTY COUNSELING & LITIGATION, Ch. 18 Privacy, Publicity and Intellectual Property, § 18.02 [4][c] (Lester Horwitz & Ethan Horwitz eds., 2024).

5. *Id.*

6. *Id.* at 3.

7. David Ubben & Tess DeMeyer, *What is NIL, how has it changed college sports, and why are schools under investigation?,* THE ATHLETIC (Feb. 2, 2024), https://www.nytimes.com/athletic/5245564/2024/02/02/nil-explained-ncaa-name-image-likeness-investigation/.

8. *See generally* Julia Chaffers, *The Hypocrisy of the NCAA's Amateurism Model*, PRINCETON UNIV. (Mar. 4, 2020), https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

9. Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004).

10. *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

11. *Id.*

12. Tom Farey, *Players, game makers settle for $40M*, ESPN (May 30, 2014, 11:18 PM), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

The NCAA settled the right of publicity claims for $20 million and provided a blanket eligibility waiver for current athletes who were compensated under the settlement.[13] Plaintiff Ed O'Bannon opted out of the settlement to put forth antitrust claims that the NCAA rules prohibiting schools from paying student-athletes for use of NIL restrained trade.[14] In *O'Bannon v. NCAA,* the Ninth Circuit held that the NCAA rule was a violation of antitrust law.[15] While the court agreed with the NCAA that amateurism was an important element of the college athletics market, extending the value of an athletic scholarship to include cost of attendance was a reasonable alternative that still promoted amateurism.[16]

Criticisms of the NCAA increased to a slow boil as California enacted the Fair Pay to Play Act in 2019 making it illegal for California universities to prohibit college athletes from receiving compensation.[17] Not wanting to be left behind, other states also enacted legislation,[18] creating a patchwork of laws that created anything but a level playing field and put the NCAA in the untenable position of having to sue its member institutions for complying with state laws or suing the states directly.

College athletics, particularly NCAA Division I institutions, have experienced rapid and unprecedented change over the past few years. In the first year of NIL, 2021–2022, spending was reported at $917 million.[19] By 2024–25 that figure is projected to be $1.67 billion.[20] Only 20% of the NIL activity involves compensation in the form of sponsorship or endorsement deals for student-athletes in the commercial marketplace.[21] Slightly more than three-quarters of these deals involve football players (76.6%), and all other athletes receiving less than the

13. *NCAA reaches settlement in EA video game lawsuit*, NCAA (June 9, 2014, 10:53 AM), https://www.ncaa.org/news/2014/6/9/ncaa-reaches-settlement-in-ea-video-game-lawsuit.

14. O'Bannon v. NCAA, 802 F.3d 049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

15. *Id.*

16. *Id.*

17. Fair Pay to Play Act, 2021 Cal. SB No. 26, ch. 159 (codified 2021).

18. *Tracker: Name, Image and Likeness Legislation by State*, BCS, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ ((last updated July 28, 2023).

19. OPENDORSE, NIL AT 3: THE ANNUAL OPENDORSE REPORT 3 (2024).

20. *Id*. at 5

21. *Id.*

remaining quarter: women's basketball (10.2%), men's basketball (8.6%), women's volleyball (2.9%), and women's track and field and cross country (1.6%).[22] Collectives[23] have created 80% of the overall NIL market opportunities, with emphasis on recruitment and retention for football (72.2%), men's basketball (21.2%), and baseball (3.6%) leaving only 3% for women's basketball (2.3%) and women's volleyball (0.8%).[24]

The NCAA has provided little additional guidance,[25] the private collectives NIL market has confused the meaning of NIL,[26] and lawsuits continue to challenge the NCAA regulations without regard for the impact on the majority of student-athletes.[27] The focus on college football and men's basketball purports a "those who make the most should get the most" mentality; this perspective does not take into consideration that intercollegiate athletics exists in a higher education environment, not a commercial marketplace.[28] Neither does it consider that the student-athletes in the most popular (as defined by fan support) sports are also those who are already getting the most within their athletics departments.[29] Most importantly, it fails to consider that

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22. *Id.*

23. Collectives are organizations that were created soon after the NCAA loosened its NIL restrictions. They are separate from the athletics departments and schools, and typically pool funds from boosters and businesses to facilitate NIL deals for athletes. *See* Chase Garrett, *What are NIL Collectives And What Do They Do?*, ICON SOURCE, https://iconsource.com/blog/nil-collectives/ (last visited Mar. 17, 2025).

24. OPENDORSE, *supra* note 19, at 5.

25. *See* Michelle Brutlag Hosick, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, NCAA (Jun. 30, 2021, 4:20 PM), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf; NCAA, NCAA DIVISION I,
INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES (2022).

26. *See infra* Part III.

27. *See generally In re* Coll. Athlete NIL Litig., No. 20-cv-03919, 2023 WL 7106483 (N.D. Cal. Sept. 22, 2023) (order granting motion for certification of injunctive relief class); Fontenot v. NCAA, No. 1:23-cv-03076 (D. Colo. filed Nov. 20, 2023); Tennessee v. NCAA, 715 F.Supp.3d 1048 (E.D. Tenn. 2024).

28. *See generally* Barbara Osborne, *The Myth of the Exploited Student-Athlete*, 7 J. OF INTERCOLLEGIATE SPORT 143, 143 (2014).

29. *See* U.S. DEP'T OF EDUCATION, EQUITY IN ATHLETICS DATA ANALYSIS (2023), https://ope.ed.gov/athletics/#/; Eli Boettger, *An Analysis of College Football Return on Investment*, ADU, https://athleticdirectoru.com/articles/analysis-of-college-football-return-on-investment/ (last visited Mar. 17, 2025).

educational institutions are required by law to prohibit discrimination based on sex under Title IX of the 1972 Civil Rights Act.[30]

The purpose of this research is to examine activity in the current NIL landscape to determine if and how Title IX may apply. First, we examine the history of Title IX, its regulatory framework, and relevant case law. Using this information, we create a model to analyze Title IX compliance related to NIL. This framework is then applied to examples of current NIL practices in the college sport industry to provide guidance for athletics administrators who are required to comply with Title IX while navigating the evolving NIL landscape. Continued ignorance of Title IX in the NIL space could create significant legal risk to colleges and universities, and this model framework may help mitigate those risks.

I. TITLE IX HISTORY AND REGULATORY FRAMEWORK

Title IX of the Educational Amendments in the Civil Rights Act of 1972 is civil rights legislation enacted to prohibit sex discrimination in educational institutions that receive federal funding.[31] The legislation states: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . "[32]

Title IX was needed to address the significant educational inequities for girls and women that existed before its passage.[33] Girls had limited access to various academic courses, such as higher-level math and science courses as well as vocational track classes such as wood shop, auto mechanics, or metal shop.[34] Not all colleges and universities admitted women, and some of those limited admission to only the minimum necessary to meet quotas.[35] These institutions also

30. *See generally* Title IX, the Education Amendments of 1972 (1972), 20 U.S.C. §§ 1681–1688.

31. *Id.* § 1681(a).

32. *Id.*

33. *See generally* U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX (2012) (hereinafter DOJ EQUAL ACCESS).

34. Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (Aug. 16, 2023), https://www.history.com/news/title-nine-womens-sports; Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 18–19 (2003).

35. Pruitt, *supra* note 34.

typically required women applicants to be exceptional, by demonstrating higher grades and test scores than male applicants.[36] For those women admitted to co-educational institutions, scholarships and curricular options were also limited.[37] Women were directed toward teacher education programs and sometimes prohibited from professional schools such as engineering, medicine, and law.[38] Boys and men were also gender stereotyped in their academic choices, as they generally were not allowed to take home economics classes or nursing courses.[39]

Competitive athletics opportunities for women were also limited and, in many schools, nonexistent, before Title IX's enactment.[40] In the 1966-67 academic year, there were ten times as many intercollegiate athletics opportunities for male student-athletes than for females: 15,182 women versus 151,198 men.[41] When Title IX was passed in 1972, there were approximately 31,852 women participating in college sports, compared to 172,447 men.[42] Some leaders within sports and politics were concerned about the impact of Title IX on college athletics and tried to have the legislation amended.[43] They proposed exempting revenue-generating sports from Title IX and exempting donations or receipts generated by specific sports from being shared with women's sports.[44] While Congress rejected the notion that revenues from those sports could somehow be segregated and treated differently than any other athletics department revenue, the Javits Amendment was passed in 1974 which required the (then) Department of Health, Education, and Welfare to propose regulations for intercollegiate athletics including "reasonable provisions considering the nature of particular sports."[45]

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36. DOJ EQUAL ACCESS, *supra* note 33, at 2.

37. *Id.*

38. *See id.*; DOJ EQUAL ACCESS., *supra* note 33, at 2, 4.

39. DOJ EQUAL ACCESS, *supra* note 33, at 2 n.7.

40. Samuels & Galles, *supra* note 34, at 18–19.

41. NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT (1956-57 THROUGH 2021-22) 129 (Oct. 27, 2022) (hereinafter NCAA PARTICIPATION RATES REPORT).

42. Samuels & Galles, *supra* note 34, at 18–19.

43. *See* 117 CONG. REC. 30406-07 (1971).

44. *See* CONG. RSCH. SERV., SUMMARY: S.2106—94TH CONG. (1975–1976); S. 2106, 94th Cong. § 3 (as reported to the Senate Committee on Labor and Public Welfare, July 15, 1975).HYPERLINK "https://www.congress.gov/bill/94th-congress/senate-bill/2106?r=8&s=1"

45. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612.

As required by the General Education Provisions Act,[46] the proposed Title IX Regulations were submitted to Congress for review in 1975.[47] During the review process, congressional representatives made several more attempts to limit Title IX's impact on revenue-generating sports.[48] These attempts were meant to exempt athletics from the scope of Title IX's non-discrimination mandate or, alternatively, to allow revenue-generating sports to retain their own revenue instead of requiring those funds to be distributed in a way that would provide equitable opportunities for all student-athletes.[49] Some proposals attempted to eliminate the Title IX Regulations entirely,[50] while others proposed eliminating the sections related to athletics programs and scholarships.[51] Excluding athletics from the scope of Title IX would have allowed athletics programs to continue to maintain their attention on revenue-producing men's sports rather than providing athletics opportunities for women and girls that were equitable to those available for men and boys.[52] Congress again rejected all such attempts and approved the Title IX Regulations[53] which were signed into law by President Gerald R. Ford.[54]

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46. Education Amendments of 1974, Pub L. No. 93-380 § 504(2)(B)(2), 88 Stat. 561; 20 U.S.C. § 1232(f) (2000).

47. *See* CONG. RSCH. SERV., *supra* note 45 ("Provides that Title IX of the Education Amendments of 1972, relating to discrimination, shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity"); *Prohibition of Sex Discrimination, 1975: Hearing on S. 2106 Before the Subcommittee on Educ. of the Comm. on Labor & Public Welfare*, 94th Cong. 46-47 (1975), https://files.eric.ed.gov/fulltext/ED136136.pdf.

48. CONG. RSCH. SERV., SUMMARY: S. CON. RES. 46—94TH CONG. (1975-1976).

49. Samuels & Galles, *supra* note 34, at 20–21; *see*, *e.g.,* Cong. Rsch. Serv., *supra* note 45 ("Provides that title IX of the Education Amendments of 1972, relating to discrimination, shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity").

50. *See* S. Con. Res. 46, 94th Cong. (1975); H.R. Con. Res. 310, 94th Cong. (1975); H.R. Con. Res. 311, 94th Cong. (1975); H.R. 8394, 94th Cong. (1975)

51. Samuels & Galles, *supra* note 34, at 21 (sharing that Representative Patsy Mink described these failed resolutions as an attempt to imply "that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX.")

52. H.R. 8394, 94th Cong. (1975).

53. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R §106.4 (1975).

54. *See* 34 C.F.R. § 106.1 (2024). As stated in the statute, all educational institutions that receive federal funding are prohibited from discriminating on the basis of sex. Educational institutions receiving federal funds are required to provide assurance of compliance with the statute or indicate they are taking remedial measures to comply. *See id*

The Title IX Regulations address every aspect of sex discrimination in education, including athletics.[55] Generally, institutions cannot provide any aid, benefit or service to a student that discriminates based on sex, and cannot aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.[56]

Because funding is important in any discussion regarding access to opportunities, including NIL activities,[57] the Title IX Regulations addressing financial assistance state:

[I]n providing financial assistance to any of its students, a recipient [of federal funding] shall not:

> (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; [or]
>
> (2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex[.][58]

The Title IX Regulations specific to athletic scholarships required that " . . . athletic scholarships or grants-in-aid . . . must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[59]

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§ 106.4(a). Other broad policy rules include the requirements to designate a Title IX coordinator, disseminate a non-discrimination policy, and adopt grievance procedures. *Id.* § 106.8.

55. *Id.* § 106.21 (admissions process), § 106.32 (housing), § 106.37 (financial aid), § 106.40 (marital and parental status of students), § 106.51 (employment), § 106.41 (athletics). The regulations remain in effect today.

56. 45 C.F.R. § 86.31(a), (b)(2), (b)(6) (2024).

57. *See id.* (discussing the regulations that most directly relate to the NIL landscape in college athletics).

58. 34 C.F.R. § 106.37(a)(1)–(2) (2024).

59. *Id.* § 106.37(c).

In addition to the financial assistance regulations, the Title IX Regulations require equal participation opportunities and equal treatment for male and female athletes.[60] Equal participation opportunities include the quantity and level of competition.[61] Equal treatment for male and female athletes is measured across a non-exclusive list of athletics program components, including publicity, the provision of equipment and supplies and the provision of training and competition facilities.[62] Title IX does not require equal spending by sex, but wholistically measures whether the experience of the student-athletes by sex is equal.[63]

The Office for Civil Rights (OCR) within the Department of Health, Education and Welfare was charged with enforcing Title IX.[64] Just four months after the Title IX Regulations became effective, the OCR issued a memorandum to state education officials, local school superintendents, and college and university presidents to clarify expectations for compliance with Title IX.[65] The memorandum explained that for each listed program component included in the Title IX Regulations, Title IX requires comparison of the men's athletics program as a whole to the women's athletics program as a whole.[66] A disparity in one program component can alone constitute a Title IX violation if it is substantial enough to deny equality of athletic opportunity to students of one sex.[67] Identical programming is not required, and differences in treatment due to the application of gender-neutral rules are permissible, so long as the application does not create a discriminatory disparity in the experience for student-athletes based on sex.[68]

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60. *Id.* § 106.41(c).

61. *Id.* § 106.41(c)(1).

62. *Id.* § 106.41(c).

63. *Id.* § 106.41(c). "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

64. *About OCR*, U.S. DEP'T OF EDUC. (Jan. 15, 2025), https://www2.ed.gov/about/offices/list/ocr/aboutocr.html.

65. PETER E. HOLMES, ELIMINATION OF SEX DISCRIMINATION IN ATHLETIC PROGRAMS 3 (1975).

66. *Id.* at 8.

67. *Id.* at 7–8.

68. *Id.* at 8.

The OCR memorandum also reminded institutions that funding provided to a team or the athletics program from private sources "does not remove [the team or program] from the reach of the statute and hence the regulatory requirements."[69] While the Department of Health, Education, and Welfare strengthened Title IX through additional direction to schools, lawmakers who opposed Title IX continued proposing amendments to limit the legislation's reach within athletics, and specifically to limit its application to revenue-producing sports.[70] Amendments were also introduced to eliminate extracurricular activities broadly (which would include athletics)[71] as well as to narrow the scope of Title IX's applicability to only those educational programs or activities that directly received federal financial assistance and those that are integral to the required curriculum.[72] Once again, all attempts to protect revenue producing sports or limit the scope of Title IX failed.[73]

On December 11, 1979, the OCR published *A Policy Interpretation: Title IX and Intercollegiate Athletics* (*Policy Interpretation*) to provide additional guidance for colleges and universities to comply and assess their compliance with Title IX in the athletics context.[74] The *Policy Interpretation* includes a detailed explanation of how the OCR determines Title IX compliance in intercollegiate athletics programs, adds two new program components (recruiting and support services) and provides a process to evaluate the components on the equal-treatment list.[75] By expressly referencing the many failed legislative efforts to exclude revenue producing sports from Title IX, *The Policy Interpretation* reiterated that football programs must comply with the prohibition against sex discrimination within the athletics program as a whole.[76]

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69. *Id.* at 3; U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *Elimination of Sex Discrimination in Athletic Programs* (Sept. 1975), https://files.eric.ed.gov/fulltext/ED119583.pdf.

70. Samuels & Galles, *supra* note 34, at 19–23.

71. *See* Amend. 389, 94th Cong., 2d Sess. (1976), 122 CONG. REC. 28136 (1976); *see also* S. 2106, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 22778 (1975).

72. *See* S. 535, 95th Cong., 1st Sess. (1977); 123 CONG. REC. 2781 (1977).

73. *See* 122 CONG. REC. at 28147.

74. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413. ("to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses.").

75. *See id.* at 71415.

76. *Id*. at 71419 (Appendix A.).

According to the *Policy Interpretation*, the test for athletics scholarships compliance requires funding for men and women athletes to be substantially proportionate to their participation rates, and any disparity must be explained by legitimate non-discriminatory factors.[77] It further explains that financial assistance includes forms other than scholarships, and when such "financial assistance is provided in forms other than grants, the distribution of" these benefits will also be measured by examining whether equivalent benefits are proportionately available to male and female athletes.[78]

Section B of the *Policy Interpretation* addresses Title IX's equal-treatment analysis.[79] Determining whether an athletics program provides equal-treatment of men and women athletes requires educational institutions to examine the availability, quality and kinds of benefits, opportunities, and treatment for student-athletes of both sexes for each component listed and identify any disparities.[80] Then, the institution must examine whether any identified disparity can be justified by non-discriminatory factors (such as the unique needs of a particular sport).[81] The men's program as a whole is compared to the women's program as a whole to determine whether policies are discriminatory on their face or as applied, if the disparities are substantial and unjustified, or if the disparities are substantial enough to deny equality of athletics opportunity.[82]

In 1984, the Supreme Court did what the legislature failed to do and limited the scope of Title IX to only those educational programs and activities that directly received federal funding.[83] In *Grove City College v. Bell*, the Supreme Court concluded that Grove City College was subject to Title IX but applied a program-specific approach—only those educational programs and activities that received federal financial aid within the institution were subject to Title IX.[84] This limited the application of Title IX at Grove City College to their financial aid

77. *Id.* at 71415.
78. *Id.*
79. *d*. at 71415–17.
80. *Id. at* 71415.
81. *Id.*
82. *Id*. at 71417.
83. *See* Grove City College v. Bell, 465 U.S. 555 (1984).
84. *See id.*

program—the direct recipient of financial aid—rather than the institution as a whole.[85]

Congress disagreed with the Supreme Court's narrow, program-specific application of Title IX; to overturn the Supreme Court's ruling, Congress passed the Civil Rights Restoration Act on March 22, 1988.[86] This legislation adopted an institution-wide approach, specifying that *all* programs and activities at educational institutions that receive any federal funding directed to any part of the institution must comply with Title IX.[87] The plain language of Title IX and its implementing regulations, combined with Congress's reaffirmed intent demonstrated in the Civil Rights Restoration Act, clearly establishes that intercollegiate athletics programs are subject to Title IX and that the benefits, opportunities, and treatment of male and female student-athletes must be equivalent.[88]

II. OFFICE FOR CIVIL RIGHTS ENFORCEMENT AND CASE LAW

The following section details the decisions and laws that were developed to enforce Title IX. A person who believes a school is not complying with Title IX or has experienced discrimination they believe is in violation of Title IX has legal options to address this injustice. The OCR in the U.S. Department of Education is responsible for enforcing federal civil rights laws such as Title IX.[89] Individuals who believe Title IX has been violated may file a complaint with the OCR, and they do not need to have standing as the victim of the alleged discrimination as they would in a civil lawsuit.[90] Victims of discrimination have the option of filing an OCR complaint or filing a civil lawsuit; it is not necessary to exhaust administrative options before filing.[91] When the OCR investigates a complaint, it determines whether discrimination occurred and provides the complainant and the school with a letter

85. *See id.*

86. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28.

87. *Id.*

88. *See* Samuels & Galles, *supra* note 34, at 19.

89. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418.

90. *See OCR Discrimination Complaint Forms,* U.S. DEP'T. EDUC., https://www2.ed.gov/about/offices/list/ocr/complaintintro.html (last visited Sept. 4, 2024).

91. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009) ("Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court. . . .").

explaining the results of its investigation.[92] These documents are publicly available through the Department of Education Office for Civil Rights Recent Resolution search.[93] As of 2024, a search of that database elicited only eight OCR complaints relating to § 106.37(a)'s financial assistance regulations.[94] § 106.37(a) prohibits the school from discriminating on the basis of sex related to amounts, types or sources of financial assistance and also prohibits the school from engaging or assisting external funding sources which discriminate on the basis of sex.[95] A school can express interest to voluntarily resolve the complaint prior to the conclusion of the OCR's investigation and, if appropriate, OCR can decide to come to a resolution agreement.[96] Of the eight OCR complaints relating to § 106.37(a) and financial assistance, all were voluntarily resolved.[97]

The only court interpretation of the financial aid regulations comes from *Fisk v. Board of Trustees of the California State University.*[98] While this case is specific to athletics financial aid, it provides guidance on how courts could address financial assistance more broadly related to our analysis of financial assistance and NIL. This case addresses § 106.37(c), which states that schools must provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.[99] Compliance is measured by whether there are "substantially equal amounts," of aid to men's and women's athletic programs or if the "disparity can be explained by 'legitimate, nondiscriminatory factors,'" with an unexplained disparity of 1% or more as a strong presumption that there is a violation.[100]

In *Fisk*, the "[p]laintiffs, 'past and current female varsity student-athletes at'" San Diego State University (SDSU) sued the

92. *See How the Office for Civil Rights Handles Complaints,* U.S. DEP'T. EDUC., https://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last visited Sept. 7, 2024).

93. *See OCR Search*, U.S. DEP'T. EDUC., https://ocrcas.ed.gov/ocr-search (last visited Sept. 22, 2024) (limiting database search to cases after 2013).

94. *See id.*

95. 34 C.F.R. §106.37 (2024).

96. U.S. DEP'T. EDUC., *supra* note 92.

97. *See OCR Search*, U.S. DEP'T. EDUC., https://ocrcas.ed.gov/ocr-search (last visited Sept. 22, 2024) (limiting database search to cases after 2013).

98. Fisk v. Bd. of Trs. of the Cal. State Univ., No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at *18-19 (S.D. Cal. Apr. 12, 2023).

99. *Id.*

100. *Id*.

school alleging, among other Title IX claims, unequal provision of financial aid.[101] Plaintiffs' relevant claims for this discussion included that they were harmed by SDSU's failure to provide proportional athletic financial aid to female student-athletes in the following ways: (1) being denied the opportunity to compete for and receive equal financial aid because of their sex (lost opportunity theory); "(2) they received smaller financial aid awards because of their sex (smaller financial award theory) . . . ." Ultimately, the court ruled that the plaintiffs have standing and a redressable claim that survived the defendant's motion for summary judgment.[102]

The plaintiffs argued that Title IX protects the "opportunity to compete for aid on an equal basis" and the court acknowledged that no other court has addressed the "argument in the Title IX financial aid context."[103] The plaintiffs analogized cases in the equal protection context to the relevant financial aid context, using three cases to do so.[104] First, the plaintiffs argued that the injury in fact "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[105] They proposed that "a plaintiff need only demonstrate that she is 'able and ready' to compete for the benefit 'and that a discriminatory policy prevents [her] from doing so on an equal basis.'"[106] The plaintiffs then cited to *Pederson*,

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101. *Id.* at *4.

102. *See id.* at *69.

103. *Id.* at *21.

104. *Id*. at *21–22, *28 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (explaining how the prospective student had standing to challenge the university's use of race in undergraduate admissions because he was "able and ready to apply" but had been denied the opportunity to compete for admission on an equal basis); Gratz v. Bollinger, 539 U.S. 244, 262 (2003) ("[T]o establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is 'able and ready' to compete for a position on the unfielded team."); Pederson v. Louisiana State Univ., 213 F.3d 858, 871 (5th Cir. 2000).

105. Fisk v. Bd. of Trs. of the Cal. State Univ., No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at *21–22 (S.D. Cal. Apr. 12, 2023) (quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am., 508 U.S. at 666).

106. *Id.*; *see also* Gratz, 539 U.S. at 262 (2003) (holding prospective student had standing to challenge university's "use of race in undergraduate admissions" because he was

which held that "to establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is 'able and ready' to compete for a position on the unfielded team."[107] The plaintiffs argued that providing proportionately fewer "financial-aid dollars to female student athletes is a similarly actionable 'barrier'" to *Pederson*, where the court held the plaintiffs had standing because of a discriminatory barrier since the university was providing proportionally fewer participation opportunities for women compared to men.[108] Second, the plaintiffs argued that they have a "protected interest in the *opportunity* to be considered for financial aid [not to the scholarship itself] on equal footing, without invidious discriminatory *barriers*."[109]

While the defendants argued that the plaintiff "must show a causal relationship between the alleged funding disparity and the diminution of her scholarship award;"[110] the court noted that none of the cases cited by the defendants addressed the lost opportunity theory that the plaintiffs brought in *Fisk.*[111] Stating that "there are multiple ways to allege injuries-in-fact for Title IX financial aid claims,"[112] the court found that the plaintiffs had sufficiently proved there was a barrier based on sex[113] that prevented them from competing equally with male student-athletes for proportional funding, and that they had the ability to

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"able and ready to apply" but had been denied the opportunity to compete for admission on an equal basis).

107. Fisk v. Bd. of Trs. of the Cal. State Univ., No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at *22–23 (S.D. Cal. Apr. 12, 2023) (quoting *Pederson,* 213 F.3d at 871).

108. *Id.* at *23.

109. *Id.*

110. *Id*. at *25. *See Anders v. Cal. State Univ.*, No. 1:21-cv-00179-AWI-BAM, 2021 U.S. Dist. LEXIS 137899, at *1, *52 (E.D. Cal. July 22, 2021) (citing Beasley v. Alabama State Univ., 966 F. Supp. 1117, 1126 (M.D. Ala. 1997); *Balow v. Mich. State Univ.*, No. 1:21-CV-44, 2021 U.S. Dist. LEXIS 181250, at *1, *20 (W.D. Mich. Sept. 22, 2021) (citing *Anders*, No. 1:21-cv-00179-AWI-BAM, 2021 U.S. Dist. LEXIS 137899, at *18*)*; *Beasley*, 966 F. Supp. at 1126 (stating that a plaintiff's standing to assert a claim in this context "must hinge on overall disproportionate provision of support funds to athletes of each gender, and on whether she can show a relationship of causation from that overall funding disparity to the asserted withdrawal of promised financial support from her").

111. *Id.* at *9.

112. Fisk v. Bd. of Trs. of the Cal. State Univ., No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at *26 (S.D. Cal. Apr. 12, 2023).

113. *Id.* at 29–30 (citing Braunstein v. Ariz. Dep't of Trans., 683 F.3d 1177, 1186 (9th Cir. 2012)).

compete for that funding.[114] The court found that the plaintiffs were able to provide sufficient facts to allege an injury-in-fact.[115]

While *Fisk* does not provide an interpretation of the financial assistance regulations of § 106.37(a), it is helpful in developing our model for assessing Title IX compliance for NIL activities. As a decision on motions to dismiss for a lack of standing, the *Fisk* case does not analyze the actual legal issues at hand.[116] However, *Fisk* shows that courts are willing to examine standing and redressability in Title IX financial aid regulation athletics cases, and to consider novel theories regarding the opportunity for equal treatment.[117]

III. THE PROPOSED TITLE IX FINANCIAL ASSISTANCE FRAMEWORK FOR NIL ACTIVITIES COMPLIANCE

Based on the history of Title IX, its regulations, and other guidance documents, I propose the following framework for college and university athletics administrators to determine whether NIL activities comply with the financial assistance requirements. The inquiry begins by asking: does the activity involve a college or university that receives federal funding?[118] As stated in the statute, Title IX only applies to educational programs and activities at institutions that receive federal funding.[119] If the college or university receives federal funding, as the overwhelming majority do, the analysis can proceed.

Next, ask: who is making the payment? If the school is making the payment to a student-athlete directly, Title IX applies.[120] If a third party is making the payment to the student-athlete, an investigation is required as to whether the institution provides significant assistance to the third party.[121] This is discovered by asking if there is solicitation, listing, approval, provision of facilities, or other services or assistance provided to, or for, the third party or student-athlete.[122] If so, then Title

114. *Id.* at 28.
115. *Id.* at 31.
116. *See generally, id.* at *31.
117. *Id.* at *31.
118. Title IX, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.37(a)(1)-(2) (2024).
119. 20 U.S.C. § 1681(a).
120. *See* 34 C.F.R. §§ 106.37(a)(1)-(2) (2024).
121. *See id.*
122. *See id.*

IX will apply. If the institution is not involved in any way, Title IX would not apply.

If Title IX applies, the next inquiry is whether the payment is based on sex.[123] Relevant questions include: is there a difference in a program, benefit, aid, or service that is based on sex?[124] Are there different amounts or types of assistance provided based on sex?[125] Is eligibility for this payment limited to a particular type or source or is different criteria applied for eligibility based on sex?[126] If the payment is being made because of a sex-based category, such as sex-based team membership, then the payments would need to comply with the equitable distribution framework for financial assistance. As mentioned, this framework requires total payments for male and female athletes in proportion with the total percentage of male and female athletes in the athletics program.[127] A disparity of less than 1% of the total funding will be presumed compliant with Title IX.[128]

NCAA v. Alston provides an example of a direct education-related financial award.[129] NCAA member institutions may provide student-athletes a cash award for academic achievement as a result of the 2021 decision in *Alston.*[130] Although these cash awards, commonly called "Alston payments," are not NIL related payments, they are a financial award provided to the student-athlete that are not an athletic scholarship, thus triggering the financial assistance regulations.[131] If an athletics department has a policy that Alston payments are designated for athletes on a specific team, such as football, men's basketball, or

123. *See* 20 U.S.C. § 1681(a).

124. *See* 45 C.F.R. § 86.31(a), (b)(2)(6) (2024).

125. *See* 34 C.F.R. § 106.41(c) (2024).

126. *See* 34 C.F.R. §§ 106.37(a)(1)-(2) (2024). *See also* Cohen v. Brown Univ., 101 F.3d at 177 (1st Cir. 1996).

127. *See* 34 C.F.R. § 106.37(c) (2024).

128. Dear Colleague Letter from Mary Frances O'Shea, Dept. of Education, to Bowling Green State University at 10 (July 23, 1998), https://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html.

129. NCAA v. Alston, 594 U.S. 69 (2021). The Court affirmed the judgement of the district court that the NCAA violated the Sherman Act (15 U.S.C.S. §1) by limiting education-related benefits that schools could provide to student-athletes. The District Court enjoined the NCAA from limiting cash awards for academic achievement to an amount not lower than the amount allowed for athletic achievement, which was $5,980 at the time. *Id.* at 85. Thus, these cash awards for academic achievement, paid directly to student-athletes by their schools, have come to be known as "Alston awards."

130. *Id.*

131. *Id.*; *see* 34 C.F.R. §§ 106.37(a)(1)-(2) (2024).

women's basketball, this is a sex-based criteria.[132] Using the current NCAA athletics scholarship limits, approximately eighty-five football players, thirteen men's basketball players, and fifteen women's basketball players would be receiving the payments.[133] The policy would not be in compliance because the ratio of male to female athletes receiving payments (87% to male athletes and 13% to female athletes) would not be within 1% of the overall ratio of male to female athletes in the department.[134] To become compliant, if the school wanted to provide Alston payments for all football and men's basketball players, then those same payments would need to be made to as many female athletes as necessary to reach proportionality with the ratio of male and female student-athletes at the institution.[135] Alternatively, the institution could also be in compliance by choosing to provide full funding to each of the women's basketball players and divide a proportionate amount of funding between all football and men's basketball players.[136] Title IX does not dictate how the institution distributes the funding; it simply requires that the funding the school provides be proportionate to the ratio of men and women athletes in the department.[137]

It is unclear how Alston payments should be counted if the payment is being made based on a non-discriminatory policy. It can be argued that the payments will be presumed equitable as long as the criteria for payment in the policy applies equally to all student-athletes.[138] If Alston payments are made under a policy that awarded funding based on the student-athlete achieving a certain grade point average, that payment would be based on a non-discriminatory academic criteria, not a sex-based criteria. As long as all student-athletes, regardless of sex or team membership, are eligible for these payments, and the qualifying criteria does not change based on the team or sex of the athlete, then it could be argued that the school would not have to monitor for proportionality in funding, as all similarly situated athletes would be treated equally.[139] However, it can also be argued that

132. O'Shea, *supra* note 128, at 6.

133. NCAA Division I 2023-24 Manual, Bylaw 15.5.5.1 Men's Basketball; Bylaw 15.5.5.1 Women's Basketball; Bylaw 15.5.6.1 Football FBS.

134. *See* 34 C.F.R. § 106.37(c) (2024).

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* O'Shea, *supra* note 128 at 6.

139. *Id.*

because the school is *not* allowing those students outside of athletics who also meet the GPA standard to benefit from Alston awards, the athletics regulation for financial assistance should apply, which requires application of the proportionality standard.[140]

IV. APPLICATION OF THE TITLE IX FINANCIAL ASSISTANCE FRAMEWORK TO NIL ACTIVITIES

In allowing student-athletes to engage in activities related to their NIL, the NCAA provided a brief Interim Policy, effective July 1, 2021, to guide member institutions.[141] Highlights of the Interim Policy include:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.[142] Colleges and universities may be a resource for state law questions.[143]
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.[144]
- Individuals can use a professional services provider for NIL activities.[145]
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.[146]

Under the interim policy, schools are allowed to be a resource for student-athletes' questions about state law and for gathering information regarding student-athlete NIL activities.[147] Using the framework, and assuming a school receives federal funding, a school would be directly involved as a resource for state law questions and for monitoring NCAA compliance that student-athlete NIL activities are consistent with school and conference rules—Title IX would apply. Because these activities do not involve financial assistance, the

140. *See* 34 C.F.R. § 106.37(c) (2024).

141. *Interim NIL Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

142. Brutlag Hosick, *supra* note 26.

143. *Interim NIL Policy*, *supra* note 143.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

Financial Assistance Framework would not be applied. However, because a university provides services to student-athletes, the equitable treatment regulations will apply.[148] To provide equitable treatment, provision of resources and monitoring for compliance should not be based on team membership but made equally available for all student-athletes.[149]

Many NCAA member institutions created Athletics NIL Policies to identify institutional support and resources as well as balance institutional interests with student-athlete interests.[150] Institutions sought to mitigate risks by reinforcing state laws (where applicable) and NCAA rules, while also promoting relationships with promotional and educational partners.[151] For example, the University of North Carolina (UNC) Athletics' NIL policy states that: (1) student-athletes must disclose NIL agreements to the Athletic Department via Compass;[152] (2) any use of intellectual property must be approved by University Licensing; (3) student-athletes must have pre-approval to enter into NIL agreements with sponsors of the University or entities that compete with sponsors of the University; and (4) student-athletes need approval for use of athletic department facilities.[153] In applying the financial assistance framework, UNC's policy does not indicate any funding flowing from the institution to the student-athletes.[154] Additionally, the policy applies to all student-athletes, regardless of sex.[155] However, equal treatment provisions would warrant tracking of University Licensing approvals for use of intellectual property, athletics

148. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

149. *Id.*

150. Anita M. Moorman, Adam Cocco, & Barbara Osborne, Presentation at the Sport and Recreation Law Association Annual Conference: An Examination of the Influence of State NIL Legislative Requirements on NIL Policy Development and Implementation of NIL Initiatives Among Universities in the ACC (Feb. 2024). Most NIL policies included clauses restricting endorsements that conflicted with university sponsors or involved prohibited categories such as gambling, firearms, alcohol, or adult entertainment; required permission for use of institutional intellectual property and/or facilities; required disclosure of athlete NIL deals to the athletics department.

151. *Id*.

152. Compass is a proprietary platform provided by Learfield to assist athletics departments with compliance monitoring. *Compass NIL*, LEARFIELD, https://www.learfield.com/schools/compass-nil/ (last visited Mar. 5, 2025).

153. *UNC NIL Policy,* UNIV. OF N. CAROLINA ATHLETICS (Feb. 14, 2023), https://goheels.com/documents/2023/2/14/UNC_NIL_Policy_2.14.23.pdf.

154. *See id*.

155. *See id*.

department approval for student-athlete endorsement opportunities with university sponsors or sponsors who conflict with a university sponsorship, and approval for use of athletic department facilities to ensure equal opportunities and treatment of athlete requests based on sex.[156]

Clemson University's (Clemson) NIL policy includes a clause that allows the university and its employees to transmit information regarding NIL opportunities to student-athletes and to provide student-athletes' contact information to potential sponsors for NIL purposes.[157] Further, the policy requires any Clemson employees, coaches, and staff obtain an Athletic Compliance clearance prior to communicating with or engaging with a collective.[158] Clemson's NIL policy does not provide any direct payments to student-athletes, but it does provide more direct involvement in connecting student-athletes with financial opportunities. This additional level of involvement would require scrutiny as to whether there are differences in benefits, aid or services based on team membership (which is a sex-based category).[159] If so, then the financial assistance proportionality provision of less than 1% would apply;[160] if not, then the general Title IX equal treatment provisions would apply.[161]

Beyond the NIL policy, institutions have various contracts with third parties to provide NIL services. For example, the UNC Athletics Department has contracts with several third-party service providers: Altius, Brandr, INFLCR, and Compass.[162] My proposed Title IX analysis would require examining whether the institution is providing

156. *See* 34 C.F.R. § 106.41(c) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

157. *Name, Image, and Likeness Information Page,* CLEMSON TIGERS (June 27, 2023), https://clemsontigers.com/nilinfo/.

158. *See id*.

159. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

160. O'Shea, *supra* note 128.

161. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415 ("When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes.").

162. Information acquired through publicly available documents, *supra* note 155, 159, 162.

significant assistance to the third party.[163] The Altius contract provided the athletics department with consulting services related to NIL policy development which is purely an administrative endeavor.[164] Similarly, the Compass contract provides employees and administrators, student-athletes, boosters and donors with education and training on NIL, tools for measuring participation, engagement, and comprehension of NIL, tracking of NIL activity for student-athletes, a centralized source for NIL communication, and data and reports for NIL activities.[165] The services provided under these contracts do not involve payments to student-athletes, so the Financial Assistance Framework is not triggered;[166] services are provided to all student-athletes, so the equal treatment provisions would be satisfied as well.[167]

The Brandr[168] contract was for services related to the development of a group licensing program for UNC athletics.[169] This contract involves former men's basketball student-athletes.[170] It is unclear whether Title IX would apply to services involving former student-athletes as the regulations refer to "male or female participants in the athletic program . . . ."[171]

The INFLCR contract with UNC provides a platform for UNC student-athletes to manage brand ambassador social media channels and content.[172] INFLCR hosts an exchange (the exchange) to connect student-athletes with NIL deals by facilitating connections, providing

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163. *See Altius Agreement*, UNIV. OF N. CAROLINA ATHLETICS (May 15, 2021), https://goheels.com/documents/2021/9/16//Altius_UNC_Agreement.pdf?id=25945. Altius Sports Partners is a consulting company that provides NIL education, strategies, and infrastructure plans for its institutional clients. ALTIUS SPORTS Partners, https://altiussportspartners.com/.

164. *Compass Agreement,* UNIV. OF N. CAROLINA ATHLETICS (June 15, 2021), https://goheels.com/documents/2021/9/16//Compass_UNC_Agreement.pdf?id=25946.

165. *Compass Agreement,* UNIV. OF N. CAROLINA ATHLETICS (June 15, 2021), https://goheels.com/documents/2021/9/16//Compass_UNC_Agreement.pdf?id=25946.

166. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024).

167. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415.

168. The Brandr Group is a consulting firm that assists universities with a variety of NIL related services. *About Us*, BRANDR GROUP, https://thebrandrgroup.com/about-us/ (last visited Feb. 15, 2025).

169. *See Brandr Agreement*, UNIV. OF N. CAROLINA ATHLETICS (Nov. 12, 2020), https://goheels.com/documents/2021/9/16//Brandr_UNC_Agreement.pdf?id=25947.

170. *Id.*

171. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

172. *INFLCR Agreement,* UNIV. OF N. CAROLINA ATHLETICS (June 4, 2020), https://goheels.com/documents/2021/9/16//INFLCR_UNC_agreement.pdf?id=25948.

direct payments to the student-athletes, and automating disclosure through the INFLCR compliance ledger.[173] While UNC employees may not negotiate deals or contracts, they can direct student-athletes to the exchange.[174] Finally, the UNC compliance office approves requests by potential sponsors to register for the exchange.[175] In the case of INFCLR, a third party is making financial payments to student-athletes, and there is significant involvement by the institution, so the Title IX financial assistance framework applies.[176] As none of the services provided are based on sex (services are available to all student-athletes equally), the equal treatment provisions are satisfied.[177] The UNC Compliance Office should monitor requests by potential sponsors to determine whether there are any disparities in approvals based on the sex of the team or athlete which would trigger the financial assistance rule.[178]

V. FINANCIAL ASSISTANCE AND THE NIL COMMERCIAL MARKETPLACE

When the NCAA implemented their interim policy allowing student-athletes to receive compensation for their NIL, these opportunities were intended to come from the commercial marketplace and not be related to pay for play.[179] The NIL commercial marketplace includes deals made between a student-athlete and a commercial entity, typically to promote or endorse a business, product or service.[180] Since 2021, student-athlete NIL deals in the commercial marketplace continue to grow, but such activity is only 20% of the NIL market.[181] Individual athlete endorsements are purely market transactions: the student athlete works directly with the company (perhaps with the help of a marketing

173. *Id.*
174. *Id.*
175. *Id.*
176. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.
177. *Id.*
178. 34 C.F.R. § 106.37(a)(1)–(2) (2024).
179. Michelle Brutlag Hosick*, NCAA adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx#:~:text=Interim%20policy%20goes%20into%20effect%20Thursday%20%22This,likeness%20opportunities%2C%22%20NCAA%20President%20Mark%20Emmert%20said.
180. OPENDORSE, *supra* note 19, at 3.
181. *Id.* at 5.

agent, attorney, or NIL platform) and engages in marketing activities to promote the product, organization, or event for compensation as specified in a contract.[182] This is the actual use of the athlete's name, image, and likeness in the commercial marketplace.[183] In this case, there is no institutional involvement in facilitating or maintaining this type of transaction and the Title IX financial assistance regulations would not apply as the educational institution that receives federal funding is not providing the activity nor substantially assisting with the transaction.[184]

VI. FINANCIAL ASSISTANCE AND NIL COLLECTIVES

The NIL commercial marketplace is distinct from financial assistance provided by collectives.[185] When college athletes became eligible to benefit from their own name, image, and likeness, several prominent alumni and donors of the University of Oregon (Oregon) launched Division Street in September 2021 to empower Oregon student athletes and elevate their NIL opportunities.[186] Division Street is considered to be the first NIL collective. There are now more than 200 collectives, for-profit, or not-for-profit companies established to provide boosters, companies, and other interested parties the opportunity to contribute financial resources to athletes at the specific institution that the collective was created to support.[187]

The NCAA issued additional NIL Guidance in May 2022 to address concerns about "booster" involvement in promoting athletics interests.[188] Without specifically using the term "collective," the NCAA referenced third-party entities promoting and supporting specific institutions by providing NIL opportunities to prospective and current student-athletes. The guidance noted that third-party promotions trigger

182. *Id.*

183. 2 Intellectual Property Counseling & Litigation § 18.02(c) (2024).

184. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024).

185. OPENDORSE, *supra* note 19, at 3.

186. *Helping Oregon Athletes Win on a New Playing Field*, DIVISION STREET, https://www.divisionst.com/about (last visited Sep. 24, 2024).

187. Daniel Libet, *NIL Collectives Take Tax Shelter Amid a Storm of College Cash*, SPORTICO (Jan. 5, 2024), https://www.sportico.com/leagues/college-sports/2024/blueprint-sports-nil-collective-nonprofit-1234761748/.

188. Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement, NCAA https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

the definition of a booster.[189] Additionally, member institutions are reminded that NCAA rules prohibit boosters from engaging in recruiting activities and/or directly or indirectly providing benefits to recruits.[190] The guidance also specifies that coaches and staff are prohibited from providing information on recruits to boosters and/or facilitating communication or meetings between boosters and recruits.[191] Finally, NIL agreements must be based on an "independent, case-by-case analysis of the value that each athlete brings to an NIL agreement" and not as incentives for enrollment, rewards for athletics performance, or membership on a team.[192]

Collectives now contribute more than 80% of the total NIL market spending regardless of the NCAA rules and guidance.[193] As collectives have heavily focused on recruitment and retention of football and men's basketball players,[194] examination of these reported deals using the Financial Assistance Framework as well as the NCAA recruiting regulation is warranted.[195]

A. *Examples of NIL Activity by Collectives*

In July 2022, all eighty-five scholarship players and twenty walk-ons at Texas Tech University (Texas Tech) received a $25,000 per year NIL contract via the Matador Club Collective.[196] The women's

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The following NCAA rules from the NCAA Constitution and NCAA Division I Manual support the NCAA's guidance regarding "booster"/third party entities involvement with recruits: NCAA Constitution 2.1.2 and 2.8.1; NCAA Division I Manual Bylaw 11.1.3, 12.1.2, 12.1.2.1.4.1, 12.1.2.1.5, 13.01.2, 13.10, 13.1.2.1, 13.02.14, 13.2.1.

193. OPENDORSE, *supra* note 19, at 5. The report represents NIL compensation for NCAA Division I student-athletes disclosed to or processed by Opendorse between July 1, 2021, and June 7, 2024.

194. *Id.* Note, recruiting and retention payments made by Collectives may not be truly related to compensation for NIL, but are labeled NIL, nonetheless.

195. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979). Note, analysis is provided based on the information collected through publicly available reports cited. To determine whether the institution is in compliance with Title IX would require a complete audit of all financial assistance activities which is beyond the scope of this research.

196. Max Olson, *Texas Tech Collective to Offer $25,000 NIL Deals to 100-Plus Football Players,* ATHLETIC (July 19, 2022), https://theathletic.com/4165622/2022/07/19/texas-tech-collective-to-offer-25000-nil-deals-to-100-plus-football-players/.

softball team also received $10,000 for each player from the Matador Club's team NIL deal.[197] Another NIL collective, Level 13 Agency, gave $25,000 per year to all Texas Tech women's basketball players.[198] Texas Tech's entire baseball team also was signed to five-figure NIL deals but the exact amount is undisclosed.[199]

Similarly, the Boulevard Collective affiliated with Southern Methodist University made a team deal with both the football and men's basketball teams where players received $3,000 per month.[200] The Anchor Impact Fund signed the Vanderbilt University baseball team to a team-wide NIL deal.[201] Likewise, The Volunteer Club Collective provided the entire baseball team at The University of Tennessee with an NIL deal.[202] Michigan State University reported a women's team NIL deal: the This is Sparta! Collective and Charitable Gift America gave each member of the women's gymnastics team $5,000 with the stipulation that they give 5% of it to a charity of their choice.[203] At the University of Oklahoma (OU), the Crimson and Cream collective made a team NIL deal with both the entire football and entire men's basketball teams.[204] A different collective, 1Oklahoma, signed the

197. *Matador Club Offering $10k Annual Contracts to All Tech Softball Players,* LUBBOCK AVALANCHE-J. (Sept. 29, 2022, 2:06 PM CT), https://www.lubbockonline.com/story/sports/college/red-raiders/2022/09/29/matador-club-offering-10k-contracts-to-all-texas-tech-softball-players/69526342007/.

198. Clare Brennan, *Texas Tech Women's Basketball Players Each Will Receive $25K NIL Deal,* JUST WOMEN'S SPORTS (July 29, 2022), https://justwomenssports.com/reads/texas-tech-womens-basketball-25k-nil-deal/.

199. Mason Horodyski, *Matador Club Signs Entire Texas Tech Baseball Team to NIL Deal,* EVERYTHING LUBBOCK (May 16, 2023, 3:46 PM CDT), https://www.everythinglubbock.com/sports/matador-club-signs-entire-texas-tech-baseball-team-to-nil-deal/.

200. Pete Nakos, *New Boulevard Collective to Pay SMU Athletes $3.5 Million Annually Through NIL,* ON3 (Aug. 8, 2022), https://www.on3.com/nil/news/smu-mustangs-football-basketball-boulevard-collective-nil-3-5-million-36-annually-chris-kleinert/.

201. Alan George, *Anchor Impact Fund Announces Team-Wide Deal for Vanderbilt Baseball,* NIL NEWSSTAND (Nov. 15, 2023), https://vucommodores.com/anchor-impact-and-vanderbilt-sports-properties-announce-official-partnership/.

202. Pete Nakos, *Volunteer Club Inks Team-Wide NIL Deal with Tennessee Baseball Ahead of College World Series,* ON3 (June 17, 2023), https://www.on3.com/nil/news/volunteer-club-team-wide-nil-deal-tennessee-baseball-college-world-series-cws/.

203. Pete Nakos, *Michigan State Women's Gymnastics Signs Team-Wide Deal with Charitable NIL Collective,* ON3 (Aug. 25, 2022), https://www.on3.com/nil/news/michigan-state-womens-gymnastics-nil-charitable-gift-america-this-is-sparta/.

204. Jeremy Crabtree, *Oklahoma-Focused Crimson and Cream Announces Teamwide NIL Deal for Football Roster*, ON3 (Jan. 13, 2023),

whole OU women's basketball team to NIL deals.[205] In March 2024, it was reported that the Buffs4Life Collective was providing $2,000 each semester to football walk-ons to provide the same opportunities that scholarship football players receive through Alston awards at the University of Colorado.[206]

At Brigham Young University (BYU), The Royal Blue collective made a deal with BYU's football team where they would pay an undisclosed amount to all 123 players on the football roster.[207] As discussed in more detail below, news articles describe the deal's alignment with the head coach's leadership and imply some involvement between the collective and coach.[208] Prior to this deal, a company called Built Bars paid tuition for all BYU walk-on football players and each scholarship football player received $1,000.[209] After a small scandal with the deal, involving players alleging that they had not been paid, a quote from Built Bars revealed direct involvement between them and the football coach.[210] Built Bars "would ensure more would reach their pockets after some payments to BYU Licensing and to a 'football discretionary fund' controlled by head coach Kalani Sitake were made."[211] Desert News reported that the coach had not received the funds to distribute yet and was asking the players for patience.[212]

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https://www.on3.com/nil/news/oklahoma-sooner-focused-crimson-and-cream-announces-teamwide-nil-deal-for-football-roster/#.

205. Ross Lovelace, *Barry Switzer's NIL Collective Signs Oklahoma Women's Basketball Team to NIL Deals,* ON SI (Feb. 13, 2023, 5:10 PM EST), https://www.si.com/college/oklahoma/womens-basketball/1oklahoma-barry-switzers-nil-collective-has-signed-the-oklahoma-womens-basketball-team-to-nil-deals.

206. Pete Nakos, *Buffs4Life collective to match Colorado's Alston benefits for walk-ons*, ON3 (Mar. 7, 2023), https://www.on3.com/nil/news/buffs4life-collective-nil-colorado-buffaloes-alston-benefits-walk-ons-deion-sanders/.

207. Mitch Harper, *BYU's NIL Collective Launches Program that Pays Every Football Player,* KSL SPORTS (Aug. 30, 2023), https://kslsports.com/504185/byu-nil-collective-the-royal-blue-pays-every-player-kalani-sitake/.

208. *See id.*; *Jeff* Hansen, *The Royal Blue to Pay Every Player on BYU's 123-Man Roster,* 247 SPORTS (Aug. 30, 2023, 4:32 PM), https://247sports.com/college/byu/article/byu-football-royal-blue-collective-215063332/.

209. Mitch Harper, *NCAA Looking into BYU Football's High-Profile NIL Deal with Built Bar,* KSL SPORTS (Dec. 10, 2021, 5:57 PM) https://kslsports.com/474620/byu-football-ncaa-built-bar-nil-probe/.

210. *See* Jay Drew, *Built Bar Pays BYU Football Players an 'Additional $600' After Questions Arose About NIL Deal Payments,* DESERET NEWS (June 2, 2023, 4:43 PM), https://www.deseret.com/2023/6/2/23747426/byu-football-nil-built-energy-protein-bars-pays-players-600-dollars-more-nick-greer-kalani-sitake/.

211. *Id.*

212. *Id.*

The only women's sports team found to receive a deal at BYU was its women's volleyball team, via the Royal Blue collective.[213] The deal prescribed a total of $700,000 to be divided among each team member over multiple years.[214]

Another collective program that received significant media attention was the Dodge Ram Truck deal at the University of Utah (Utah). In this deal, the Utah Crimson Collective provided (paid the lease on) trucks for all eighty-five scholarship football players at the Utah as long as the player remained eligible and enrolled.[215] The deal was announced with the athletes and vehicles lined up on the football field.[216] The Crimson Collective also provided similar deals to the men's and women's basketball teams and women's gymnastics teams who were able to choose between a 2024 Jeep Grand Cherokee or a 2024 Ram 1500 Big Horn Truck.[217]

B. *Applying the Financial Assistance Framework to Collectives*

These are just a few examples of the myriad types of NIL opportunities being provided by collectives to student-athletes at various schools. As discussed, to ascertain whether an institution is at risk of violating the Title IX financial assistance regulations, the Financial Assistance Framework is applied. The first step is to determine whether the institution receives any type of federal funding. The easiest way to check federal funding is to use the Federal School Code list of all colleges and universities that receive federal funding for financial aid

213. *See* Mitch Harper, *BYU's NIL Collective Launches Team-Wide Deal for Women's Volleyball Program,* KSL SPORTS (Sep. 22, 2023, 8:01 AM), https://kslsports.com/505133/byu-womens-volleyball-nil-collective-the-royal-blue/.

214. *Id.*

215. *Utah Football NIL Deal Gives Every Scholarship Play a Car,* SPORTS ILLUSTRATED (Oct. 4, 2023, 4:31 PM), https://www.si.com/college/utah/football/utah-football-nil-deal-gives-every-scholarship-play-a-car.

216. Josh Furlong (@JFurKSL), X, (Oct. 4, 2023, 3:25 PM), https://x.com/JFurKSL/status/1709646029178773925.

217. Austin Eames, *Utah's Crimson Collective Surprises Athletes with Expanded NIL Deal: Luxury Cars for Basketball and Gymnastics Teams,* SPORTS ILLUSTRATED (Dec. 13, 2023, 3:21 PM), https://www.si.com/college/utah/basketball/utahs-crimson-collective-surprises-athletes-with-expanded-nil-deal-luxury-cars-for-basketball-and-gymnastics-teams.

programs.[218] Each of the schools in the examples provided above receives federal funding, so Title IX applies.[219]

Next, all the NIL payments were made by collectives, so one then needs to examine whether the institution provides significant assistance to the third party—this can be in the form of solicitation, listing, approval, provision of facilities or other services or assistance.[220] In many of the examples, the athletics program provides significant assistance. At Utah, the collective exists to benefit Utah athletics.[221] Per Utah's NIL policy, student-athletes must disclose their NIL deals to the school, or the third party discloses the student athlete's deal directly to the school.[222] Additionally, student-athletes must get permission from the school to use the institution's intellectual property.[223] Further, Utah dictates which NIL deals students can and cannot make, restricting NIL beverage deals to Pepsi and restricting apparel NIL deals to Nike, Adidas, Lululemon, Reebok, New Balance, and Converse.[224] Additionally, the football players "NIL deal" was publicized on the Utah football field (using university facilities) and was lauded by athletics department personnel indicating significant assistance and involvement with the athletics program.[225]

Further, many of the collective's websites indicate significant involvement of the schools with the collective. Several of the collective websites had quotes from university staff showing involvement between the university and the collective. For example, 502 Circle (University of Louisville's Collective) quotes the Louisville athletic director on the front page of its website, stating "Name, Image, and Likeness is at the forefront of a constantly changing collegiate athletics landscape . . .

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218. *See Federal School Code Search*, FED. STUDENT AID https://studentaid.gov/fafsa-app/FSCsearch?locale=en_US (last visited Sep. 27, 2024).

219. *Id.* (each institution's name was entered into the Federal School Code Search to determine whether they receive federal financial aid funding, the most common federal funding to colleges and universities).

220. *See supra* notes 113–15 and accompanying text; 34 C.F.R. § 106.37(a)(1)–(2) (2024); *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

221. *See* CRIMSON COLLECTIVE, https://www.crimsoncollective.org/ (last visited Sep. 27, 2024).

222. *Name, Image, Likeness Policy & Procedure,* UTAH UTES, https://utahutes.com/sports/2022/5/26/name-image-likeness-policy-guidelines.aspx (last visited Sep. 27, 2024).

223. *Id.* (Intellectual property includes logos, colors, and trademarks).

224. *Id.*

225. Furlong, *supra* note 216.

your support will allow our programs to continue to compete at an elite level."[226] Auburn's ON TO VICTORY Collective's website indicates that "OTV works closely with Auburn to keep the university informed of our procedures and progress."[227]

As noted above, the BYU example indicated significant involvement between the collective and athletics department administration and coaches.[228] A local paper quoted The Royal Blue collective, saying:

"The Royal Blue has stated that they've worked extensively with BYU Athletics to ensure alignment with the mission and ideals of the athletic department. BYU Administration responded favorably that although the [The Royal Blue's] initial focus is on NIL opportunities for the BYU football and men's and women's basketball student-athletes, ultimately, [The Royal Blue] hopes to engage with student-athletes from every sport at BYU."[229]

Further, the newspaper reported that BYU's head football coach has been a massive proponent of team-wide NIL deals and The Royal Blue collective was quoted stating that their collective "is in alignment with the leadership of [BYU's football coach]."[230] Meanwhile, The Royal Blue website states that it is not a BYU entity.[231] Similarly, another collective of BYU, Coug Connect, states that it is not affiliated with BYU Athletics.[232] However, disclaimers of this kind do not protect the schools from Title IX liability for the third party when there is significant involvement between the university and collective.[233]

Other signs of institutional involvement with a third-party collective are more subtle. 110 Society, a collective for Clemson, claims that they are the "official partner of Clemson Athletics."[234]

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226. *Change the Game, Shape the future of Louisville Athletics*, 502 CIRCLE, https://502circle.com/ (last visited Sep. 10, 2024).

227. *FAQ's,* ON TO VICTORY, https://www.ontovictory.com/faq (last visited Apr. 10, 2024).

228. See *supra* notes 192–95 and accompanying text.

229. Harper, *supra* note 209.

230. *Id.*

231. *Frequently Asked Questions,* THE ROYAL BLUE, https://www.royalbluecollective.org (last visited Apr. 10, 2024).

232. COUG CONNECT, https://cougconnect.com (last visited Apr. 10, 2024).

233. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024).

234. *110 Society Launches as Official "One-Stop NIL Shop" For Clemson,* CLEMSON TIGERS (Nov. 17, 2023), https://clemsontigers.com/110-society-launches-as-official-one-stop-nil-shop-for-clemson/#:~:text=Clemson%2C%20S.C.%20–%20To%20support%20Clemson,official%20partner%20of%20Clemson%20Athletics.

Similarly, on the website for Rising Spear, a collective for Florida State University (FSU) once stated they are a "proud partner of Florida State Athletics," but then went on to state that they are not.[235] Under the Financial Assistance Framework, this type of relationship would warrant further investigation to determine whether the involvement meets the significant assistance.[236] Hypothetically, an organization or company could act completely independently of the institution, athletics department and/or its employees and provide an NIL deal, such as a promotional appearance, to a specific team if it contacted each student-athlete directly. In this situation, if the institution were not involved in any way, Title IX would not apply.[237]

The next question in the Financial Assistance Framework is whether the payment is based on sex. All of the examples above were directed to specific teams, which is sex-based criteria.[238] Because of this, the institution would need to comply with the equitable distribution framework for financial assistance which, as discussed, requires total payments for male and female athletes in proportion with the total percentage of male and female athletes in the athletics program.[239] In the examples provided, the majority of NIL deals[240] were provided to football players. This is reflective of the national data on NIL deals provided by collectives, which indicate that football players receive 72.2%, men's basketball 21.2%, baseball 3.6%, women's basketball 2.3%, and women's volleyball 0.8%.[241] A funding disparity of less than 1% based on the proportion of male and female student-athletes in the program is presumed compliant.[242] The gross imbalance favoring male student-athletes in the examples provided make it seem unlikely that this standard could be achieved.[243] However, the Title IX inquiry requires a detailed examination of the financial assistance provided to the women's program as a whole compared to the men's program as a

235. RISING SPEAR, https://risingspear.com (last visited Apr. 10, 2023).

236. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024).

237. *Id.*

238. *See* A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).

239. *Id.*

240. "NIL deals" are in quotations because the funding provided is not based on the value of the student-athlete's NIL but is a uniform payment for membership on a team.

241. OPENDORSE, *supra* note 19, at 5.

242. O'Shea, *supra* note 128.

243. *See* A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).

whole on an annual basis, an analysis that will be unique to each institution.[244]

VII. RELEVANCE OF THE FINANCIAL AID FRAMEWORK FOR THE FUTURE OF COLLEGE ATHLETICS

The college athletics environment continues to present new challenges and opportunities on a seemingly daily basis. By using the Financial Assistance Framework, institutions can assess their risk and make informed decisions regarding their involvement in the NIL marketplace.

As of August 1, 2024, the NCAA implemented new rules which will allow institutions to identify NIL opportunities and facilitate deals between student-athletes and third parties.[245] Student-athletes who engage in NIL deals of $600 or more and disclose this information within thirty days of the agreement will be eligible for increased NIL-related support from their institutions.[246] The national Student-Athlete Advisory Committee supported the increased institutional involvement, as transparency and disclosure will provide some "stability and assistance to student-athletes in a very unstable environment."[247] While the new rules allow more direct involvement by the institution, student-athletes are not obligated to work with the institution and are unilaterally responsible for satisfying the terms of their NIL agreements.[248] The new rules also appear to address the legal claims posed by Tennessee, Florida, New York, the District of Columbia, and Virginia, all of whom sued the NCAA claiming that the NCAA's rule prohibiting prospective student-athletes from negotiating NIL deals with

244. *Id.*

245. Michelle Brutlag Hosick, *Division I Board of Directors ratifies transfer, NIL rule changes,* NCAA (Apr. 22, 2024, 5:18 PM), https://www.ncaa.org/news/2024/4/22/media-center-division-i-board-of-directors-ratifies-transfer-nil-rule-changes.aspx.

246. *Id.*

247. Meghan Durham Wright, *DI council approves NIL reforms, permits school assistance with NIL activity*, NCAA (Apr. 17, 2024, 6:32 PM), https://www.ncaa.org/news/2024/4/17/media-center-di-council-approves-nil-reforms-permits-school-assistance-with-nil-activity.aspx.

248. *Id.*

third parties, such as alumni and booster collectives, violates antitrust law.[249]

Under the new rules, the NCAA now allows the interaction between institutions and collectives that was previously prohibited.[250] More direct school involvement also increases the likelihood that institutional activities related to NIL will be subject to Title IX—both relative to financial assistance, but also for equal treatment to assure that institutional policies and practices relative to providing support and facilitating opportunities are equally available for male and female student athletes.[251]

Institutions are already taking advantage of the increased ability to collaborate more closely with collectives. The University of Kansas announced they would be providing priority points for donations to collectives.[252] Schools are also getting more creative with their NIL initiatives: University of Houston football student athletes will compete against fans who pay to play in an online College Football 25 tournament facilitated by a partnership between TheLinkU and HLX via the LinkingCoogs collective; fans can also win exclusive memorabilia.[253] However, institutions must still be mindful of their obligations under Title IX to create equitable NIL opportunities for a proportionate number of female student-athletes.[254]

The NCAA's legal landscape is still uncertain with significant litigation proceeding through the courts. Three major class action lawsuits, *House v. NCAA*,[255] *Hubbard v. NCAA*,[256] and *Carter v.*

249. Tennessee v. Nat'l Collegiate Athletic Ass'n, No. 3:24-CV-00033-DCLC-DCP, 2024 U.S. Dist. LEXIS 32050 (E.D. Tenn. Feb. 23, 2024).

250. *See* Brutlag Hosick, *supra* note 25.

251. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).

252. *Archive of Editions*, D1.TICKER (Sept. 4, 2024), https://my.omeda.com/portal/report/EmailPreviewDeploymentExternal.jsp?aW5Ccm93c2VyPXkmU3BsaXRJZD0yMTA5MiZFbnZpcm9ubWVudElkPTEyNTY4.

253. *Id.*

254. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024); DEP'T OF EDUC., OCR-00005, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

255. Complaint at 4, House v. NCAA, 4:20-cv-03919 (N.D. Cal. filed June 15, 2020) (arguing that the NCCA rules prohibiting NIL compensation and future revenue sharing violate the Sherman Act).

256. Complaint at 3, Hubbard v. NCAA, 4:23-cv-01593 (N.D. Cal. filed Apr. 4, 2023) (arguing that the NCAA rules prohibiting athlete compensation violate the Sherman Act).

NCAA,[257] assert that various NCAA rules prohibiting direct student-athlete compensation violate antitrust laws. The parties in the *House* litigation have proposed a settlement[258] that would allow revenue sharing with student-athletes; schools would decide how the funds would be distributed across their sports programs.[259] Should the settlement be approved, the Financial Assistance Framework, proposed in this paper, will be an essential tool for schools to determine compliance with the Title IX financial assistance regulations in addition to the schools' obligations to provide equal treatment for male and female student-athletes.[260] The *House* settlement does not prohibit future litigation. A similar case, *Fontenot v. NCAA*, asserted that NCAA rules prohibiting student-athletes from receiving compensation directly from their institutions or athletics conferences violates the Sherman Act by restraining competition will proceed whether or not the *House* settlement is approved.[261] Should the settlement be approved, or the plaintiffs win their cases, the Title IX financial assistance regulations will still apply.[262]

CONCLUSION

The volatility of the current college athletics landscape makes it clear that vigilance for compliance with Title IX to address discrimination based on sex is more important than ever. The preferential treatment for football and men's basketball players apparent in the private NIL marketplace created by collectives reflect the same discriminatory preferences that Congress expressly rejected in the 1970s.[263] Recognizing this, the Office for Civil Rights in the U.S. Department of Education issued guidance on January 16, 2025, that was

257. Complaint at 61, Carter v. NCAA, 4:23-cv-06325 (N.D. Cal. filed Dec. 7, 2023) (arguing that the NCCA's "anticompetitive price-fixing actions" violate antitrust laws).

258. *See* Plaintiffs' Motion for Preliminary Settlement Approval at 9, House v. NCAA, 4:20-cv-03919-CW (N.D. Cal. filed July 26, 2024).

259. DUANE MORRIS LLP, *NCAA Student-Athlete Settlement Proposal Takes Its Best Shot at Resolving Three Antitrust Cases* (Aug. 1, 2024), https://www.duanemorris.com/alerts/ncaa_student_athlete_settlement_proposal_takes_best_shot_resolving_three_antitrust_cases_0824.html.

260. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

261. *See id.* .

262. *See id*.

263. 34 C.F.R. § 106.37(a)(1)–(2) (2024); *see* Complaint Schroeder v. Univ. of Or., 6:23-cv-01806-AA (D. Or. filed Dec. 1, 2023).

consistent with the Financial Assistance Framework proposed in this article.[264] The guidance reiterated that Title IX applies to all benefits, opportunities, and treatment provided by the institution related to NIL activities, and that student-athlete NIL agreements with third parties may also trigger the financial assistance regulations if there is institutional involvement.[265] On February 12, 2025, OCR rescinded this Title IX guidance.[266] However, the rescission of OCR guidance regarding NIL did not alter the law itself. The financial assistance regulations have been in effect since 1975 and remain intact, and educational institutions that receive federal funding must commit to compliance with the Title IX regulations to reduce their risk of OCR complaints or lawsuits.[267] The proposed Financial Assistance Framework provides an additional tool for institutions to identify inequities and protect the civil rights of student-athletes in their programs.

264. *Department of Education OCR Issues Guidance on How Schools Analyze NIL Activity Under Title IX*, MCGUIREWOODS (Jan. 17, 2025), https://www.mcguirewoods.com/client-resources/alerts/2025/1/department-of-education-ocr-issues-guidance-on-how-schools-analyze-nil-activity-under-title-ix/.

265. *Id.*

266. *The Department of Education Reverses Title IX NIL Guidance*, F3 LAW (Feb. 19, 2025), https://www.f3law.com/insights/the-department-of-education-reverses-title-ix-nil-guidance-102k0ct/.

267. 34 C.F.R. § 106.37(a)(1)–(2); *see* Complaint Schroeder v. Univ. of Or., 6:23-cv-01806-AA (D. Or. filed Dec. 1, 2023).

RECONSTRUCTION COURTS AND RIGHTS ENFORCEMENT: EXAMINING AN ENIGMATIC JURISPRUDENCE*

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This article traces the history and development of federal case law on rights enforcement during the Reconstruction era. It begins by examining certain natural-law concepts that were often implicitly relied on by nineteenth-century jurists but are sometimes overlooked by modern observers, including the secured/created rights framework. From there, this article assesses the Supreme Court's landmark decision in United States v. Cruikshank *and seeks to demonstrate that it is the linchpin of the Court's Reconstruction-era rights-enforcement jurisprudence. This article posits that the constitutional reasoning in* Cruikshank*, applied to the then-new Fourteenth and Fifteenth Amendments, was the product of an anti-Reconstruction Court's uncertainty about how long the Reconstruction movement would last. In so doing, this article seeks to demonstrate that the Reconstruction movement was at a political inflection point and that the Court attempted to use its influence to steer the federal government away from comprehensive rights enforcement in the South. As we will see,* Cruikshank *severely limited opportunities for rights enforcement generally but made the right to vote in national elections the simplest right for federal prosecutors to enforce. This article examines why voting rights, rather than civil or social rights, were given more robust protection and concludes that it was an opportunistic and calculated decision by the Court rather than the product of straightforward constitutional reasoning.*

This article concludes by examining the subsequent Supreme Court decisions that gradually dismantled the rights-enforcement edifice erected in Cruikshank. In so doing, this article will demonstrate

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that the development and dismantlement of these new constitutional-rights-enforcement doctrines was a non-linear product of contingency and opportunism. In the end, what remains is a conflicted jurisprudence that was at times transparently molded in response to contemporaneous political exigencies.

INTRODUCTION

The Reconstruction Amendments so radically transformed the United States Constitution that their ratification has been characterized as a "second founding" of the country.[1] The Reconstruction movement, conventionally dated from 1865 to 1877, was an attempt to rebuild the South and integrate formerly enslaved persons into mainstream society in the years following the Civil War.[2] A key component of Reconstruction was the passage of the Reconstruction Amendments—including the Thirteenth, Fourteenth, and Fifteenth Amendments—from

1. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

2. *See generally* David P. Currie, *The Reconstruction Congress,* 75 U. CHI. L. REV. 383 (2008).

which "a new definition of American citizenship" emerged that transferred the primary obligation to define and protect individual rights from the states to the federal government.[3] These constitutional changes recalibrated the concept of national citizenship by tying the nation together through a more comprehensive understanding of individual rights.[4] This reconceptualization was intended to "reconstruct" the South, and the country, after the Civil War.[5]

The Reconstruction Amendments provoked lobbying for competing visions of the scope and extent of national rights.[6] The "Radical Republican" faction in Congress supported an expansive view of federal rights enforcement, but the Republican Party did not speak with one voice on this issue.[7] Centrist Republican respect for the traditional authority of state and local governments complicated the Republican view of rights enforcement.[8] Meanwhile, Reconstruction was met with widespread violence and terrorism from Southern Democrats against Black citizens and their Republican supporters.[9] Thus, the Supreme Court's treatment of the Reconstruction Amendments carried enormous political stakes that would shape the legal landscape of the nation moving forward.

The post-Civil War legal rights framework gradually emerged over the course of the late nineteenth century, well beyond the traditional "end date" of Reconstruction in 1877.[10] This article will trace the development of the rights framework as it existed during Reconstruction and in the years thereafter. In so doing, this article will

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3. FONER, *supra* note 1, at 7–8.

4. It was also designed to fuel westward expansion. *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 91 (2015).

5. *Id.* at 13.

6. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 229 (1988).

7. *Id.*

8. *See id.* at 253.

9. *See id.* at 425.

10. Dating the end of Reconstruction is a matter of historical debate. The conventional view is that Reconstruction definitively ended in 1877. *See, e.g.,* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 245 (1951). Other historians argue the definitive end of Reconstruction did not occur until the early twentieth century. *See, e.g.,* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 2 (2011). This article will examine the Supreme Court's rights-enforcement jurisprudence through the end of the nineteenth century and into the twentieth to grasp the nature of federal rights enforcement more fully at that time without endorsing any particular end date for Reconstruction.

complicate the conventional view that the Court's jurisprudence was designed to destroy the Reconstruction movement by making federal rights enforcement impossible.[11] As we will see, the Court's jurisprudence did gradually diminish opportunities for federal rights enforcement, but this article seeks to inject additional nuance into the understanding of this jurisprudential period. Indeed, the primary aim of this piece is to demonstrate that the Court's Reconstruction-era rights-enforcement jurisprudence was not the product of ordinary constitutional reasoning or a straightforward attempt to sabotage Reconstruction. Instead, the Court's Reconstruction-era rights-enforcement jurisprudence emerged in a non-linear fashion informed by contingency, judicial policy preferences, opportunism, and the Court's use of malleable extraconstitutional jurisprudential schemas. The occasional inclusion of inconsistent holdings in this body of law reflects a judiciary uncertain about the fate of the Reconstruction project and the Court's weighing of ephemeral concerns that modern observers may overlook.

With these goals in mind, this article proceeds in three parts. In Part I, we will consider the typologies of rights relied on by Reconstruction-era courts. These include the overarching categories of "secured" and "created" rights and the "civil," "political," and "social" rights subgroups. The chief aim of this analysis is to provide the necessary framework to understand the intricacies of the Court's rights-enforcement jurisprudence.[12]

In Part II, this article conceives of *United States v. Cruikshank* (1875) as the focal point of the Reconstruction Court's rights-enforcement jurisprudence.[13] *Cruikshank* is a Reconstruction-era case centered around the federal prosecution of white supremacists for murder and other civil rights violations.[14] Building off important work done by Professor Pamela Brandwein and others, this article will survey

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11. *See, e.g.*, Jack M. Beermann, *Crisis? Whose Crisis?*, 61 WM. & MARY L. REV. 931, 961 (2020) (noting that "the message seemed simply to be that the Supreme Court was hostile to any antidiscrimination legislation—whether state or federal").

12. *See* BRANDWEIN, *supra* note 10, at 95.

13. The *Cruickshank* decision was first handed down by Justice Joseph Bradley as he was riding circuit and was thereafter affirmed by the entire Supreme Court in a decision issued by Justice Morrison Waite. United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874), *aff'd*, 92 U.S. 542, 23 L. Ed. 588 (1875). Justice Bradley's circuit court opinion is arguably more important than Justice Waite's Supreme Court opinion.

14. *Cruikshank*, 25 F. Cas. at 707.

the technical blueprint that *Cruikshank* provided for federal prosecutors to craft indictments for rights violations.[15] This analysis will proceed by examining the standard set by the Court for crafting indictments for both Fifteenth Amendment and Equal Protection violations. This article interprets the Court's jurisprudence in *Cruikshank* as designed to prominently signal judicial opposition to Reconstruction without fully frustrating the project.

Part IV considers the Supreme Court jurisprudence that operationalized the *Cruikshank* opinion and argues that the Court aimed to center federal rights enforcement exclusively on voting rights. This article will argue that the Court steered federal prosecutions toward national voting rights violations as opposed to other individual rights violations because a federal rights enforcement regime centered on national voting rights best served the justices' policy preferences. This piece concludes by highlighting the Court's disjointed retreat from its prior qualified support of voting rights enforcement and the Reconstruction project at the end of the nineteenth century.

I. TYPOLOGIES OF RIGHTS

Skepticism of federal rights enforcement, partially justified by federalism concerns, was common even before the Fourteenth Amendment asserted federal authority to "create a new definition of citizenship."[16] These concerns prompted the judiciary to seek out limiting principles for federal rights enforcement, resulting in two distinct rights schemas that informed whether the federal government had enforcement jurisdiction.[17] These categories are the secured/created rights framework and the civil/political/social rights trifurcation.[18] These models are essential to understanding the Court's development of its federal voting rights-enforcement jurisprudence.

15. *See, e.g.*, BRANDWEIN, *supra* note 10, at 93.
16. FONER, *supra* note 1, at 86.
17. BRANDWEIN, *supra* note 10, at 95.
18. *See generally* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

A. *Secured/Created Rights Framework and Federal Corrective Power*

Nineteenth-century jurists commonly understood individual rights as being "secured" or "created."[19] A "secured" right is a right "not derived from the grants of the [C]onstitution, but from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights which are recognized and regarded as sacred in all free governments."[20] One way jurists understood whether a right was a "secured" right was by asking whether a person would have that right irrespective of whether the federal Constitution existed.[21] For example, the freedoms to contract, choose one's employment, and access a court of law were considered "secured rights."[22] Under this framework, "secured" rights must first be adjudicated by the state, with the federal government acting in an exclusively corrective capacity if the state itself committed the violation or wholly failed to protect the right.[23]

In contrast, a "created" right is a positive enactment of a new right by the Constitution or federal law to which citizens would not otherwise be entitled but for the positive enactment of the law.[24] As we will see, "created rights" is a broad category, including rights as disparate as equal access to public accommodations and the return of "fugitive" slaves.[25] Congress possesses plenary authority over created rights because Congress can "make all laws necessary and proper for carrying into execution" positive enactments of rights.[26]

This rights duality was prominently articulated in an antebellum Supreme Court case, *Prigg v. Pennsylvania* (1842).[27] In *Prigg*, the

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19. The terminology "secured" and "created" is used by Professor Brandwein. She points out that secured rights are sometimes referred to as "declared, recognized, or guaranteed" rights, and created rights may be labeled "conferred, granted, or given" rights. BRANDWEIN, *supra* note 10, at 27 n.64.

20. *Cruikshank*, 25 F. Cas. at 714.

21. *Id.*

22. FONER, *supra* note 6, at 244; Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866).

23. *See* EDWARDS, *supra* note 4, at 107–08.

24. *See Cruikshank*, 25 F. Cas. at 712.

25. The Civil Rights Cases, 109 U.S. 3, 26 (1883); Prigg v. Pennsylvania, 41 U.S. 539, 539 (1842).

26. *Cruikshank,* 25 F. Cas. at 709.

27. *Prigg*, 41 U.S. at 539.

Court reasoned that Congress could directly enforce the constitutional right to the return of "fugitive" slaves and punish private individuals who interfered with this right.[28] The *Prigg* Court explained that "the national government, in the absence of all positive provisions to the contrary, is bound . . . to carry into effect all the rights and duties imposed upon it by the [C]onstitution."[29] Indeed, because the right of a slave owner to the return of their "fugitive" slaves is a created right that would not exist apart from the ratification of the Constitution, the primary mode of enforcement was federal.[30] Thus, the rationale for plenary federal enforcement in *Prigg* "was explicitly based on the type of right at issue."[31] *Prigg* demonstrates that nineteenth-century jurists sought to root enforcement jurisdiction in the character of the right implicated in the case.

Reconstruction-era legislation relied on the dichotomy of created and secured rights.[32] For example, Section 6 of the Enforcement Act of 1870 prohibited conspiracies to "hinder . . . enjoyment of any right or privilege *granted or secured* . . . by the Constitution or laws of the United States."[33] As we will see, the *Cruikshank* Court relied heavily on this dichotomy. To Reconstruction courts, *Prigg* stood for the proposition that "Congress has the power to enforce, by appropriate legislation, every right and privilege given or guaranteed by the Constitution."[34] Reconstruction courts also looked to the so-called "Enforcement Clauses" of the Fourteenth and Fifteenth Amendments, which empowered Congress to enact "appropriate legislation" enforcing those Amendments.[35] When Reconstruction courts considered congressional legislation passed under the Reconstruction Amendments, the dichotomy of secured and created rights operated in the background of what, to them, constituted "appropriate legislation" as contemplated in the Enforcement Clauses.[36] Legislation that did not map onto the

28. *Id.* at 541.
29. *Id.* at 616.
30. *Id.* at 570.
31. BRANDWEIN, *supra* note 10, at 37.
32. *See* Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140 (1870).
33. *Id.* (emphasis added).
34. United States v. Cruikshank, 25 F. Cas. 707, 710 (C.C.D. La. 1874).
35. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.
36. *See, e.g.*, United States v. Hall, 26 F. Cas. 79, 81 (C.C. Ala. 1871) (explaining it is "appropriate legislation" where the federal government steps in to enforce rights after a state fails to do so because "any other doctrine . . . would leave constitutional rights guarded only by the protection which each state might choose to extend them").

secured-and-created-rights framework could not be "appropriate" in the eyes of Reconstruction-era courts.[37]

Many political actors were unwilling to give the federal government primary enforcement authority over rights sourced from "nature."[38] These distinctions in the character of rights informed the Civil Rights Act of 1866, which protected those rights that were considered most fundamental to the concept of citizenship, such as the right to enter into contracts or bring a lawsuit.[39] The effect of the Civil Rights Act of 1866 was to confer "secured rights" onto a new class of persons: former slaves.[40]

Because it implicated secured rather than created rights, the Civil Rights Act of 1866 was meant to be enforced by the states, with the federal government gaining enforcement jurisdiction only after the states failed to provide an adequate remedy.[41] This interpretation is congruent with the limited grants of authority Congress received in Article I, Section 8 compared to the plenary police power that states exercise.[42] This formulation is diametrically opposed to the modern state-action doctrine, which holds that the Equal Protection and Due Process Clauses of the Fourteenth Amendment—and the protections of the Bill of Rights as incorporated by the Fourteenth Amendment—are only enforceable to correct actions that are fairly attributable to the state

37. There is considerable tension between the Reconstruction Court's conception of "appropriate legislation" and the principle of high deference to Congress announced in *McCulloch v. Maryland*. Nevertheless, the Court's interpretation of "appropriate legislation"—which included the secured-and-created-rights framework operating in the background—prevailed during the Reconstruction era.

38. *See* FONER, *supra* note 6, at 257–58.

39. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27.

40. *See id*. (enforcing the applicability of widely accepted natural rights to all Americans, regardless of race).

41. There is debate among historians as to whether the dichotomy of secured/created rights was desired by the drafters of Reconstruction legislation or was retroactively imposed by the judiciary. *See* Robert Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly*, 73 FORDHAM L. REV. 154 (2004) (arguing that Congress expected to have plenary enforcement of secured rights); MICHAEL LES BENEDICT, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction, in* PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 3, 3–22 (2006) (arguing that Congress expected its authority to enforce these rights to be corrective only). Regardless, some degree of federal enforcement was expected.

42. U.S. CONST. art. I, § 8 (outlining the scope of federal legislative power, including the power to levy and collect taxes, regulate commerce, declare war, and create inferior courts).

itself, as opposed to purely private conduct that the state fails to punish.[43]

The Civil Rights Act of 1866 clarified that when a state actor violated one of the rights covered by the Act, or if state remedies are unavailable to remedy violations of the secured rights listed in the Act, the violation then gained the "color of law . . . or custom," making it subject to federal prosecution.[44] This rule is applied even if the initial offense was carried out by a private individual.[45]

In light of the secured-and-created-rights framework, it is evident that rights-enforcement litigation often depended on whether the federal government had plenary or corrective authority to enforce rights.[46] When surveying the totality of the jurisprudence engaging with this framework, it becomes clear that the distinction is often illusory. Indeed, the Court's treatment of this rights framework has been inconsistent and arguably contingent on contemporaneous judicial policy preferences.[47]

A key example that captures the ideas of federal corrective power over secured rights and the general fluidity of the secured/created rights framework is the South Carolina Ku Klux Klan Trials of 1870–71.[48] At the time, the constitutional rights conferred in the Reconstruction Amendments were largely untested in the courts, and federal prosecutors hoped to "stretch the limits of the state action concept" and nationalize the Bill of Rights through the Fourteenth Amendment.[49] *United States v. Petersburg Judges of Election* (1874)

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43. *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 (1982).

44. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27*; see also* BRANDWEIN, *supra* note 10, at 13 (arguing that the concept of a state-neglect predicate before federal enforcement jurisdiction over secured rights tracks the "master principle of the founding generation" that unequal administration of the law by the states unfairly confers advantages and disadvantages to particular factions).

45. While the concept of "color of law" today requires state agents to jointly participate in the wrongdoing, Reconstruction-era courts offered a more expansive construction in which individual race-based wrongs against civil rights gain the color of law if state authorities fail to remedy the wrong. BRANDWEIN, *supra* note 10, at 162; *see also infra* Part IB (discussing the *Civil Rights Cases*).

46. *See* Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329, 332 (2016).

47. *See infra* Part IIB.

48. *See generally* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS 1871–1872 (2004).

49. *Id.* at 122.

represents one such effort from federal prosecutors during the Ku Klux Klan Trials.[50]

Federal prosecutors charged the defendant in *Petersburg Judges of Election* under the Fifteenth Amendment with race-based interference with voting.[51] With the secured-and-created-rights framework operating in the background, the court noted that it is "appropriate legislation" for the federal government to punish individuals who wrongfully obstruct the free exercise to vote based on race because the state did not first remedy the violation.[52] This is because, to the *Petersburg* court, the freedom from race-based interference with voting is a secured right to be adjudicated first by the state. This case confirms that state officials "who failed to protect Black rights were involved in a kind of state action that could be punished by the federal government."[53]

Petersburg was an early formulation of the role of corrective federal power over secured rights.[54] As we will see, the nature of Fifteenth Amendment prosecutions will change substantially by the time of *Cruikshank*. The right to freedom from race-based interference with voting will shift in judicial treatment from a secured right as seen in *Petersburg* to become a created right in *Cruikshank*, causing Fifteenth Amendment cases to be subject to plenary Congressional enforcement.[55] The transition in judicial treatment of the Fifteenth Amendment from a secured right to a created right is reflective of the instability of this rights construct. It further indicates how the broad scope and sheer newness of the rights conferred by the Reconstruction Amendments permitted an almost unprecedented degree of judicial malleability and formulation. Still, this case is important as an early articulation of the federal corrective-enforcement scheme over secured rights.[56]

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50. United States v. Petersburg Judges of Election, 27 F. Cas. 506, 509 (C.C.E.D. Va. 1874) (No. 16,036).

51. *Id*.

52. *Id.* at 510.

53. WILLIAMS, *supra* note 48, at 72.

54. *See generally Petersburg Judges of Election*, 27 F. Cas. at 509.

55. United States v. Cruikshank, 25 F. Cas. 707, 712 (C.C.D. La. 1874).

56. *See also* United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (upholding federal indictment under the Civil Rights Act of 1866 after Kentucky failed to punish white criminals who tried to prevent a Black person from testifying);, United States v. Hall, 26 F. Cas. 79, 81 (C.C. Ala. 1871) (holding that Congress has the power "to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation").

The *Slaughter-House Cases* (1873)—the landmark series of Supreme Court cases interpreting the Privileges or Immunities Clause of the Fourteenth Amendment—further complicated the paradigm of corrective federal power.[57] In these cases, the Court declined to find that the Privileges or Immunities Clause incorporated the Bill of Rights.[58] These cases considerably narrowed the potency of federal corrective power by limiting the scope of civil rights to those listed in the Civil Rights Act of 1866.[59] As we will see in *Cruikshank*, the Court later constructed its voting rights edifice around these limitations.[60]

B. *The Civil/Political/Social Trifurcation of Rights*

In addition to categorizing rights as "secured" or "created," the Court also developed subcategories of individual rights in the form of "civil," "political," and "social" rights.[61] Civil rights constitute the "essence of freedom" and were generally considered secured rights.[62] They include the freedom to contract, control one's employment, and access a court of law.[63] The Civil Rights Act of 1866, which was based on the Thirteenth Amendment, guaranteed these fundamental, secured rights for former slaves.[64] The Act was passed under the rationale that withholding these rights would render emancipation meaningless.[65] Most Republicans agreed on the importance of civil rights for Black Americans, and political actors frequently invoked the distinctions between civil rights, political rights, and social rights when explaining their political positions.[66]

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57. Slaughter-House Cases, 83 U.S. 36, 55 (1872) (interpreting U.S. CONST. amend. XIV, § 1).

58. *Id.* at 74.

59. FONER, *supra* note 1, at 135; *The Slaughter-House Cases*, 83 U.S. at 96–97; BRANDWEIN, *supra* note 10, at 57.

60. *See Cruikshank*, 25 F. Cas. at 711–15.

61. *See* RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 156–57 (1999) (describing this conception of rights as a "shell game" because rights moved fluidly between the categories based on whether legislators and judges wanted to confer those rights on Blacks).

62. FONER, *supra* note 6, at 244.

63. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866).

64. *Id.*

65. BRANDWEIN, *supra* note 10, at 71.

66. *See, e.g.,* PAUL M. ANGLE, ED., CREATED EQUAL? THE COMPLETE LINCOLN–DOUGLAS DEBATES OF 1858, 117 (1958) (quoting President Lincoln as stating, "I have no purpose to introduce political and social equality between the white and Black races . . . But

Political rights, especially the rights to vote and hold office, were considered privileges at the time of passage of the Civil Rights Act of 1866.[67] In the eyes of many contemporaneous commenters, conferring rights on Black Americans was meant to ensure they could become free and independent laborers.[68] Thus, the right to vote was not initially viewed as essential, but Southern violence would soon convince centrist Republicans that Black male suffrage was necessary for Black independence.[69] As we will see, one of the critical maneuvers of this jurisprudential period was to gradually eliminate the distinction between civil and political rights as Black male suffrage became an "essential attribute of autonomous citizenship in a competitive society."[70] Black political rights became the focal point of the Court's rights-enforcement edifice erected in *Cruikshank*.[71]

Black social rights were resisted heavily by most white Americans at this time.[72] Social rights essentially amount to equal access to public accommodations, education, and intermarriage.[73] Centrist Republicans and Democrats "used the social rights category to delimit a sphere where racial caste was maintained."[74] Black civil and political rights gained mainstream support among white Republicans in part because it was believed these rights would allow Black citizens to "assume responsibility for their own fate."[75] In contrast, white opposition to social rights for Black Americans was rooted in the fear of

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in the right to eat the bread which his own hand earns, [Black Americans] are the equal of every living man.").

67. FONER, *supra* note 1, at 60.

68. *Id.* at 244; CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (during debates on the Civil Rights Bill, one congressman stated that the scope of the bill should be to "secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce payment for their wages, and the means of holding and enjoying the proceeds of their toil").

69. BRANDWEIN, supra note 10, at 71.

70. FONER, *supra* note 6, at 277. Importantly, the right to vote was not considered an automatic privilege of every United States citizen. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (declining to find that women have a constitutional right to vote on the grounds that citizenship is not coextensive with voting rights).

71. United States v. Cruikshank, 25 F. Cas. 707, 712 (C.C.D. La. 1874).

72. BRANDWEIN, *supra* note 10, at 72.

73. *See, e.g.*, WILLIAMS, *supra* note 48, at 51 (quoting Judge Hugh L. Bond, author of *Petersburg Judges of Elections*, as stating that "[t]o make a man equal before the law does not necessarily make it obligatory for me to eat, sleep, or drink with him.").

74. BRANDWEIN, *supra* note 10, at 72; *see also* State v. Gibson, 36 Ind. 389 (1871) (recasting marriage as a quasi-public institution as a workaround for the fact that a contract theory of marriage would invalidate anti-miscegenation laws under the Civil Rights Act of 1866).

75. FONER, *supra* note 6, at 277.

"forced association," triggering anxieties about the "loss of white purity."[76] White opposition to an integrated, multiracial democracy persisted throughout the Reconstruction period.[77] The legal basis for this opposition was provided in the *Civil Rights Cases*.[78]

In the *Civil Rights Cases* (1883), the Supreme Court struck down much of the Civil Rights Act of 1875 as unconstitutional.[79] The Civil Rights Act of 1875, passed just after the death of prominent abolitionist Senator Charles Sumner of Massachusetts,[80] guaranteed public-accommodation rights for Black Americans.[81] It was passed to honor Senator Sumner but on the belief its provisions would not be enforced.[82] Indeed, by the time the Supreme Court heard constitutional challenges to the Act in 1883, the Act had already become "a dead letter."[83]

The *Civil Rights Cases* exist at the intersection of the secured-and-created-rights framework and the civil/political/social rights framework. The conventional view is that the *Civil Rights Cases* invalidated the public-accommodations provisions of the Civil Rights Act of 1875 because the state-action doctrine precluded federal rights enforcement against purely private conduct, such as discrimination in public accommodations.[84] According to that view, the Civil Rights Act of 1875 fell outside the purview of the Reconstruction Amendments regardless of whether the states applied neutral laws unevenly or failed to furnish a remedy when rights were violated.[85] Scholars who reach this conclusion as to the significance of the *Civil Rights Cases* may trace

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76. BRANDWEIN, *supra* note 10, at 72.

77. *See, e.g.*, JAMES ALEX BAGGETT, THE SCALAWAGS: SOUTHERN DISSENTERS IN THE CIVIL WAR AND RECONSTRUCTION (2003).

78. *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883). Note that these decisions were issued after *Cruikshank* and after the conventionally dated end of Reconstruction of 1877 but are essential to understanding the legal framework for rights enforcement in the Reconstruction era.

79. *Id.*

80. ELIAS NASON, LIFE & TIMES OF CHARLES SUMNER: HIS BOYHOOD, EDUCATION, & PUBLIC CAREER (1874).

81. The Civil Rights Act of 1875, 18 Stat. 335 (1875).

82. *See* BRANDWEIN, *supra* note 10, at 67.

83. FONER, *supra* note 6, at 556.

84. *See, e.g.*, Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. UNIV. L. REV. 893, 894–95 (1984) (arguing the conventional view that the *Civil Rights Cases* announced the modern conception of the state-action doctrine).

85. *Id*.

a linear development of the modern state-action doctrine, originating with this line of cases.

In the *Civil Rights Cases*, the Court considered Section 2 of the Civil Rights Act of 1875, which states that the Act's provisions apply whenever a deprivation "under color of any law" is committed.[86] Justice Bradley's majority opinion explained that an action taken by a private individual transforms into one "under color of law" within the meaning of Section 2 when the private individual is "protected in these wrongful acts by some shield of State law or State authority."[87] Moreover, Justice Bradley determined that the federal government's jurisdiction to enforce the public-accommodations provisions of the Act was "corrective in character."[88] Thus, the *Civil Rights Cases* "articulated the understanding that individual wrongs may or may not have state authority" because of the role of federal corrective power.[89]

As noted previously, a key component of federal corrective power is that a state's failure to remedy a rights violation committed by a private actor transforms the violation into one committed under color of law, which then grants the federal government corrective-enforcement jurisdiction.[90] Thus, the conventional proposition that the *Civil Rights Cases* mean that the federal government can never reach private individuals who commit rights violations conflicts with the notion of federal corrective power displayed in *Petersburg*.[91] Professor Brandwein has thoroughly explained how later observers "have missed the extent to which the Court viewed non-enforcement of neutral laws as a rights denial and preserved federal power to reach private individuals as a remedy."[92]

The Civil Rights Act of 1875 was struck down in the *Civil Rights Cases* not because the Act targeted purely private conduct but because the Court believed that the Act made Black Americans the "special favorite of the laws."[93] The Court's primary concern was that under the Civil Rights Act of 1875, white citizens could be freely

86. The Civil Rights Act of 1875, 18 Stat. 335 (1875).
87. The Civil Rights Cases, 109 U.S. 3, 17 (1883)
88. *Id.* at 15.
89. BRANDWEIN, *supra* note 10, at 168.
90. *See, e.g.*, EDWARDS, supra note 4, at 167.
91. *See* United States v. Petersburg Judges of Election, 27 F. Cas. 506, 510 (C.C.E.D. Va. 1874); *The Civil Rights Cases*, 109 U.S. at 15.
92. BRANDWEIN, *supra* note 10, at 166.
93. *The Civil Rights Cases*, 109 U.S. at 25.

discriminated against in public accommodations, but Black citizens could not be.[94] Further, the Court did not view social rights as helpful for carrying out the goal of Black independence from white society.[95] Thus, the Act could not be "appropriate legislation" under any of the Reconstruction Amendments.[96] This notion disrupts conventional linear treatment that the state-action doctrine has been given—often thought to originate in the *Civil Rights Cases*.[97] The Court appears to have stopped short of expounding the modern state-action doctrine, apparently restrained by the need to craft its jurisprudence around the preexisting notions of secured/created rights and federal corrective power.[98]

II. *UNITED STATES V. CRUIKSHANK* AND THE MALLEABILITY OF NEW RIGHTS

United States v. Cruikshank (1875) is "largely ignored in the legal-professional literature," but it remains the "subject of controversy among historians."[99] In short, *Cruikshank* was a case about the mass murder of Black citizens by white supremacists.[100] The Court used the *Cruikshank* decision to establish a blueprint for federal prosecutors to enforce rights under the Reconstruction Amendments.[101] This section will survey the facts of *Cruikshank* and dissect the two key areas of federal rights enforcement touched on in the opinion: voting rights and Equal Protection.[102] As we will see, *Cruikshank* established an

94. *Id.* at 57.

95. *Id.* at 22, 25.

96. *Id.* at 20.

97. *See, e.g.*, Ayoub, *supra* note 84, at 894–95; Robert Cottrol, *The Civil Rights Cases*, *in* OXFORD COMPANION TO THE SUPREME COURT 174 (Kermit Hall ed., 2005).

98. *See* BRANDWEIN, *supra* note 10, at 7; RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 105 (Benjamin I. Page ed., 1st ed. 2004).

99. James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank (1876) *Belongs at the Heart of the American Constitutional Law Canon*, 49 Harv. C.R.-C.L. L. Rev. 385, 427 (June 1, 2014); *see also* SAMUEL ISSACHAROFF, PAMELA KARLAN, RICHARD PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 43 (5th ed. 2016) (characterizing *Cruikshank* as "eviscerating various federal protections for Black voting rights"); FONER, *supra* note 6, at 531 (writing that *Cruikshank* "beamed a green light to acts of terror where local officials either could not or would not enforce the law"); BRANDWEIN, *supra* note 10, at 17 (arguing that *Cruikshank* "signaled a voting rights jurisprudence in a shorthand that Republican administrations understood and later acted upon").

100. United States v. Cruikshank, 25 F. Cas. 707, 708 (C.C.D. La. 1874).

101. *Id.*

102. *Id. at* 711–12.

enforcement edifice rooted in the judicial conception of the nature of rights at that time.[103] This section aims to complicate a linear view of rights enforcement during this period by emphasizing the role that political uncertainty played in shaping this line of jurisprudence. The *Cruikshank* decision was issued at a time when the forces supporting and opposing Reconstruction were evenly matched.[104] The following section suggests that the Court erected an enforcement mechanism that allowed for flexibility as to the level of permissible federal support for Reconstruction but ultimately established several procedural hurdles that would thwart Reconstruction efforts in accordance with the justices' policy preferences. The *Cruikshank* voting rights-enforcement edifice is steeped in the secured/created rights dichotomy and was heavily influenced by white resistance to Black social rights.[105]

One key aspect of this analysis is that the rights-enforcement edifice erected in *Cruikshank* resulted in federal rights enforcement primarily being directed towards protecting national elections as opposed to protecting civil or social rights.[106] This article posits that *Cruikshank* and its progeny directed federal rights enforcement to focus on national elections as opposed to other forms of rights enforcement in order to limit, but not eliminate, federal involvement in the daily lives of Black Americans. This decision helped ensure that Black social rights never gained traction in the interim between *Cruikshank* and the formal rejection of Black social rights in *Plessy v. Ferguson* (1896).[107]

This section concludes by assessing the judicial policy rationale informing the *Cruikshank* decision. As we will see, the contemporaneous political concerns of the justices and their opinions about "the character of the right conferred" greatly influenced the decision.[108] This article contends that *Cruikshank* was a messy amalgamation designed primarily to serve the immediate interests and desires of the Court amidst great political and social uncertainty and

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103. *See, e.g.*, *id.* at 715.

104. Jeff Strickland, "*The Whole State Is On Fire": Criminal Justice and the End of Reconstruction in Upcountry South Carolina*, 13 CRIME, HISTOIRE & SOCIÉTÉS [CRIME, HIST. & SOCIETIES] 89, 89–117 (2009) (documenting Southern resistance to Reconstruction); Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867) (authorizing military occupation of the South to enforce Reconstruction).

105. *See Cruikshank*, 25 F. Cas. at 711–12.

106. *See id.*

107. Plessy v. Ferguson, 163 U.S. 537 (1896).

108. *Cruikshank*, 25 F. Cas. at 710.

was not necessarily designed to sabotage all efforts at Reconstruction. However, this section will also highlight the key role that *Cruikshank* played in ultimately unravelling the Reconstruction project.

A. *Contextualizing* Cruikshank

Cruikshank arose "from a massacre of Black Republicans in the courthouse of Colfax, Louisiana by white Democrats disputing the result of the 1872 election in Grand Parish."[109] The "Colfax Massacre"—carried out by the Ku Klux Klan on Easter Sunday 1873—was an attempt to overturn the Louisiana gubernatorial election of 1872.[110] It resulted in the deaths of between sixty-two and eighty-one Black citizens, making it the deadliest racial massacre of the entire Reconstruction period.[111] Despite seeking indictments against ninety-seven men, federal prosecutors only won three convictions, including of William Cruikshank.[112] Justice Bradley vacated the three convictions in an influential circuit court opinion that was later adopted by the Supreme Court.[113]

The Colfax Massacre was arguably the most egregious example, but violent attacks were committed by white supremacists in the South on a regular basis during Reconstruction.[114] In the 1870s, white Southerners opposed to Reconstruction known as "redeemers" engaged in "comprehensive effort[s]" to undo Reconstruction and reassert *de jure* discrimination.[115] Spearheading these efforts to end Reconstruction was the Ku Klux Klan, which functioned as a "counterrevolutionary terror" group that "serve[d] the interests of the Democratic party."[116]

The Klan commonly engaged in widespread acts of violence in service of restoring "racial subordination in every aspect of Southern

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109. Martha T. McCluskey, *Facing the Ghost of* Cruikshank *in Constitutional Law*, 65 J. OF LEGAL EDUC. 278, 280 (2015). The horrific details of the massacre are described in TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA, 1862–1877 173, 218 (1984).

110. CHARLES LANE, THE DAY FREEDOM DIED 265–66 (2008).

111. *Id.*; FONER, *supra* note 6, at 437.

112. BRANDWEIN, *supra* note 10, at 87.

113. *See Cruikshank*, 25 F. Cas. at 707; FONER, *supra* note 6.

114. LANE, *supra* note 110, at 265–66; FONER, *supra* note 6, at 423.

115. FONER, *supra* note 6, at 423.

116. *Id.*

life."[117] To oppose these efforts, Congressional Republicans secured the passage of the Fifteenth Amendment in 1870.[118] Later that same year, Congress passed the Enforcement Act, which provided the federal government with authority to prosecute conspiracies meant to deprive citizens of their constitutional rights.[119] Additionally, Congress passed the Ku Klux Klan Act in 1871, which the federal government used to suspend *habeas corpus* against suspected Klan members.[120]

Some historians perceive *Cruikshank* as closing off the theory articulated in *Petersburg* that a state failure to correct a private constitutional violation transforms the violation into one occurring under color of law.[121] This understanding of *Cruikshank* is the conventional view, and it is consistent with the conventional view of the *Civil Rights Cases*, which are thought to have placed private individuals outside the reach of the Reconstruction Amendments.[122] Other historians perceive *Cruikshank* as articulating a voting rights-enforcement mechanism that "became the basis for later successful prosecutions brought by the federal government."[123] This article offers a qualified endorsement of the latter theory. *Cruikshank* provided a road map for federal rights enforcement, but the Court announced its opinion in a manner that was designed to limit, without eliminating, federal rights enforcement in the South.

There was nothing in the substantive legal issues of the case that required the *Cruikshank* Court to outline its rights-enforcement theories in its decision.[124] Nevertheless, the Court announced three distinct approaches for federal prosecutors to consider when drafting

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117. *Id.*; *see also* Ray Granade, *Violence: An Instrument of Policy in Reconstruction Alabama*, 30 ALA. HIST. Q. 181, 182–83 (1968).

118. *Landmark Legislation: The Fifteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/15th-amendment.htm#:~:text=Ratified%20February%203%2C%201870%2C%20the,many%20former%20confederate%20states%20took (last visited March 31, 2025).

119. Enforcement Act, ch. 114, 16 Stat. 140 (1870).

120. Julie Silverbrook, *The Ku Klux Klan and Violence at the Polls*, BILL OF RIGHTS INST. (Mar. 6, 2020), https://billofrightsinstitute.org/essays/the-ku-klux-klan-and-violence-at-the-polls. Much of the Ku Klux Klan Act as amended is codified at 42 U.S.C. §§ 1983, 1985–1986.

121. *See, e.g.,* WILLIAMS, *supra* note 48, at 267 (arguing *Cruikshank* signified that a state's failure to protect its citizens "could not be construed as a reason for the federal government to intervene").

122. *See, e.g.*, Ayoub, *supra* note 84, at 895.

123. BRANDWEIN, *supra* note 10, at 88.

124. *Id.* at 93.

indictments for national and state election-interference cases as well as general Equal Protection claims.[125] The following sections will assess these avenues for rights enforcement and argue that the *Cruikshank* rights-enforcement scheme was designed to dissuade further federal intervention into securing Black civil and social rights while preserving federal rights enforcement for Black voting rights. This article conceptualizes *Cruikshank* as an anti-Reconstruction Court's response to uncertainty about whether the political branches would continue to pursue the Reconstruction project in the latter half of the 1870s and into the 1880s. The *Cruikshank* framework was designed to greatly diminish federal presence in the South but keep voting rights prosecutions available should the political branches insist on pursuing them.[126]

B. *The* Cruikshank *Federal Rights-Enforcement Scheme*

The *Cruikshank* indictments were crafted under Section 6 of the Enforcement Act of 1870.[127] This section gave the federal government authority to effectuate the Enforcement Act's provisions whenever citizens conspired to deprive other citizens of constitutional rights.[128] In *Cruikshank*, the government advanced Fifteenth Amendment and Equal Protection claims as the legal bases to punish the participants in the Colfax massacre.[129]

1. Fifteenth Amendment Claims Under *Cruikshank*

In determining whether a remedial act of Congress constituted "appropriate legislation" under the Reconstruction amendments, Justice Bradley's circuit-court opinion relied heavily on the secured/created rights dichotomy, ultimately locating the Fifteenth Amendment as a created right.[130] Citing to *Prigg*, Justice Bradley confirmed that

125. United States v. Cruikshank, 25 F. Cas. 707, 711–15 (C.C.D. La. 1874).

126. *See generally* BRANDWEIN, *supra* note 10 (arguing that *Cruikshank* announced a coherent rights-enforcement framework).

127. *Cruikshank*, 25 F. Cas at 715.

128. Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870).

129. *Cruikshank*, 25 F. Cas. at 715; Pope, *supra* note 99, at 407; *see* BRANDWEIN, *supra* note 10, at 93 (explaining that Justice Bradley went out of his way to widely publicize his circuit opinion in the media).

130. *Cruikshank*, 25 F. Cas. at 710.

enforcement of a constitutional right "depend[s] upon the character of the right conferred."[131] Justice Bradley began his constitutional analysis with Section 1 of the Fifteenth Amendment, which prohibits both federal and state governments from engaging in race-based infringements on voting rights.

Based on a plain reading of the Fifteenth Amendment, Justice Bradley admitted that it seemed that "Congress had no duty to perform until the state has violated its provisions."[132] Nevertheless, he concluded that the Fifteenth Amendment "confers a positive right which did not exist before."[133] Justice Bradley explicitly grappled with the secured/created rights framework and concluded that the right to freedom from race-based interference with voting granted by the Fifteenth Amendment is a created right.[134] Based on this finding, Justice Bradley posited that the federal government "undoubtedly" has the power to "directly enforce the right and punish individuals for its violations."[135] Thus, despite the plain text of the amendment prohibiting only states from committing race-based interferences with voting rights, Justice Bradley announced that it is "appropriate legislation" within the meaning of the Enforcement Clause for Congress to directly provide a remedy for Fifteenth Amendment violations against private individuals.[136]

There was a "political dimension" to reading the Fifteenth Amendment as a created right as opposed to an extension of a secured right.[137] In coming to this conclusion, Justice Bradley implicitly disagreed with the *Petersburg* court, which viewed the Fifteenth Amendment as an enactment of a secured right.[138] If Justice Bradley had read the Fifteenth Amendment to extend a secured right, federal

131. *Id*.
132. *Id.* at 712.
133. *Id.*
134. *Id.*
135. *Id.* at 713.
136. *Id.;* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); BRANDWEIN, *supra* note 10, at 99 (explaining that Justice Bradley, in contending that Congress could directly enforce the Fifteenth Amendment against private individuals, "dispensed with the text" of the amendment, which itself contains the language "no state shall" engage in race-based voting interference).
137. BRANDWEIN, *supra* note 10, at 100.
138. United States v. Petersburg Judges of Election, 27 F. Cas. 506, 510 (C.C.E.D. Va. 1874).

enforcement power would have been exclusively corrective.[139] This reading likely would have been more consistent with the plain meaning of the text of the Fifteenth Amendment.

The difference in treatment of the Fifteenth Amendment in *Petersburg* and *Cruikshank* is a key example of the malleability of the nineteenth-century rights construct. At the time of *Cruikshank*, the Reconstruction Amendments were brand new and expansive in scope.[140] Justice Bradley's interpretation of the Fifteenth Amendment as allowing for direct federal enforcement against private individuals was likely designed to aid efforts to build the Republican Party in the South.[141] This was not an inevitable, neutral reading of the Fifteenth Amendment, and the *Petersburg* court had already interpreted it differently. Nevertheless, the Court did not make unsupported, sweeping pronouncements in favor of its own policy preferences.[142] Instead, these judicial preferences were couched in a careful and nuanced, albeit unstable and ultimately pretextual, doctrinal framework.

Despite finding direct federal enforcement of the Fifteenth Amendment to be appropriate, Justice Bradley nevertheless vacated the indictments on the basis that they failed to allege that the right to vote was denied on account of race.[143] Here, Justice Bradley showed "no concern either for Congress's judgment or for the practicalities of enforcement."[144] Justice Bradley acknowledged a racial motive could easily be inferred based on the circumstances of the massacre, but he nevertheless "insisted on technical exactitude."[145]

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139. *See, e.g.*, EDWARDS, *supra* note 4, at 107–08.

140. *See generally* FONER, *supra* note 1. The Reconstruction Amendments were ratified between 1865–1870, and Justice Bradley's *Cruickshank* opinion was issued in 1874.

141. These efforts to aid the Republican Party in the South were bolstered by Justice Bradley's dicta in his circuit court opinion that suggested Congress had direct enforcement power over all national elections because of Article I, Section 4. *Cruikshank*, 25 F. Cas. at 712. The Court will make this clearer in future cases, discussed *infra* part II.

142. *See generally, Cruikshank*, 25 F. Cas. at 707.

143. *Id*. at 715.

144. Pope, *supra* note 99, at 410. *But see* BRANDWEIN, *supra* note 10, at 152 (arguing that the racial predicate Justice Bradley required for a valid Fifteenth Amendment complaint "did not appear onerous").

145. Pope, *supra* note 99, at 411.

2. Equal Protection Claims Under *Cruikshank*

Justice Bradley also found fault with the Equal Protection counts.[146] Justice Bradley required a racial motivation to be pleaded to supply the federal government with direct enforcement power over Equal Protection claims.[147] By requiring a racial motive, Justice Bradley implicitly racialized the Equal Protection Clause and put claims for political rights violations out of its reach.[148] This was done with no textual warrant within the Fourteenth Amendment and with little deference to Congress as to what constituted "appropriate legislation" within the meaning of the Enforcement Clause.[149]

Justice Bradley also dismissed the Equal Protection counts because they alleged violations of secured rights, over which Congress may only provide corrective remedies.[150] Finding that the indictments did not adequately allege that the violations occurred under color of law, Justice Bradley explained that all "ordinary crimes," such as murders and assaults, are generally adjudicated in state court, but if the state fails to act then an "ordinary crime" may also become a denial of Equal Protection cognizable in federal court.[151] In finding that federal enforcement was contingent on the state first failing to rectify an Equal Protection violation, Justice Bradley confirmed the longstanding notion that the federal government retained purely corrective power over secured rights.[152] The federal government's power to directly enforce rights protected by the Equal Protection Clause—such as those granted in the Civil Rights Act of 1866—did not extend to "ordinary crimes" committed by non-state actors.[153] Only if the state denied an adequate remedy to a class of persons for these types of rights could the federal government step in to directly enforce the right.[154]

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146. *Cruikshank*, 25 F. Cas. at 715.
147. *Id.*
148. BRANDWEIN, *supra* note 10, at 120.
149. U.S. CONST. amend. XIV.
150. *Cruikshank*, 25 F. Cas. at 715.
151. *Id.* at 711–12.
152. EDWARDS, *supra* note 4, at 107; Prigg v. Pennsylvania, 41 U.S. 539, 657 (1842).
153. Justice Bradley considered and rejected a Thirteenth Amendment rationale for these counts on the grounds that the Thirteenth Amendment also requires a racial motive and does not apply to ordinary crimes. EDWARDS, *supra* note 4, at 101.
154. BRANDWEIN, *supra* note 10, at 13.

Cruikshank thus erected two hurdles that federal prosecutors must satisfy before bringing an Equal Protection count of the type seen in *Cruikshank*. First, because *Cruikshank* interpreted the Equal Protection Clause as a secured right, federal prosecutors must demonstrate either that a state actor committed the constitutional violation or that the state had an opportunity to redress a private wrong and failed to do so.[155] Second, the indictment must allege that the Equal Protection violation was committed with a racial motivation.[156]

Some historians have argued that these pleading requirements were "not onerous."[157] Others claim that Justice Bradley's opinion "left open a wide range of possible standards for proving state neglect and racial intent."[158] Regardless of the onerousness of the pleading requirements, the decision was designed to signal the Court's wavering commitment to Reconstruction. Justice Bradley's nuanced blueprint for federal rights enforcement was likely muted by the fact that the case released notorious Klan members on technical grounds.[159]

Justice Bradley's dicta holding out the theoretical possibility of future enforcement did little to blunt the force of the *Cruikshank* decision on the ground.[160] Within months of Justice Bradley's ruling, racial violence and terrorism from white supremacists reached levels comparable to those at the outset of the Civil War in 1861.[161] *Cruikshank* "embolden[ed] white supremacists, discourag[ed] prosecutors, and demoraliz[ed] Republicans across the South."[162] Indeed, the doctrinal nuances of Justice Bradley's constitutional analysis, rooted in the character of the right at issue, were not "clearly understood by contemporaries, but the end result certainly was."[163]

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155. *Cruikshank*, 25 F. Cas. at 709–10, 713.

156. *Id.* at 712 ("To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise, it is a case exclusively within the jurisdiction of the state and its courts.").

157. BRANDWEIN, *supra* note 10, at 107.

158. Pope, *supra* note 99, at 429.

159. *Id.* at 429–30.

160. *Id.*

161. *Id.* at 413.

162. *Id.* at 412.

163. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876 150 (1985).

C. *The* Cruikshank *Rights Framework and Judicial Policy Preferences*

As discussed above, *Cruikshank* came at an inflection point for the Reconstruction project, and the Court offered a muddled rights-enforcement scheme designed to minimize but not eliminate federal intervention in the South. Without acknowledging it, *Cruikshank* failed to apply the principle—announced in *McCulloch v. Maryland*—that Congress has discretion in choosing what means to utilize when implementing constitutional provisions.[164] In so doing, the Court steered the federal government to enforce voting rights only, ensuring diminished federal involvement in the daily lives of Black Americans in the South.

In choosing to tunnel rights enforcement to voting rights, *Cruikshank* made rights enforcement more palatable to wavering moderate Republicans in the North.[165] *Cruikshank* came in the wake of the Panic of 1873, a financial crisis that brought the American economy to a "wrenching halt" during the 1870s.[166] The economic downturn deflated Republican zeal to carry out the expensive Reconstruction project.[167] The Panic of 1873 is often seen as resulting in Democrats capturing the House of Representatives in 1874 and otherwise frustrating the political ambitions of national Republicans.[168]

The judiciary was thus faced with the increasingly realistic prospect that an anti-Reconstruction Democrat would take the presidency and discard all the Court's pronouncements in favor of federal rights enforcement.[169] Another possibility was that the Republicans would retain the presidency but greatly deemphasize federal rights enforcement in the South.[170] Rights enforcement was expensive and becoming unpopular as the economic downturn worsened.[171] This article posits that contemporaneous concerns regarding the expense of rights enforcement amid the economic depression informed the Court's constitutional reasoning to center

164. Pope, *supra* note 99, at 424; McCulloch v Maryland, 17 U.S. 316, 388 (1819).
165. FONER, *supra* note 6, at 523.
166. *Id*. at 512.
167. BRANDWEIN, *supra* note 10, at 117.
168. FONER, *supra* note 6, at 523.
169. *Id.*
170. *Id.*
171. *Id.*

federal rights enforcement on voting rights. Enforcing national voting rights, as opposed to other forms of rights, generally requires only biannual attention from the federal government. Thus, enforcing national voting rights was likely more cost-effective for the Justice Department than enforcing other rights.[172]

Another key component informing the Court's rights-enforcement edifice was Justice Bradley's sympathy toward former slaveholders.[173] Justice Bradley "viewed slaveholders not as a distinct class of pre-capitalist aristocrats, but as businessmen who happened to employ slave as opposed to wage labor."[174] Justice Bradley saw a need for class solidarity between northern business interests and the Southern planter elite.[175] To Justice Bradley, a key problem facing the nation in the 1870s was the need to "restore Southern labor to a normal condition" of cost-controlled manual labor.[176]

In light of his concerns about newly freed Black laborers disrupting the Southern economy, Justice Bradley's rationale for the *Cruikshank* federal rights-enforcement apparatus makes sense.[177] In this way, Justice Bradley prefigured the corporate takeover of the Republican Party, which was completed by the 1890s.[178] *Cruikshank* can be understood as articulating a means of potentially vigorous rights enforcement designed to be as unintrusive as possible to the prevailing social order.

These considerations also shed light on the Court's decision to require the thresholds of state inaction and racial intent to be met at the time of indictment for Equal Protection violations.[179] The *Cruikshank* rights-enforcement edifice was designed to discourage federal intervention into the daily lives of Black Americans in the South. The prohibition on applying the Equal Protection Clause to "ordinary

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172. *Id.* at 603 (documenting how the economic challenges of the 1870s undermined centrist white support for Reconstruction).

173. Pope, *supra* note 99, at 418.

174. *Id.*; JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEOWNERS 180–89 (1983).

175. *See* Pope, *supra* note 99, at 420.

176. *See id.* at 419 (citing Letter from Joseph P. Bradley to Carry Bradley 3 (Apr. 30, 1867) (on file with the New Jersey Historical Society)).

177. *See id.*; *see generally* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874). ``

178. BRANDWEIN, *supra* note 10, at 184; *see generally* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985).

179. *Cruikshank*, 25 F. Cas. at 710–12.

crimes" is designed to limit the extent of federal resistance against the reassertion of labor control by the planter elite in the South.[180] Regardless of how onerous the pleading requirements for demonstrating racial motivation and a lack of state remedy were meant to be, courts typically imposed requirements prosecutors failed to meet "in the overwhelming majority of cases, including *Cruikshank* itself."[181]

In contrast to Equal Protection prosecutions, prosecutions based on the Fifteenth Amendment did not require a preliminary showing that the state committed or failed to correct a violation because the *Cruikshank* Court determined that it was a created right.[182] Considering the limited resources the federal government was willing to devote to rights enforcement after the Panic of 1873, the lowered standard for bringing indictments under the Fifteenth Amendment as compared to the Equal Protection Clause proved attractive to federal prosecutors.[183] In the 1870s, it was "clear that the protection of the [B]lack electorate and the success of the Republican Party were so dependent on each other that it is impossible to separate them."[184] Elections were decided by razor-thin margins, prompting increased reliance on Fifteenth Amendment prosecutions to secure additional Black votes, which at the time were overwhelmingly cast for the Republican candidates.[185]

At this inflection point in the history of Reconstruction, *Cruikshank* reflects a judiciary hedging its bets. Republican support for Reconstruction was wavering, and it was unclear whether the party would continue to expend the costs of rights enforcement.[186] Further, Justice Bradley's concerns about labor control in the South spawned sympathies towards the partially displaced Southern planter elite.[187]

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180. *But see* BRANDWEIN, *supra* note 10, at 152 (arguing that the state-neglect and racial-predicate showings are not onerous for federal prosecutors to make). *See also Charge to Grand Jury—Civil Rights Act*, 30 F. Cas 1005, 1007 (C.C.W.D. Tenn. 1875) (No. 18,260) (instructing the jury that a racial motive is well-pleaded only with proof the perpetrators acted "solely on account of race").

181. Pope, *supra* note 99, at 429.

182. *Cruikshank*, 25 F. Cas. at 712.

183. *See id at* 713 (setting a lower barrier to prosecution for Fifteenth Amendment claims as opposed to Equal Protection claims, as Fifteenth Amendment claims do not first require a showing that the state failed to act).

184. WILLIAMS, *supra* note 48, at 23.

185. *See* BRANDWEIN, *supra* note 10, at 141–42.

186. FONER, *supra* note 6, at 556.

187. Pope, *supra* note 99, at 419–20.

The *Cruikshank* rights-enforcement scheme threaded the needle of these concerns. On the one hand, it left open the possibility of federal rights enforcement for a hypothetical Republican faction to continue to pursue should popular support for Reconstruction rejuvenate.[188] On the other hand, the rights-enforcement scheme itself prompted confusion for both Republicans and Democrats.[189] This sense of confusion directly contributed to less rights enforcement, as prosecutors were reluctant to pursue cases that they were unsure they could win.[190]

The practical outcome of releasing notorious Klan members was a signal to the Radical Republican faction dedicated to rights enforcement that they did not have an ally in the Court. It also opened a renewed push for what Justice Bradley referred to as the "normal condition" for Southern labor, which was antithetical to wage labor and aligned with northern business interests.[191] A federal government willing to, at least in theory, protect Black voting rights but not the Black lives who were killed in the Colfax massacre is an odd incongruity.[192] This policy choice is best explained by the centrist Republican desire to obtain votes in the South without upending the prevailing social order.

The *Cruikshank* rights-enforcement edifice served opponents of multiracial democracy in America but perhaps not in the way conventionally imagined. Because *Cruikshank* helped remove perennial federal involvement in the daily lives of Black Americans, Black social rights were never on the table.[193] The convergence of civil and political rights in the Court's jurisprudence during this time never occurred with social rights, in part because of the restraints placed on the federal government's ability to prosecute "ordinary crimes."[194] Unsurprisingly, the Court formally closed off the constitutional pathways to

188. *See generally Cruikshank*, 25 F. Cas. at 710–15 (explaining how federal prosecutors should craft indictments under the Fourteenth and Fifteenth Amendments).

189. *See* BRANDWEIN, *supra* note 10, at 130–31.

190. *See* Pope, *supra* note 99, at 415 (demonstrating that rates of conviction in southern civil rights prosecutions fell from 36–49% in 1871–1873 to less than 10% after 1874).

191. *Id.* at 419–20.

192. *See* FONER, *supra* note 1, at 129–30, 132–34 (documenting how Black political rights, unlike Black civil rights, were not initially considered essential).

193. *Id*.

194. United States v. Cruikshank, 25 F. Cas. 707, 711–12 (C.C.D. La. 1874).

enforcement of Black social rights in the *Civil Rights Cases* and *Plessy*, which occurred in the years after *Cruikshank*. [195]

III. FEDERAL RIGHTS ENFORCEMENT AFTER *CRUIKSHANK*

So far, we have established that *Cruikshank* provided a somewhat coherent doctrinal federal rights-enforcement framework rooted in a nineteenth-century conception of the typology of rights.[196] The *Cruikshank* rights-enforcement edifice was in tension with the text of the Reconstruction Amendments, their demonstrable legislative purpose, and prior judicial interpretations of Congressional power.[197] Nevertheless, the Court overlooked these inconsistencies due to its desire to judicially curate a federal rights-enforcement regime in the South.[198]

Part IV of this article explores the aftermath of *Cruikshank,* arguing that the Supreme Court continued to incentivize federal prosecutors to target voting rights infringements over other rights violations. The Court's most notable contribution to that end pertains to Article I, Section 4 of the Constitution—the "times, places, and manner" clause.[199] As we will see, this jurisprudence was designed to reinforce the ability of the federal government to protect federal elections.[200]

The Supreme Court committed to this theory of federal enforcement of voting rights during the 1870s and 1880s.[201] However, the Court would unravel even the limited rights-enforcement blueprint that it articulated in *Cruikshank* during the 1890s and early 1900s.[202] The dismantlement of the *Cruikshank* voting rights edifice was carried

195. The Civil Rights Cases, 109 U.S. 3, 24–26 (1883); *Plessy*, 163 U.S. at 542–44.

196. *See generally Cruikshank*, 25 F. Cas. at 710–15 (outlining the requirements of a federal enforcement scheme).

197. *See, e.g.*, BRANDWEIN, *supra* note 10, at 120.

198. *Id.* at 118.

199. U.S. CONST. art. I, § 4.

200. BRANDWEIN, *supra* note 10, at 143.

201. *See generally* Ex parte Siebold, 100 U.S. 371, 390–91, 25 L. Ed. 717 (1879); *see also* United States v. Butler, 25 Fed. Cas. 213, 226 (No. 14,700) (C.C.D.S.C. 1877) (issued by the federal Circuit Court for the District of South Carolina).

202. *See, e.g.*, James v. Bowman, 190 U.S. 127 (1903).

out in a complex series of cases that leaves a murky legacy for the Court's Reconstruction-era rights-enforcement jurisprudence.[203]

A. *The Court Operationalizes Article I, Section 4*

In the years following *Cruikshank*, the Court funneled voting rights infringements into two buckets: one resting on Article I, Section 4 for national elections; and the other on the Fifteenth Amendment for state and local elections.[204] Critically, neither of these paths of rights enforcement contained a state-action requirement because both emanated from created rights.[205] As we will see, the lack of a state-action requirement greatly enhanced their desirability as bases for rights enforcement for federal prosecutors as compared to Equal Protection claims.[206]

United States v. Butler (1877), a circuit court opinion written by Chief Justice Morrison Waite, neatly implemented the voting rights-enforcement scheme announced in *Cruikshank* and also operationalized Article I, Section 4 to permit federal oversight of national elections.[207] The *Butler* case arose in Ellenton, South Carolina, when a white mob sought to disrupt the presidential election of 1876.[208] The mob killed dozens in another example of violent white supremacy in the South.[209] The five-count indictment proceeded under Article I, Section 4 and the Fifteenth Amendment.[210] A racial motive was alleged only in the counts rooted in the Fifteenth Amendment, as *Cruikshank* required.[211]

The *Butler* court approved the federal indictment, demonstrating that the voting rights-enforcement theory announced in *Cruikshank* provided a sufficient theoretical basis for federal prosecutors to bring cases.[212] Nevertheless, even with clear evidence of the mob's guilt, the

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203. *See, e.g.*, *Siebold*, 100 U.S. at 371; *Butler*, 25 Fed. Cas. at 213; *James*, 190 U.S. at 127.

204. *Siebold*, 100 U.S. at 383; United States v. Cruikshank, 25 F. Cas. 707, 712–13 (C.C.D. La. 1874).

205. *See generally Cruikshank*, 25 F. Cas. at 710–15 (describing the federal enforcement scheme in the context of created rights).

206. *Id.* at 713.

207. *Butler*, 25 Fed. Cas. at 224.

208. *Id.* at 221.

209. BRANDWEIN, *supra* note 10, at 145.

210. *Id.*; *Butler*, 25 Fed. Cas. at 223–24.

211. BRANDWEIN, *supra* note 10, at 146.

212. *Butler*, 25 F. Cas. at 226.

jury deadlocked.[213] Despite the result at trial, *Butler* shows that the *Cruikshank* blueprint made federal prosecutions under the Fifteenth Amendment theoretically possible even if actual convictions remained elusive.

In *Ex parte Siebold* (1879), an opinion written by Justice Bradley, the Court "insisted on a national police power" to protect the right to vote in federal elections.[214] *Ex parte Siebold* was a case involving white poll workers who stuffed ballot boxes to rig an 1878 Congressional election.[215] The Court authorized plenary federal enforcement of national voting rights on Article I, Section 4 grounds without requiring a racial predicate or a showing of state action.[216]

In the early 1880s, the possibilities for federal voting rights enforcement reached their zenith.[217] By that time, the Court had provided a theoretical basis for the federal government to bring voting rights prosecutions that was somewhat coherent.[218] And prosecutors did not have to first allege a deprivation on account of race before bringing charges of interference with a federal election under Article I, Section 4.[219] *Butler* and *Siebold* demonstrate that prosecutors at least occasionally used the Court's voting rights enforcement theories to craft indictments.[220]

Despite the favorable treatment that voting rights enforcement received from the Court, the South became solidified as a Democratic Party stronghold.[221] Thus, from the perspective of national Republicans, there was little reason to persist in federal voting rights prosecutions.[222] Accordingly, the Court foreclosed many of the possibilities of rights

213. BRANDWEIN, *supra* note 10, at 147.

214. *Id.* at 148.

215. Ex parte Siebold, 100 U.S. 371, 378 (1879).

216. *Id.* at 395.

217. J. Morgan Kousser, *Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 141 (Bernard Grofman & Chandler Davidson eds., 1992) (documenting that two thirds of adult Black men voted in the Presidential election of 1880 and over half of Black men voted in Southern gubernatorial races during the 1890s).

218. United States v. Butler, 25 Fed. Cas. 213, 226 (C.C.D.S.C. 1877).

219. *See id.* at 225–26.

220. Some historians argue federal prosecutors sought to enforce voting rights violations for political reasons, not because enforcing them is easier. *See, e.g.*, BRANDWEIN, *supra* note 10, at 151–52.

221. *See, e.g.*, DEWEY W. GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY 24–25 (1992).

222. *See id.* at 10.

enforcement in the South entirely in the early years of the twentieth century.[223] This article emphasizes that the judicial abandonment of rights enforcement was not linear. Indeed, rights-friendly pronouncements from the judiciary persisted in some areas and receded in others.

B. *Later Courts Unravel the* Cruickshank *Rights Schema*

To the extent the Supreme Court preserved a plausible avenue of federal rights enforcement in *Cruikshank*, the Court mostly abandoned this framework in the ensuing decades.[224] In short, the Republican Party gave up on the South.[225] The Republican Party devoted its political capital to promoting corporate business interests rather than Reconstruction.[226] Large corporations, buoyed by the completion of a national railroad and telegraph lines, asserted full control over the Republican Party.[227] Democrats successfully repealed most voting rights laws by 1894, in large part because Republicans did not attempt to stop them.[228] The Democrats established one-party rule in the South and enforced it through "unprecedented" violence.[229]

Judicial abandonment of the Reconstruction project was piecemeal, targeting social, political, and then, civil rights.[230] The Court dealt a devastating blow to what remained of the concept of social rights when it approved of *de jure* segregation in *Plessy v. Ferguson* (1896).[231] Dealing explicitly with the civil/political/social trifurcation of rights, the *Plessy* Court concluded that the Fourteenth Amendment "could not have been intended . . . to enforce social, as distinguished from political, equality."[232] In the *Civil Rights Cases*, the Court had denied a remedy for private discrimination in public accommodations on the grounds that the Constitution did not protect "social rights"; now, the Court

223. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).

224. *See, e.g.*, *id.*; *James*, 190 U.S. at 136–39.

225. BRANDWEIN, *supra* note 10, at 184.

226. As discussed *infra* part I, Justice Bradley in some ways prefigured this Republican Party realignment towards business in his concern for labor control in the South.

227. LAMOREAUX, *supra* note 178, at 159–60.

228. BRANDWEIN, *supra* note 10, at 184–85.

229. *Id.* at 185 (documenting the rise in lynching rates during the 1890s).

230. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).; James v. Bowman, 190 U.S. 127, 136–39 (1903).

231. *Plessy*, 163 U.S. at 550–52.

232. *Id.* at 544.

legitimized *de jure* segregation in *Plessy*.[233] The critical move of *Plessy*, building on the *Civil Rights Cases*, was formally rendering the boundary between civil/political rights and social rights "impermeable."[234] This impermeability became a fully institutionalized feature of post-Reconstruction American society in the wake of *Plessy*.[235]

As we have seen, *Cruikshank* and its progeny ensured that support for social rights for Black Americans could never gain a foothold.[236] The possibility of such social rights was a threat to the concept of white purity, a concept buttressed by the rise of social Darwinism in the 1890s.[237] In *Plessy*, the Court gave its blessing to a formal and rigid racial caste system designed to eliminate any possibility of social rights for Black Americans.[238]

The process of reasserting *de jure* white supremacy in the South culminated in the 1890s and early 1900s, when every former Confederate state held new constitutional conventions with the express goal of reducing voting rights.[239] In *Giles v. Harris* (1903), the

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233. BRANDWEIN, *supra* note 10, at 187.

234. *Id.* (citing *Plessy*, 163 U.S. at 551–52).

235. *Id.*

236. This article argues that by limiting federal involvement in rights enforcement in the South, the moderate Republican faction prevented their great fear of broad support for Black social rights from coming to fruition. For additional discussion of how consistent federal involvement can transform state and local attitudes, *see* THE FEDERALIST No. 27 (Alexander Hamilton) ("[T]he more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life; the more it is familiarized to their sight and to their feelings; the further it enters into those objects which touch the most sensible cords, and put in motion the most active springs of the human heart; the greater will be the probability that it will conciliate the respect and attachment of the community . . . . A government continually at a distance and out of sight, can hardly be expected to interest the sensations of the people. The inference is, that the authority of the Union, and the affections of the citizens towards it, will be strengthened rather than weakened by its extension to what are called matters of internal concern…").

237. "Social Darwinism" refers to "the theory that human groups and races are subject to the same laws of natural selection as Charles Darwin perceived in plants and animals in nature." Social Darwinism, ENCYCLOPEDIA BRITANNICA (last updated Aug. 18, 2024), https://www.britannica.com/topic/Social-Darwinism (last visited March 31, 2025).

238. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).

239. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONSTITUTIONAL COMMENTARY 295, 297, 301 (2000) (arguing that widespread constitutional disenfranchisement in the South "cast disenfranchisement into the most endurable and symbolically significant legal form"). Indeed, the powerful disenfranchising effect of the new constitutions can be seen in Louisiana, the site of the Colfax massacre. In 1896 there were 130,334 Black voters on the registration rolls. By 1900, two years after the

Supreme Court tacitly sanctioned these new state constitutions by announcing it would not supervise state elections, even if race-based voting rights violations were alleged.[240] In *Giles*, Black plaintiffs sued under the Fourteenth and Fifteenth Amendments to invalidate certain sections of the new Alabama Constitution that permitted Alabama election officials to remove the names of Black citizens from voter registration lists.[241] Writing for the Court, Justice Oliver Wendell Holmes explained that the enormous opposition to Black voting rights from white citizens prevented the Court from responding to the violations.[242] Justice Holmes explained that a remedy for a "great political wrong, if done, as alleged, by the people of a state and the state itself, must be given to them by the legislative and political department of the government."[243] Justice Holmes further explained that the Court was justified in its non-responsiveness because if the Court agreed that Alabama's voter rolls were unlawful, "how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"[244]

Giles overturned a key component of *Cruikshank*.[245] Under *Cruikshank*, complaints under the Fifteenth Amendment that validly assert a race-based voting rights violation in state elections are federally enforceable.[246] Fearing any ruling to the contrary would go unenforced by the political branches, Justice Holmes dispensed with this aspect of the *Cruikshank* rights-enforcement theory and directed the plaintiffs to seek a remedy from the legislature.[247]

Giles permitted the virtual elimination of Black citizens from political participation in the South.[248] *Giles* was the culmination of "several years of self-conscious construction and organized

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ratification of the new state Constitution, there were only 5320. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 237 (1988).

240. *See generally* Giles v. Harris, 189 U.S. 475 (1903).

241. *Id*.

242. *Id.* at 488.

243. *Id.*

244. *Id.* at 486; Pildes, *supra* note 239, at 306 (arguing it is "unlikely" Holmes genuinely believed this).

245. *Compare Giles*, 189 U.S. at 486, *with* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874).`

246. *Cruikshank*, 25 F. Cas. at 710–15.

247. *Giles*, 189 U.S. at 486.

248. Pildes, *supra* note 240, at 306.

mobilization of a militarized white supremacy . . . to enable white 'redemption' of the South."[249] *Giles* was the bargain the Court made with the militant white supremacists in the South and disinterested Republican business interests in the North. The Court washed its hands of whatever doctrinal commitment to voting rights it had made in *Cruikshank* and *Ex Parte Siebold* for fear of having any pro-rights-enforcement proclamations going unheeded.[250] The role of judicial decision-making under uncertainty, especially in a period of such volatility and violence, looms large.[251]

In 1905, two years after *Giles*, Congress had the opportunity to act on the Court's delegation of responsibility for the enforcement of voting rights in the South.[252] The result of the 1902 House election for South Carolina's Seventh District was disputed.[253] The losing candidate, Alexander D. Dantzler, complained that the prevailing candidate, Asbury Francis Lever, was illegitimate because the state's new constitution disenfranchised thousands of potential Black voters.[254] Rather than act on the express delegation that the Court extended to Congress to resolve these types of claims in *Giles*, the House Committee on Elections confirmed Lever's victory and declined to opine on Dantzler's constitutional claim on the grounds that such claims are the province of the judiciary.[255] Here, the Court and Congress rendered responsibility for voting rights enforcement an unhittable moving target, freely shifting to any branch of government other than the one currently being petitioned for it.

In addition to delegating responsibility for voting rights enforcement to Congress, the Court further unraveled *Cruikshank*'s

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249. *Id.* at 301.

250. *Id.* at 307 (arguing that the Republican party, led by President William McKinley, was focused on maximizing material prosperity through northern business ventures in the South and did not want that pursuit deterred by a focus on Black rights). The historian William A. Dunning, who was the leading authority on Reconstruction during the first half of the twentieth century, argued that U.S. foreign policy interests in the Philippines, Puerto Rico, and Cuba were best served through widespread legal acknowledgement of the "fact of racial inequality." William A. Dunning, *The Undoing of Reconstruction*, LXXXVIII ATLANTIC MONTHLY 437, 449 (Oct. 1901).

251. *See* BRANDWEIN, *supra* note 10, at 187.

252. *See* H.R. Rep. No. 58-1740 (1904).

253. *Id*. at 1.

254. *Id*. at 2.

255. *Id.* at 3; Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—and Beyond*, 57 MISS. L.J. 591, 638–39 (1987).

Fifteenth Amendment rights-enforcement avenue in *James v. Bowman* (1903).[256] In *James*, the Court considered an indictment charging two white men with intimidating Black voters in the 1898 Kentucky Congressional election.[257] *James* overruled *Cruikshank*'s finding that Fifteenth Amendment challenges did not require a state-action showing.[258] In doing so, *James* revived the interpretation of the Fifteenth Amendment made by the *Petersburg* court in 1874.[259] After *James*, prosecutions under the Fifteenth Amendment required state action and racial predicates, dispensing completely with the Court's analysis in *Cruikshank*.[260] Some historians have argued that *James*—not the *Civil Rights Cases*—may be the true genesis of the modern conception of the state-action doctrine.[261] The *James* Court operated with a modern conception of the state-action doctrine and retroactively cited the *Civil Rights Cases* and even *Cruikshank* for approval.[262] As discussed previously, *Cruikshank* and the *Civil Rights Cases* were operating under an earlier conception of the state-action doctrine, and the *James* Court, writing decades later, imposed its understanding of the state-action doctrine onto these prior decisions.[263]

Finally, in *Hodges v. United States* (1906), the Court took an axe to the core of the Civil Rights Act of 1866, which had guaranteed Black Americans basic rights of citizenship, such as the right to enter into contracts and file lawsuits.[264] The *Hodges* Court considered the

256. James v. Bowman, 190 U.S. 127, 127 (1903).

257. *Id.*

258. *James* "presents an internally contradictory use of the state action cases" because it simultaneously resurrects the 'no state shall' language from the text of the Fifteenth Amendment and additionally relies on the indictment's failure to specify a racial motive. This second rationale suggests the presence of a state-failure-to-remedy carve-out, which gets glossed over in the decision in favor of adhering to the "no-state-shall" language of the Amendment. BRANDWEIN, *supra* note 10, at 189.

259. *See* United States v. Petersburg Judges of Election, 27 F. Cas. 506, 509 (C.C.E.D. Va. 1874).

260. *James*, 190 U.S. at 136.

261. *See, e.g.,* Ellen D. Katz, *Enforcing the Fifteenth Amendment, in* OXFORD HANDBOOKS IN LAW 7 (M. Tushnet et al. eds., 2015) (arguing that after *James*, the "theory of a special federal power to ensure the proper functioning of the state political process was gone").

262. *James*, 190 U.S. at 136.

263. *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 13 (1999) (demonstrating how subjective narrative construction, such as the *James* Court's retroactive revision of the nature of state action, can turn into opaque "institutional memory").

264. Hodges v. United States, 203 U.S. 1 (1906).

indictments of a white mob that threatened Black laborers into leaving their place of employment.[265] The indictments were made under the Thirteenth Amendment and alleged that the Black workers were denied their rights to contract and work as free laborers in violation of the Civil Rights Act of 1866.[266] In dismissing the indictments, the Court narrowly defined a Thirteenth Amendment violation as the "state of entire subjugation of one person to the will of another."[267] Thus, disrupting the freedom of contract would no longer be considered among the "badges and incidents" of slavery.[268] The Civil Rights Act of 1866 would therefore be essentially powerless to protect Black citizens from interference with their basic civil rights.

It was not a coincidence that Black political participation began to decline in the 1890s.[269] The decline corresponds predictably to judicial pronouncements in *Plessy* and *Giles* that were oppositional to Black rights.[270] This decline can be tracked empirically, as seen in the steep decrease in Black citizens on voter rolls after the ratification of the new state constitutions.[271] Nevertheless, the Court's abandonment of its prior rights-enforcement theories did not always unfold in a linear fashion.

Guinn v. United States (1915) serves as an example of the non-linear nature of the judicial abandonment of federal rights enforcement.[272] In *Guinn*, the Court struck down Oklahoma's use of the "grandfather clause," which extended the right to vote only to those

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265. *Id.* at 1.

266. *Id.* at 20 (Harlan, J., dissenting).

267. *Id.* at 17. The original conception of the Thirteenth Amendment included the rights conferred in the Civil Rights Act. To hold otherwise would render emancipation meaningless. *See* FONER, *supra* note 6, at 244.

268. The Court forced this result by limiting the possible legal bases of the Civil Rights Act of 1866 exclusively to the Thirteenth Amendment. If the Court had interpreted the Thirteenth Amendment to include contract rights, it would have resulted in a national police power over contract rights, which the Court was unwilling to accept. Pamela Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 784–85 (2005) (drawing parallels between the Court's hands-off approach to contract rights in *Hodges* and *Lochner v. New York*); *see* BRANDWEIN, *supra* note 10, at 191.

269. VALELLY, *supra* note 98, at 134–39 (documenting how voter rolls dropped precipitously in southern states during the 1880s and 1890s as Black voters were systematically disenfranchised).

270. Plessy v Ferguson, 163 U.S. 537, 551 (1896); Giles v. Harris, 189 U.S. 475. 486 (1903).

271. *See* FRANKLIN & MOSS, *supra* note 239, at 237; VALELLY, *supra* note 98, at 134–39.

272. Guinn v. United States, 238 U.S. 347 (1915).

whose grandfathers had been eligible to vote.[273] Justice Holmes joined the unanimous majority in this decision, which is in some tension with his opinion in *Giles*.[274] While *Giles* stood for the proposition of judicial apathy to the violation of Black voting rights, it contained nothing doctrinally that could prevent a subsequent Court from issuing an opinion like *Guinn*.[275] Thus, *Guinn* complicates a linear narrative of definitive judicial abandonment.[276] *Giles* and *Guinn* reveal a Court more concerned with satisfying contemporaneous political exigencies than constructing a doctrinally stable rights-enforcement jurisprudence.[277]

CONCLUSION

"Rarely has a community invested so many hopes in politics as did Blacks during Radical Reconstruction."[278] This article has sought to understand the Court's rights-enforcement jurisprudence as it existed during the Reconstruction period. Irrespective of the practical effect on the ground, this article has argued that the *Cruikshank* decision presented an articulable theory of rights enforcement, rooted uneasily in nineteenth-century concepts of the character of rights.[279] In seeking out the rationale of decision-makers such as Justice Bradley, an evolved and technical jurisprudence can be traced. This rationale demonstrates the judiciary's desire to adapt to changing circumstances during an acutely volatile political period.

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273. *Id.* at 358 (proclaiming such provisions "repugnant to the provisions of the Fifteenth Amendment").

274. *Id.*

275. *See* Pildes, *supra* note 239, at 298 (arguing that *Guinn* is distinct from *Giles* because in *Guinn* the Court could simply invalidate the grandfather-clause provisions without needing to continuously monitor the registration process, which it would have needed to do had it ruled the other way in *Giles*).

276. *See supra* Part IIC (arguing that *Cruikshank* was, in part, a judiciary hedging its bets as to what the political branches were going to do next about Reconstruction, placing a thumb on the scale against it but nevertheless keeping an avenue open if the political branches ultimately wanted to see it through); Pildes, *supra* note 239, at 298 (arguing that the *Guinn* Court felt comfortable making the rights-friendly pronouncement in part because it was supported by the President at the time—a clear example of a contemporaneous political exigency affecting the development of caselaw).

277. Pildes, *supra* note 239, at 298.

278. FONER, *supra* note 6, at 291.

279. *See generally* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874).

These constitutional structures are further shaped by decision-makers who are attending to their own interests and theories. A key example is the outsized influence the judiciary conferred on voting rights claims compared to Equal Protection claims.[280] In the realm of voting rights enforcement during Reconstruction and its aftermath, the structure of the law was set partly to meet the contemporaneous policy goal of building the Republican Party in the South during Reconstruction.[281] The way this voting rights structure was established, and quickly toppled, is highly informative of how constitutional reasoning might be shaped by uncertain and rapidly changing circumstances. It indicates that doctrinal frameworks can be strikingly malleable, especially when a court is dealing with relatively new and expansive laws.

This article emphasized how uncertainty about the political future of Reconstruction influenced the jurisprudence of the era. The contemporaneous concerns of the authors of Reconstruction-era opinions—such as for labor control in the South, the state of the economy, and the results of mid-term and presidential elections during the 1870s and 1880s—seem to have greatly influenced the Court's constitutional reasoning.

The general tendency to treat this highly nuanced and contingent body of jurisprudence as an undisguised and linear attempt to undermine Reconstruction has produced a tremendous amount of misunderstanding.[282] This misunderstanding is not costless. Narratives formed decades later about bodies of jurisprudence can justify themselves through reading those narratives anachronistically onto earlier periods and jurists. This likely occurred when the *James* (1903) Court expressly read its modern formulation of the state-action doctrine retroactively onto *Cruikshank* (1875) and the *Civil Rights Cases* (1883) in a way that likely would have been alien at the time those earlier opinions were issued.[283] Accordingly, this article has centered its discussion of Reconstruction-era jurisprudence on what the decision-makers understood at the time and how these decisions were received by federal prosecutors in their pursuit of rights enforcement.

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280. *Id.* (finding that the federal government could directly enforce Fifteenth Amendment claims but only had corrective power over Equal Protection claims).

281. *See, e.g.*, *supra* part II.

282. BRANDWEIN, *supra* note 10, at 1.

283. James v. Bowman, 190 U.S. 127, 136–38 (1903).

ABORTION RIGHTS, FUGITIVES FROM SLAVERY AND THE NETWORKS THAT SUPPORT THEM*

REBECCA E. ZIETLOW**

The United States Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health overruled decades of reproduction rights protections, established in Roe v. Wade. Dobbs has resulted in a new legal landscape, where the scope of people's ability to exercise reproductive autonomy depends on the state in which they live, and their ability to travel across state borders. Without the precedent of Roe to stop them, states have begun enacting severe restrictions on abortion rights. People seeking reproductive rights today will play a leading role in shaping those rights, not by filing lawsuits but through their "ordinary acts," crossing state borders in search of abortions.

This post-Dobbs landscape is reminiscent of the pre-Civil War era, when fugitives from slavery crossed state borders in search of their freedom. Fugitives from slavery could not have succeeded without the help of their allies on the ground, who engaged in civil disobedience and provided clandestine support, aiding fugitives in their travels through the Underground Railroad.

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People seeking abortions, like fugitives from slavery before them, are engaged in what I call "transgressive constitutionalism," making rights claims with their bodies and their actions. Like fugitives from slavery, people seeking abortions are transgressing not only state borders, but also the line between legality and illegality, to enforce a constitution of liberation, bodily autonomy, freedom of movement, and freedom of expression.

INTRODUCTION

In June 2022, the United States Supreme Court issued a groundbreaking ruling in *Dobbs v. Jackson Women's Health Organization*, holding the United States Constitution does not guarantee the right to have an abortion.[1] The *Dobbs* ruling was uniquely disruptive because for fifty years preceding the ruling, the Court had consistently held that such a constitutional right existed.[2] In its 1973 decision, *Roe v. Wade*, the Court held that the right to choose an abortion was a fundamental right protected by the Fourteenth Amendment.[3] Under *Roe* and its progeny, the government could regulate abortions and impose

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).
2. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).
3. *Id.*

restrictions.[4] Still, relying on *Roe*, courts struck down numerous restrictions that states attempted to impose on reproductive liberty.[5] Plaintiff Jane Roe, exercised her rights pursuant to what constitutional scholars generally consider the standard form of rights enforcement – she filed a lawsuit in federal court to enforce Fourteenth Amendment based rights against state infringement.[6] After *Dobbs*, however, federal courts no longer serve as the primary arena for enforcement of abortion rights.[7] Without the precedent of *Roe* and progeny to stop them, over half of states in this country have imposed severe restrictions or outright bans on abortion.[8] We are now living in a new legal landscape, in which the scope of people's rights to reproductive autonomy depends on the state in which they live and their willingness to travel to cross stateup borders to assert their rights.[9] The Court's ruling in *Dobbs* has unleashed an unprecedented wave of open and hidden abortion rights activism.[10] Responding to the loss of federally protected fundamental, abortion rights activists are engaging in political action, practical support and clandestine activity to aid people attempting to assert their reproductive liberty.[11]

In the post-*Dobbs* legal landscape, people seeking to exercise their reproductive rights will play a leading role in shaping those rights,

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4. *See id.* at 164 (outlining a trimester approach under which abortions could be restricted in the second trimester and outlawed in the third trimester only with exceptions to preserve the health and life of the pregnant person); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992) (prohibiting states from imposing "undue burdens" on abortions prior to viability, and could only ban after viability with exceptions to preserve the health and life of the pregnant person); Whole Women's Health v. Hellerstedt, 579 U.S. 582, 624 (2016) (holding that states cannot place requirements on abortion providers that impose an "undue burden").

5. *See* e.g., *Casey*, 505 U.S. at 879 (reaffirming Roe and striking down restrictions on abortion imposed by the state of Pennsylvania); *Hellerstedt*, 579 U.S. at 591 (2016) (striking down Texas restrictions on abortion clinics). *But see* Gonzales v. Carhart, 550 U.S. 124, 166–67 (2007) (upholding the Partial Birth Abortion Act of 2003).

6. *See* REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 130 (2006) [hereinafter ENFORCING EQUALITY].

7. Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court's Decision to Overturn Roe Leads to Bans, Confusion and Chaos,* GUTTMACHER (Dec. 2022)., https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads

8. *Interactive Map: US Abortion Access After Roe*, GUTTMACHER, https://states.guttmacher.org/policies/ (last updated Feb. 12, 2025).

9. *See* David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 9–11 (2022).

10. *See infra* notes 143-189 and accompanying text. It is important to note that activists in the Reproductive Liberty movement have engaged in underground advocacy for years, mostly on behalf of women of color who lacked access under the *Roe* regime.

11. *Id*.

not by filing lawsuits but through their "ordinary acts,"[12] crossing state borders in search of abortions.[13] The success of those seeking to enforce their rights will depend on their allies on the ground who assist them.[14] Many people are obtaining abortions using medication that is shipped to them across state lines.[15] Some activists are risking criminal and civil penalties by helping people cross state lines to obtain abortions.[16] In abortion friendly states, officials are enacting laws to protect abortion seekers, and those who aid them, from criminal prosecution.[17] As activist Cazembe Murphy Jackson observed, "I think activism is evolving post *Roe*. There are a lot of trainings for folks to become abortion doulas, to assist people getting abortions, raise money, drive them to clinics . . . I think we're fired up."[18] These constitutional activists transgress not only state borders, but also the line between legal and illegal activity, placing themselves at the center of constitutional controversy. They are engaged in a crucial network of support for people seeking reproductive liberty.

The post-*Dobbs* landscape is reminiscent of another time in our history when conflicts over human rights and moral values occurred over state lines – the pre-Civil War era, when fugitives from slavery crossed state borders in search of the right to be free.[19] By fleeing from enslavement and crossing state borders, they sought what Hanna Arendt

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12. MARTHA S. JONES, BIRTHRIGHT CITIZENS 101 (2018) (describing how free Black people in Antebellum America asserted their rights by exercising their rights).

13. *See* Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES, Oct. 4, 2022, at 26; *see also* GUTTMACHER, *supra* note 8

14. *See What it's Like to Fight for Abortion Rights, Post-Roe,* ACLU NEWS & COMMENTARY (Jan. 30, 2023) https://www.aclu.org/news/reproductive-freedom/what-its-like-to-fight-for-abortion-rights-post-roe (describing the experiences of abortion rights activists); *see also* Bazelon, *supra* note 14, at 26; *see generally* Ronda Kaysen, *How Volunteers Open Their Homes to Women Seeking Abortions,* N.Y. TIMES (Oct. 15, 2022), https://www.nytimes.com/2022/10/15/realestate/abortion-volunteer-homes.html.

15. *See* Cohen, Donley, & Rebouché, *supra* note 9 at 6.

16. *See* Caroline Kitchener, *Covert Network Provides Pills for Thousands of Abortions in U.S. Post Roe*, WASH. POST. (Oct. 18, 2022), https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/.

17. Scott Wilson, *Democratic Cities in Republican States Seek Ways Around Abortion Bans*, WASH. POST. (July 13, 2022), https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/; Michelle Goldberg, Opinion, *The Next Phase of the Abortion Fight Is Happening Right Now in New York*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/opinion/new-york-abortion-rights-legislation.html.

18. ACLU NEWS & COMMENTARY, *supra* note 14.

19. *See* Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives From Slavery*, 97 NOTRE DAME L. REV. 1375, 1375 (2022) [hereinafter *Freedom Seekers*].

called the "right to have rights" – to be treated as human beings.[20] Fugitives from slavery were supported by activists on the ground, who openly engaged in the anti-slavery movement and provided both legal and political support for people who were captured and accused of being fugitives.[21] States enacted laws protecting those accused of being fugitives, and local officials resisted enforcement of fugitive slave laws.[22] Fugitives from slavery themselves asserted their rights by crossing state borders, but they could not have succeeded without the help of their allies on the ground who engaged in civil disobedience and provided clandestine support, aiding fugitives in their travels with the Underground Railroad.[23]

People seeking abortions, like fugitives from slavery before them, are engaged in what I call "transgressive constitutionalism," making rights claims with their bodies and their actions.[24] Like fugitives from slavery, people seeking abortions are transgressing not only state borders, but also the line between criminal and non-criminal activity, to assert their right to bodily autonomy. Most of these people do not consider themselves to be constitutional activists. Rather, they are desperate and seeking help. Nonetheless, they are engaging in constitutionalism. By asserting the right to bodily autonomy, their very acts are rights claims in the tradition of civil rights and labor activists engaging in civil disobedience.[25] Fugitives from slavery and people seeking abortions are not performing in front of an audience but instead are often acting in secret to avoid civil and criminal penalties. However, their acts do send a message to an audience — a message of determination and resilience which inspires political activists who support them.

To be clear, the institution of chattel slavery was a uniquely dehumanizing and cruel institution that defies any analogy.[26] Enslaved people were deprived of any human rights for their entire lives.[27] By

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20. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296–97 (1951).

21. *See* Zietlow, *Freedom Seekers*, *supra* note 19, at 1399.

22. *See id.*

23. *See id.* at 1398–1400.

24. *Id.* at 1380.

25. *See* CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA 5 (2018).

26. *See* Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L. J. 89, 113 (2005).

27. *See id.* (observing that slavery in the United States "differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of slaves by their owners.")

contrast, people who are denied the right to an abortion suffer a temporary deprivation of liberty.[28] However, that deprivation of reproductive autonomy can endanger the life of the pregnant person and impact the rest of their lives.[29] It is also true that the deprivation of reproductive autonomy was a central component of the institution of slavery.[30] To this day, people who lack institutionalized power — disproportionately likely to be people of color and descendants of enslaved people — are more vulnerable to coercion and the deprivation of reproductive rights.[31]

Moreover, anti-abortion activists have long employed the analogy of slavery to advocate *against* abortion rights.[32] They argue that a fetus is like an enslaved person because, liked an enslaved person, a fetus lacks any human rights.[33] Anti-abortion activists have long analogized *Roe* to *Dred Scott v. Sanford*, the case in which the Court held that a slaveholder had a fundamental right to own an enslaved person.[34] Calling themselves "abortion abolitionists," anti-abortion activists today advocate recognition of fetal personhood.[35] The anti-abortion group, Americans United for Life, have drafted a blueprint for "An Executive Order to Restore Constitutional Rights to All Human Beings," urging the president to issue an executive order that would recognize a fetus as a

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28. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 487 (1990) ("[t]he injury inflicted on women by forced motherhood is lesser in degree than that inflicted on blacks by Antebellum slavery, since it is temporary and involves less than total control over the body . . . ").

29. *See* Kelsey Butler, *Abortion Restrictions Shrink Women's Income by 5%, Study Finds*, BLOOMBERG (Aug. 29, 2022), https://www.bloomberg.com/news/articles/2022-08-19/every-anti-abortion-restriction-shrinks-a-woman-s-income-by-5.

30. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 6 (1997); *see also* Bridgewater, *supra* note 27, at 113; Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022) ("Black women's sexual subordination and forced pregnancies were foundational to slavery."), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html?referringSource=articleShare.

31. *See* LORETTA ROSS & RICKIE SOLLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 13 (Univ. of Cal. Press 2017).

32. *See* JUSTIN BUCKLEY DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 58 (2014).

33. *Id.* at 61–62.

34. *Id.* at 68.

35. *See* Kristi Hamrick, *SFLAction Asks Pro-Life Americans to Encourage Minority Leader McConnell to Protect Infants from Their First Heartbeats*, STUDENTS FOR LIFE OF AM. (July 19, 2022), https://studentsforlife.org/2022/07/19/sflaction-asks-pro-life-americans-to-encourage-minority-leader-mcconnell-to-protect-infants-from-their-first-heartbeats/.

"preborn person" with rights under the Fourteenth Amendment.[36] They call their proposal the "Lincoln Proposal," arguing the executive order would represent a second Emancipation Proclamation.[37] If adopted, this measure based on the anti-abortion analogy to slavery would ban abortion nationwide.[38]

Regardless of whether the analogy between slavery and the lack of reproductive rights is persuasive, people seeking abortions today in over half of the states in our nation have an essential experience in common with enslaved people before them – the need to cross state borders to assert their fundamental right to bodily autonomy.[39] After *Dobbs*, people seeking abortions must also rely on means of constitutional activism that enslaved people seeking freedom relied on before them – using their own actions to assert their rights with help from activists on the ground, and relying on the political process to advocate for change.

Another parallel between people seeking abortions today and fugitives from slavery in the Antebellum era is the constitutional conflict that both movements engender. In the Antebellum era, fugitives from slavery provoked constitutional conflict over interstate comity and federalism, as well as the scope and existence of rights for enslaved and free Black people.[40] Like fugitives from slavery before them, people seeking abortions provoke disputes not only over the scope of their rights, but also between states with conflicting laws regulating abortions.[41] Abortion rights activists and their opponents are generating constitutional conflicts reminiscent of those in the Antebellum era, over interstate comity, federalism, and the scope and meaning of fundamental rights.[42] Scholars and commentators discussing the interstate conflicts engendered

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36. *See* Catherine Glenn Foster, Chad Pecknold, & Josh Craddock, *Lincoln Proposal: An Executive Order to Restore Constitutional Rights to All Human Beings*, AMS. UNITED FOR LIFE, 1 (Sep. 2021), https://aul.org/wp-content/uploads/2021/09/Lincoln-Proposal.pdf.

37. *Id.* at 5.

38. *See* Mary Ziegler, Opinion, *The Next Step in the Anti-Abortion Playbook is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html.

39. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 22–23.

40. *See* Zietlow, *Freedom Seekers,* supra note 19, at 1375.

41. *See* Cohen, Donley & Rebouché, *supra* note 9, at 7.

42. *See id.* at 7, 44.

by the *Dobbs* ruling have noted the parallels between the Antebellum era and today.[43]

Activists in the reproductive justice movement have long operated a network of support for people seeking abortions, especially people of color.[44] That movement was necessary even while *Roe* was still good law because under *Roe* access to abortion in this country was still limited, especially for low income people who are disproportionately women of color.[45] The United States Supreme Court failed to address the underlying racial and economic inequality that created barriers to abortion access for women of color.[46] Advocacy networks have significantly expanded since *Dobbs*, creating the space to further advocate for reproductive justice and address the systemic barriers to reproductive rights experienced by low income people, people of color and descendants of formerly enslaved people.[47]

Until now, no scholar has undertaken an in-depth analysis of the parallels between fugitives from slavery and people travelling to receive an abortion, and the constitutional conflicts that they engendered. This essay seeks to remedy that oversight. Part II of this essay describes the transgressive constitutionalism of fugitives from slavery, who risked their

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43. *See, e.g.*, Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 464 (1992); *see also* Michael Hiltzik, *Threats to criminalize out-of-state abortions are a scary reminder of 1850s America*, L.A. TIMES (July 12, 2022), https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion.

44. Jessica Pinkney, *We Don't Need an 'Abortion Underground Railroad'—Black and brown people already lead the most powerful abortion fund network in the country*, PRISM REPS. (Dec. 15, 2021), https://prismreports.org/2021/12/15/we-dont-need-an-abortion-underground-railroad-black-and-brown-people-already-lead-the-most-powerful-abortion-fund-network-in-the-country/.

45. *See* Roberts, *supra* note 30 at 6.

46. *See* ROSS & SOLLINGER, *supra* note 31, at 5 ("The Hyde Amendment, which prohibits the use of federal funds for abortion, profoundly curtails a poor woman's decision making in ways that are consistent with . . . older laws, policies, and social norms that aimed to deny reproductive dignity to poor women."); Harris v. McRae, 448 U.S. 297 (1980) (holding that states participating in Medicaid could withhold funding for even medically necessary abortions); Jessica Washington, *People REALLY need to Stop Comparing Abortion Restrictions to Slavery*, THE ROOT (Jun. 9, 2022), https://www.theroot.com/people-really-need-to-stop-comparing-abortion-restricti-1849041172 ("[t]here's a ton of evidence, that when abortion access is severely limited like it already is in much of this country, pregnant people, and especially Black pregnant people, do worse across a host of measures.").

47. *See generally* Rebecca E. Zietlow, *Reproductive Justice and the Thirteenth Amendment*, 104 BOSTON UNIV. L. REV. ONLINE 143 (2024), https://www.bu.edu/bulawreview/files/2024/05/ZIETLOW.pdf.

lives to cross state borders in search of their freedom and fundamental human rights. In Part III, I argue that people crossing state borders to obtain abortions today are also engaged in transgressive constitutionalism, crossing borders to exercise what they believe to be their right to reproductive liberty. This is followed by Part IV, which maintains that in the Antebellum era and today, people engaging in transgressive constitutionalism are catalysts for constitutional conflict over interstate comity, federalism and individual rights. I build on this argument in Part V, where I discuss the importance of the right to travel to those engaged in transgressive constitutionalism, and illustrates the importance of the right to travel in the Antebellum era and today. The paper concludes by detailing the importance of freedom of expression to the anti-slavery and abortion rights movements, and describes limits on that freedom imposed by states restricting rights, both then and now.

II. THE TRANSGRESSIVE CONSTITUTIONALISM OF FUGITIVES FROM SLAVERY

This section considers another time in our nation's history when the scope of a person's fundamental rights depended on the states in which they lived – the Antebellum era of the early nineteenth century. Prior to the Civil War, states regulated the law of slavery – and while slavery was legal and essential to the economy of some states, it was illegal and reviled in other states. During this time, many enslaved people asserted their human rights by fleeing across state borders, provoking conflict between free and slave states. This section describes how activists on the ground supported fugitives asserting their rights, and engaged in a rights movement of their own. As a result of this activism, constitutional conflicts over the legality of slavery, and our structure of federalism played out, not in courts, but on the ground.

In the Antebellum era, the scope of the most basic human rights of people of African descent depended on the state in which they lived. Chattel slavery in the United States was a uniquely dehumanizing and cruel institution. Slavery in the United States "differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of slaves by their owners."[48] Enslaved people were treated as property, not as human beings, and

48. Bridgewater, *supra* note 26, at 113.

lacked fundamental human rights. They had no legal autonomy and were under the "absolute dominion" of the slaveholder.[49] In states where slavery was legal, free Black people were also constantly in danger of being kidnapped and sold into slavery.[50] Enslaved people lacked the freedom of movement entirely and were generally confined to the area in which they lived.[51] By contrast, in states where slavery was not legal, free Black people were treated as human beings, albeit with diminished rights.[52] Most importantly, in free states, free Black people could advocate for their rights and against slavery, exercising their freedom of expression and association.[53] Many enslaved people also engaged in their own form of advocacy, crossing state borders to free states to escape slavery, in search of the "right to have rights" and to be treated as a human being.[54]

In the Antebellum era, few opponents of slavery won victories through litigation.[55] Most anti-slavery activists engaged in political, not legal action to assert their rights. Many simply used their bodies and actions to assert their anti-slavery views by escaping across borders and assisting those who escaped.[56] To exercise any rights at all, fugitives from slavery had to travel across state borders.[57] By traveling, they asserted there right to travel, a fundamental human right linked to citizenship.[58] When they escaped into free states, they were frequently aided by free Black people and their allies, who by their own transgressive acts also

49. *See* Lisa A. Crooms-Robinson, *The amendment ending slavery could be the key to securing abortion rights,* NBC News, (Jul. 5, 2022, 4:28 AM), https://www.nbcnews.com/think/opinion/abortions-rights-new-supreme-court-strategy-based-13th-amendment-rcna36309 ("Denying the rights of reproductive health and choice, bodily integrity and personal autonomy was essential to U.S. slavery, which recognized enslavers' complete dominion over the people they enslaved.").

50. *See* JONES, *supra* note 12, at 21.

51. *See* HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 70 (5th ed.1993).

52. *Id.* at 25 (laws in many Northern states limited the right of free Black people to travel, enter into contracts, and bring lawsuits).

53. *See infra* notes 338–361 and accompanying text.

54. *See* Zietlow, *Freedom Seekers*, *supra* note 19, at 1393.

55. *See generally* LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014); ANNE TWITTY, BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857 (2016).

56. *See* Zietlow, *Freedom Seekers*, *supra* note 19, at 1393.

57. *See id.* at 1387.

58. *See id.* at 1404; *see* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 31–33 (2018) [hereinafter FORGOTTEN EMANCIPATOR].

asserted the human rights of fugitives from slavery.[59] Anti-slavery activists supported fugitives from slavery, resisted slave catchers attempts to re-enslave them, and advocated for rights for free Black people.[60] Northern state officials responded to this activism by enacting legislation protecting the rights of people accused of being fugitives and openly resisting slave catchers.[61] From vigilance societies to mob actions, free Black people and their allies openly advocated against slavery and provided crucial support for those who risked criminal penalties by secretly aiding fugitives from slavery.[62]

Many anti-slavery activists argued that slavery was unconstitutional even before the Thirteenth Amendment.[63] They insisted that freedom was the default rule, a fundamental human right.[64] "Freedom national" was the motto of the anti-slavery, Free Soil, Free Labor Party.[65] The Republican Party platform also maintained that slavery was illegal in the federal territories.[66] As discussed in greater detail below, in the landmark 1857 Supreme Court case, *Dred Scott v. Sandford*, the Court ruled against the enslaved plaintiff who was seeking his freedom.[67] It ruled squarely in favor of slavery, blocking both legal and political avenues for anti-slavery advocacy.[68] *Dred Scott* was not an anomaly – it was one of many pro-slavery Court rulings in the Antebellum era.[69]

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59. *See* JONES, *supra* note 12, at 101 ("the act of travelling gave rise to the right to travel.").

60. *See* Zietlow, *Freedom Seekers, supra* note 19, at 1406.

61. While the existence and history of the antebellum Underground Railroad is widely known, the "above ground" activism of free Black communities and their antislavery allies in white communities is not. Fortunately, a number of historians have recently written about their efforts. *See, e.g.*, R.J.M. BLACKETTE, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY (2018); CHRISTOPHER JAMES BONNER, REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP (2020); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); JONES, *supra* note 12, at 26.

62. *See* BLACKETTE, *supra* note 61, at xiv; ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD 15 (2015) [hereinafter GATEWAY].

63. *See* ZIETLOW, FORGOTTEN EMANCIPATOR, *supra* note 58, at 11.

64. *Id.*

65. *Id.*

66. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 83 (1995).

67. Dred Scott v. Sandford, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

68. *Id.*

69. *See also* Prigg v. Pennsylvania, 41 U.S. 539 (1842) (upholding the 1793 federal Fugitive Slave Act); Ableman v. Booth, 62 U.S. 506 (1858) (upholding the 1850 Fugitive Slave Act).

Though some anti-slavery activists brought lawsuits, the vast majority confined their activism to the political realm.[70]

The transgressive constitutionalism of fugitives from slavery sparked controversy over the scope and extent of their citizenship, due process, and other fundamental rights.[71] Fugitives from slavery raised constitutional questions over the legality of slavery when they crossed from states in which slavery was legal to those in which it was not.[72] Their movement across state lines led to important court battles, and to a denial of comity by both Northern and Southern courts.[73] When slave catchers chased fugitives from slavery across state lines, they demanded assistance to capture the people who had fled.[74] Many Northern officials refused to return fugitives.[75] Tensions rose between slave and free states over the capture and rendition of accused fugitives ultimately culminating in a Civil War.[76] As historian Richard Blackette explained, "the crisis caused by escaping slaves was not enough to bring on the Civil War, but there is no doubt that it was a major contributing factor."[77] By their actions, the slaves placed themselves at the center of the political debate about the future of slavery."[78]

It is certainly true that most fugitives from slavery did not view themselves as political activists.[79] However, some fugitives from slavery did engage in political advocacy with the anti-slavery movement after they escaped.[80] Some of the most prominent leaders in the anti-slavery movement in the decade leading up to the Civil War, including Frederick Douglass, Henry Box Brown, and Henry Bibb, were fugitives from slavery.[81] Douglass and Bibb published anti-slavery newspapers and were active speakers on the anti-slavery circuit.[82] Box Brown went a step

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70. *See* Zietlow, *Freedom Seekers*, *supra* note 19, at 1383–84.

71. *See id*. at 1402.

72. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 137 (1981); Zietlow, *Freedom Seekers*, *supra* note 19 at 148-49.

73. *Id.* at 4.

74. BLACKETTE, *supra* note 61, at xiii.

75. *See* FINKELMAN, *supra* note 72, at 7.

76. *See* FONER, GATEWAY, *supra* note 62, at 218 (noting that fugitive slaves were named as an "immediate cause" of secession by NC, SC, and other lower Southern states).

77. BLACKETTE, *supra* note 61, at xv.

78. *Id.*

79. *See* Zietlow, *Freedom Seekers*, *supra* note 19, at 1380.

80. MANISHA SINHA, THE SLAVES CAUSE: A HISTORY OF ABOLITION 421 (Yale University Press 2016).

81. *See id.* at 425–30.

82. *Id.* at 430–31.

further by re-enacting his escape from slavery before audiences in the United States and England.[83] Brown escaped by hiding in a box and mailing himself to freedom.[84] By recreating his escape, Brown literally performed the plight of a fugitive from slavery, a forceful and effective plea for freedom. However, the vast majority of fugitives hid and did not pursue public activism. Still, even in secret, they were engaging in transgressive constitutionalism. By transgressing state borders, they exercised their right to be treated as human beings.[85] They provided a powerful inspiration for those who engaged in the anti-slavery movement on their behalf – both openly and in secret.

During the Antebellum era, numerous anti-slavery activists engaged in civil disobedience to help fugitives from slavery to escape to free spaces.[86] Abolitionists saw aid to fugitives as a form of "practical anti-slavery action," which combined aiding people escaping from slavery, protecting free people from kidnapping, and combatting the illegal slave trade.[87] In Northern cities, free Black activists and their allies formed "vigilance committees" to protect suspected fugitives and free Blacks from being kidnapped by slave catchers.[88] Eventually, the vigilance societies evolved into the Underground Railroad, a clandestine network who sheltered fugitives in their homes and organized networks of safe houses to aid fugitives to travel to places where they would be free.[89] Many of these activists also showed public support for the rights of free Black people, claiming citizenship rights for free Blacks, including the right to vote, to an education, and to economic opportunities.[90] Free Black activists felt a commonality of interest with the fugitives that they aided.[91]

Fugitives from slavery and their Northern allies were so effective at undermining the capture of suspected fugitives that Southerners demanded federal legislation to bolster their efforts.[92] In 1850, Congress enacted a new Fugitive Slave Act (FSA), which created the first federal

83. DAPHNE A. BROWN, BODIES IN DISSENT 4 (Duke Univ. Press, 2006).
84. *Id.*
85. Zietlow, *Freedom Seekers*, *supra* note 19, at 1403.
86. *Id.* at 1399–401.
87. FONER, GATEWAY, *supra* note 62, at 20.
88. *Id.* at 20.
89. *See id.* at 15; BLACKETTE, *supra* note 61, at 144.
90. FONER, GATEWAY, *supra* note 62, at 20.
91. Zietlow, *Freedom Seekers*, *supra* note 19, at 1402.
92. *See* FONER, GATEWAY, *supra* note 62, at 25.

police force to aid Southern slave catchers and required Northern state officials to cooperate with them.[93] The 1850 act was a devastating blow to free Black communities.[94] Many fugitives who had settled in free Black communities, and free Black people who had never been enslaved, moved to Canada because they no longer felt safe in the United States.[95] The FSA radicalized the anti-slavery movement.[96] Local communities in Northern states often shunned federal commissioners enforcing the FSA.[97] "[L]oud and rowdy black crowds" showed up at hearings of people accused of being fugitives.[98] Some crowds pushed their way into courtrooms where hearings were being held.[99] Crowds of free Black people often "overwhelmed the authorities capacity to control them," and mobs sometimes grew violent.[100] According to Richard Blackette, "these black crowds were the foot soldiers without whom resistance would have been muted if not impossible."[101]

The crowds of protestors succeeded in creating safe havens for fugitives.[102] Slave catchers avoided Northern cities such as Detroit and Chicago because the Black communities there were determined to resist enforcement of the fugitive slave law.[103] When a slave catcher kidnapped John Price, a Black man who they suspected of being a fugitive, in Oberlin, Ohio in 1857, 300-400 people, including prominent Oberlin citizens, stormed the hotel where Price was held and rescued him from captivity.[104]

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93. Zietlow, *Freedom Seekers*, *supra* note 19, at 1397.

94. *See* NIKKI M. TAYLOR, FRONTIERS OF FREEDOM: CINCINNATI'S BLACK COMMUNITY, 1802–1868 155 (Ohio Univ. Press, 2005); *see* FONER, GATEWAY, *supra* note 62, at 134.

95. *See* BLACKETTE, *supra* note 61, at 163; FONER, GATEWAY, *supra* note 62, at 26; ANGELA F. MURPHY, 'MY FREEDOM I DERIVED FROM GOD': JERMAIN LOGUEN'S REJECTION OF FREEDOM PURCHASE 8 (draft on file with author). An estimated 30,000 to 40,000 formerly enslaved people escaped to Canada on the underground railroad. *See* Natasha Henry-Dixon, *Underground Railroad*, The Canadian Encyclopedia, https://www.thecanadianencyclopedia.ca/en/article/underground-railroad (Mar. 3, 2023).

96. *See* FONER, GATEWAY, *supra* note 62, at 145.

97. BLACKETTE, *supra* note 61, at 58–59.

98. *Id.* at 66.

99. *Id.* at 67.

100. *See id.* at 73, 79.

101. *Id.* at 73.

102. *See id.* at 161–64.

103. *Id.*

104. FINKELMAN, *supra* note 72, at 42. The activists ushered the suspected fugitive across Lake Erie to safety in Canada.

In Milwaukee, Wisconsin, abolitionist Sherman Booth was arrested by federal authorities when he and a group of activists stormed a jail to help a person accused of being a fugitive escape.[105] Booth and his allies insisted that the 1850 FSA, which authorized his arrest, was unconstitutional.[106] The Wisconsin Supreme Court agreed and issued a writ of habeas, ordering the federal government to release Booth.[107] The United States Supreme Court overturned the Wisconsin Supreme Court and upheld the constitutionality of the 1850 FSA in *Ableman v. Booth*.[108]

Northern state legislators responded to anti-slavery activism by enacting laws protecting fugitives from slavery and their allies.[109] Some states enacted personal liberty laws to impede the enforcement of the federal law, banning state and local correctional facilities from holding fugitive slaves.[110] For example, Vermont guaranteed trial by jury and habeas to those accused of being fugitives.[111] The governor of Vermont said that the state law "protected the citizen from all unlawful imprisonment," a "stunning" affirmation that the state recognized fugitives from slavery as citizens.[112] Helping fugitives was dangerous and could lead to fines and imprisonment, but few activists suffered legal consequences because Northern officials seemed to have little interest in prosecuting.[113]

Over time, opposition to slavery, and support for the fugitives who fled its evils, grew substantially in the North.[114] By the mid-1850s, the Underground Railroad was conducting its activities in the open in Pennsylvania, New York City and upstate New York.[115] Sparked by the interstate travel of the fugitives from slavery, the civil disobedience of

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105. *See* Jeffrey Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1328 (2007).

106. *Id.* at 1324.

107. *See id.* at 1340.

108. *See* Ableman v. Booth, 62 U.S. 506 (1859).

109. *See* FINKELMAN, *supra* note 72, at 131–133. In *Prigg v. Pennsylvania*, the United States Supreme Court held the Pennsylvania Personal Liberty Act to be invalid because preempted by the federal 1793 Fugitive Slave Act. *See* Prigg v. Pennsylvania, 41 U.S. 539 (1842). The Pennsylvania state legislature responded by enacting another Personal Liberty Act. *See* FINKELMAN, *supra* note 72, at 137.

110. BLACKETTE, *supra* note 61, at 35–36.

111. *Id.* at 36.

112. *Id.*

113. *Id.* at 21.

114. *Id.* at 223.

115. *See id.* at 156, 178.

Northern activists greatly undermined the institution of slavery.[116] In 1854, the Republican Party formed as an anti-slavery party.[117] Once elected to Congress, members of the Republican Party led efforts to limit, and eventually abolish, slavery after the Civil War.[118]

Fugitives from slavery brought legal challenges to courts, claiming that by crossing borders they had transformed their legal status from enslaved to free. Some of these suits were successful in lower courts.[119] However, as noted above, in 1856, the United States Supreme Court's ruling in *Dred Scott v. Sanford* foreclosed all judicial avenues for fugitives seeking freedom.[120] Plaintiff Dred Scott claimed that by crossing from the slave state of Missouri to the free state of Illinois, he had become a free man and a citizen of the state of Illinois.[121] The Court disagreed.[122] According to Chief Justice Taney, no person of African descent could be a citizen of any state or the United States.[123] Notwithstanding the Court's ruling in *Dred Scott*, freedom seekers continued to cross borders from slave states to free, exercising their right to travel, a fundamental right of citizenship, even though the Court had held that they could never be citizens.[124] Thanks to the help of their allies in the Underground Railroad, thousands of people achieved freedom through their transgressive constitutionalism.[125]

Five years after *Dred Scott*, during the Civil War, thousands more enslaved people transgressed battle lines and volunteered for the Union Army.[126] Leaders of the Underground Railroad also fought for the Union army.[127] For example, in 1863, Harriet Tubman served as a spy for the Union army, guiding Union forces who liberated over 700 enslaved people in a daring raid on a Combahee River plantation.[128] Their efforts were essential to the Union victory.[129] After that victory, Congress

116. *See* BLACKETTE, *supra* note 61, at XV.
117. *See* ZIETLOW, FORGOTTEN EMANCIPATOR, *supra* note 58, at 39.
118. *See generally id.* at 108–129.
119. *See generally* VANDERVELDE, *supra* note 55; TWITTY, *supra* note 55.
120. Dred Scott v. Sandford, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
121. *Id.* at 394.
122. *Id.*
123. *Id.* at 407.
124. *See* FONER, GATEWAY, *supra* note 62, at 212.
125. *Id.* at 8.
126. *See id.* at 225.
127. *See* FONER, GATEWAY, *supra* note 62, at 225.
128. *Id.*
129. *See id.*

overturned *Dred Scott* with the Citizenship Clause of the 1866 Civil Rights Act.[130] This was followed by the incorporation of the Citizenship Clause of the Fourteenth Amendment, which enshrined their claims into constitutional law.[131] Of course, fugitives from slavery alone did not end the institution of slavery. However, they did provoke constitutional change, and their actions were essential to the success of the anti-slavery movement.

III. ABORTION AND TRANSGRESSIVE CONSTITUTIONALISM

Like in the Antebellum era, in the post-*Dobbs* world, fundamental rights again vary from state to state, with the scope of those rights depending on the state in which a person lives. This section discusses the new abortion rights landscape after *Dobbs* and highlights how crucial the ability to cross state borders is for people in need of abortions. Abortion rights activists are supporting people seeking abortions both openly and secretly – and provoking constitutional conflict over rights and interstate comity that is reminiscent of the Antebellum era. Since the Court's ruling in *Dobbs*, disputes over abortion rights have been divisive.[132] Even before the Court's ruling in *Dobbs*, access to abortion in this country varied widely from state to state.[133] Many pregnant people already needed to travel across state borders to state with less restrictive laws to obtain abortions.[134] The rates of such travel have predictably increased in the wake of Dobbs – as has the rate of activism supporting the travelers.[135]

As a result of the Court's ruling in *Dobbs*, people living in over half of the states in this country need to cross state borders to obtain an abortion.[136] Since the *Dobbs* ruling, states have adopted a patchwork of

130. *See* Rebecca E. Zietlow, *The Other Citizenship Clause*, *in* THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY 37, 37 (Christian Samito, Ed. 2018).

131. *See* U.S. CONST. amend. XIV, § 1.

132. *See* Stacy Weiner, *Abortion in America: From Roe to Dobbs and Beyond*, AAMC NEWS (Sept. 21 2023), https://www.aamc.org/news/abortion-america-roe-dobbs-and-beyond.

133. *See Latest Data Confirm People Are Traveling Farther Distances to Access Abortion Care Post-Dobbs*, GUTTMACHER (June 13, 2024), https://www.guttmacher.org/news-release/2024/latest-data-confirm-people-are-traveling-farther-distances-access-abortion-care [hereinafter *Latest Data*].

134. *See id.*

135. *Id.*

136. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 13 ("[A]bortion travel will become an essential part of the post-Roe reality . . . .").

laws regulating abortion[137]. As of the fall of 2024, fourteen states, including Texas, Alabama, Louisiana and Indiana, have enacted outright abortion bans, some without any exceptions.[138] In addition, Florida, Georgia, Iowa, and South Carolina have enacted bans on abortion after six weeks of gestation, which functionally amounts to a complete ban of the procedure.[139] On the other end of the spectrum, ten states, including Washington D.C., New Jersey and Vermont, do not ban abortions at all.[140] Nine states – California, Michigan, Ohio, Arizona, Colorado, New York, Maryland and Vermont, have established a constitutional right to choose an abortion in their state constitutions.[141] Fourteen states restrict abortions only after viability, with exceptions to protect the life and health of the pregnant person.[142] State borders are now demarcation lines limiting the scope of reproductive liberty.

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137. *See* GUTTMACHER, *supra* note 7.

138. *See id.* (noting that states with total bans as of the fall of 2024 are Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia).

139. *Id*.

140. *Id.*

141. *Id.*

142. *Id. See also, e.g.*, WASH. REV. CODE ANN. § 9.02.110 (explaining how exceptions apply either during pre-viability stages or for the life or health of the mother); DEL. CODE ANN. tit. 24, § 1790(b) (allowing for exceptions for termination prior to viability if "in the good faith medical judgement of the physician, the termination is necessary for the protection of the woman's life or health or in the event of a fetal anomaly for which there is not a reasonable likelihood of the fetus's sustained survival outside the uterus without the extraordinary medical measures"); 775 ILL. COMP. STAT. ANN. 55/1-10 (allowing exceptions for abortions to be performed until when "there is a significant likelihood of a fetus' sustained survival outside the uterus without the application of extraordinary medical measures"); R.I. GEN. LAWS § 23-4.13-2 (West 2019) (stipulating termination is prohibited after viability, defined as when "there is a reasonable likelihood of the fetus' sustained survival outside of the womb with or without artificial support," unless "when necessary, in the medical judgement of the physician, to preserve the life or health of that individual"); ME. REV. STAT. tit. 22, § 1598 1-B (allowing abortions after viability "only when it is necessary in the professional judgement of a physician licensed" in the state); MD. CODE ANN., HEALTH–GEN. § 20-209 (allowing termination either before viability or during the pregnancy if "necessary to protect the life or health of the woman" or "[t]he fetus is affected by genetic defect or serious deformity or abnormality"); N.Y. PUB. HEALTH LAW § 2599-bb (finding that a health care practitioner may perform an abortion when "the patient is within twenty-four weeks from the commencement of pregnancy, or there is an absence of fetal viability, or the abortion is necessary to protect the patient's life or health"); UTAH CODE ANN. § 76-7-302 (allowing several exceptions for abortions to be performed, including prior to the unborn fetus reaching "18 weeks gestational age"); MASS. GEN. LAWS ch. 112, § 12M-N (explaining that abortions after the twenty-four week mark of the unborn fetus may not be performed unless "necessary to preserve the life of the patient," "necessary to preserve the patient's physical or mental health," "warranted because of a lethal fetal anomaly or diagnosis," or "warranted because of a grave fetal diagnosis that indicates that the fetus is incompatible with sustained life outside

In our new legal landscape, crossing state borders is a more effective means of asserting rights than filing lawsuits.[143] After *Dobbs*, abortion clinics through the country closed down or greatly restricted their services.[144] Suddenly, people who expected to be able to obtain medical treatment were left with significantly fewer options. The new restrictions have a disproportionate impact on people of color, especially Black people.[145] In states where abortions are banned, pregnant people are also less likely to receive pre-natal care, leading to an increase in infant mortality.[146] Areas marked by rural and urban poverty, have the least access to reproductive health care.[147] Because of this, *Dobbs* has exacerbated the racial and economic barriers to reproductive rights throughout this country, increasing the need for a broader abortion rights movement to help those crossing state borders in search of reproductive liberty.[148]

The thousands of people living in states where abortion is now illegal likely had never believed themselves to be constitutional activists, and most probably still do not. However, when they seek abortions, they are constitutional actors because they are exercising a fundamental right – a right that was protected by the federal constitution until *Dobbs*, and

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of the uterus without extraordinary medical interventions"); NEV. REV. STAT. § 442.250 (permitting abortions to be performed under certain circumstances, including "to preserve the life or health of the pregnant woman"); 18 PA. CONS. STAT. § 3211 (prohibiting abortions after the gestation age of the unborn fetus is at least twenty-four weeks, unless a "physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman").

143. For example, after Kate Cox failed to obtain a court order authorizing her to have a medically necessary abortion in Texas state court, she travelled to New Mexico to obtain her abortion. *See* Eleanor Klibanoff, *Texas Supreme Court Blocks Order Allowing Abortion; Woman who Sought it Leaves State*, TEX. TRIBUNE (Dec. 11, 2023, 6:00 PM), *https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox/*.

144. *See* Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña, & Lauren Tierney, *States Where Abortion is Legal, Banned or Under Threat*, WASH. POST (June 24, 2022, 10:23 AM), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/.

145. Karen Attiah, *As Abortion Rights Collapse, Black and Brown Women will Suffer Most*, WASH. POST (July 1, 2022, 3:33 PM), https://www.washingtonpost.com/opinions/2022/07/01/abortion-rights-loss-black-hispanic-women-suffer-most/.

146. *See* Jill Wieber Lens, *Fetal Life Hypocrisies*, on file with the author.

147. *See* Caitlin Murphy, Peter Shin, Feygle Jacobs, & Kay Johnson, *In State with Abortion Bans, Community Health Center Patients Face Challenges Getting Reproductive Care,* COMMONWEALTH FUND (Sept. 5, 2024), https://www.commonwealthfund.org/blog/2024/states-abortion-bans-community-health-center-patients-face-challenges-getting.

148. *Id.*

is still recognized by nine state constitutions.[149] Like fugitives from slavery before them, they are engaging in transgressive constitutionalism by asserting rights claims with their very actions. Similarly, they are also inspiring a network of people supporting them openly and secretly as they assert their rights.

Since *Dobbs*, the number of pregnant people crossing state lines has increased substantially – as has the distance that needed to travel to obtain an abortion.[150] A 2019 study predicted that if *Roe* was overturned, the average person would experience a 249-mile increase in travel distance, causing the abortion rate to fall by 32.8%.[151] "Abortion deserts" are developing, mostly in Midwestern and Southern states.[152] A Guttmacher Institute Study, completed in June 2023, supports the predictions of the 2019 research.[153] It revealed substantial increases in abortions in "border states" – states where abortion is legal that border states where abortion is banned or highly restricted.[154]

For example, in 2023, more than 3,500 people traveled from Louisiana to states with less restrictive laws, including Florida, Illinois, and Georgia to obtain abortions.[155] But after *Dobbs*, both Florida and Georgia have banned abortions after six weeks – requiring Louisiana

149. The California, Michigan, Ohio, and Vermont constitutions contain protections for abortion rights. *See* GUTTMACHER, *supra* note 7.

150. *See Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election*, KAISER FAM. FOUND. (Aug. 23, 2024), https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/.

151. *See* Cohen, Donley, & Rebouché, *supra* note 10, at 11 (citing Caitlyn Myers, Rachel Jones, & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, CONTRACEPTION, Nov. 2019, at 367, 372.).

152. *See* Isaac Maddow-Zimet, Kelley Baden, Rachel K. Jones, Isabel DoCampo, & Jesse Philbin, *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST.: MONTHLY ABORTION PROVISION STUDY POL'Y ANALYSIS (Sept. 7, 2023), https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care; Cohen, Donley, & Rebouché, *supra* note 9, at 11 (citing Lisa Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 79–80 (2015)).

153. *See* Isaac Maddow-Zimet, Kelley Baden, Rachel K. Jones, Isabel DoCampo, & Jesse Philbin, *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST.: MONTHLY ABORTION PROVISION STUDY POL'Y ANALYSIS (Sept. 7, 2023), https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care.

154. *Id.* Perhaps not coincidentally, many of the border states today, such as Illinois and Pennsylvania, were also crucial border states in the Antebellum era. *Id.*; *see* BLACKETTE, *supra* note 61, at 42.

155. GUTTMACHER, *Latest Data*, *supra* note 133.

residents to travel even further to obtain abortions.[156] Though availability of medication abortions is mitigating the need for people in early-stage pregnancies to travel,[157] they will still need access to out-of-state medical providers and pharmacists in order to obtain the necessary medication.[158] Some patients are travelling across borders to states that allow abortions by remote health care.[159] Providers are considering placing mobile clinics near borders.[160] Some people have their medication mailed to someone in a state where it is legal, then have that person forward it to them.[161] The availability of interstate travel, and interstate commerce, will be crucial to those seeking to assert their right to reproductive autonomy in this post-*Roe* world.

Like anti-slavery activists in the Antebellum era, supporters of reproductive liberty today are engaging in activism at all levels in support of the right to receive an abortion. Many are engaging in political activism at the state and local level, supporting state referenda on constitutional amendments, state legislation protecting abortion rights, and galvanizing support for reproductive liberty.[162] State and local officials are supporting measures to protect reproductive rights and resisting federal and state efforts to restrict those rights.[163] Underlying all of these efforts is a network of activists supporting people seeking abortions on the ground, employing legal and illegal measures to assist people seeking reproductive liberty.

Even before the *Dobbs* decision, millions of activists engaged in demonstrations in favor of women's rights, protesting the Court's cutbacks to abortion access.[164] Since *Dobbs*, abortion rights activists have dramatically increased their efforts.[165] It is too early to know precisely

156. *Id.*
157. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 14.
158. *Id.* at 15.
159. *Id*. at 17.
160. *Id*.
161. *Id*.
162. *See infra*, notes 189-196 and accompanying text.
163. *See infra*, notes 197-206 and accompanying text.
164. *See* ASHUTOSH A. BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 141 (2020) (for example, after the 2017 election of Donald Trump, half a million people attended the Women's March in Washington D.C., and over seven million people demonstrated in support of women's rights nationwide).
165. *See* Eleanor J. Bader, *'We Are in Survival Mode': How the End of Roe v. Wade Changed Abortion Activism*, PROGRESSIVE MAG. (Jan. 22, 2024, 5:37 PM), https://progressive.org/latest/how-the-end-of-roe-v-wade-changed-abortion-activism-bader-20240122/.

the impact of this newly energized pro-abortion rights movement. However, there are signs that the issue has mobilized voters and spurred a new abortion rights movement. For example, in August 2022, voters in Kansas turned out in general election level numbers to reject a ballot initiative that would have banned abortion. The initiative failed by a sixty-forty percent vote.[166] In November 2022, Vermont voters approved a state constitutional amendment which guarantees "an individual's right to reproductive liberty and autonomy."[167] In August 2023, voters in Ohio soundly rejected a ballot measure that would have made it harder to amend the state Constitution right before the voters would weigh in on a proposed abortion rights amendment in November.[168] In November, fifty-seven percent of Ohio voters approved the abortion rights amendment.[169] Unlike Vermont, Kansas and Ohio are both conservative states which Republican presidential candidate Donald Trump won easily in 2016 and 2020.[170] Voters in California, Kentucky, Michigan, and Montana have also approved measures protecting reproductive liberty or rejected measures which would have restricted it.[171] Abortion rights measures were on the ballot of as many as ten states in the fall of 2024.[172]

State officials are responding to this advocacy, enacting measures protecting reproductive liberty. Even before the *Dobbs* opinion was

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166. Annie Gowen & Colby Itkowitz, *Kansans Resoundingly Reject Amendment Aimed at Restricting Abortion Rights*, WASH. POST, https://www.washingtonpost.com/nation/2022/08/02/kansas-abortion-referendum/ (Aug. 3, 2022, 1:12 AM).

167. *Planned Parenthood Vermont Action Fund Celebrates the Passage of the Reproductive Liberty Amendment*, PLANNED PARENTHOOD (Nov. 8, 2022), https://www.plannedparenthoodaction.org/pressroom/planned-parenthood-vermont-action-fund-celebrates-the-passage-of-the-reproductive-liberty-amendment.

168. Vanessa Williamsen & Itai Grofman, *Ohio voters reject Issue 1—here's what that means for democracy,* BROOKINGS (Aug. 9, 2023), https://www.brookings.edu/articles/ohio-voters-reject-issue-1-heres-what-that-means-for-democracy/.

169. Amanda Becker, *Ohio's abortion protections take effect, but the fight over access continues*, THE 19 (Dec. 7, 2023), https://19thnews.org/2023/12/ohios-abortion-protections-take-effect-issue-1-fight-access/.

170. *See 2016 Presidential Election*, 270 TO WIN, https://www.270towin.com/2016_Election/ (last visited Jan. 31, 2025); *Presidential Election Results 2020: Biden Wins*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html (last visited Jan. 31, 2025).

171. Julie Carr Smyth, *Ohio voters enshrine abortion access in constitution in latest statewide win for reproductive rights*, AP NEWS, https://apnews.com/article/ohio-abortion-amendment-election-2023 fe3e06747b616507d8ca21ea26485270 (last updated Nov. 7, 2023 11:31 PM).

172. *See* KAISER FAM. FOUND., *supra* note 150.

officially released, the Connecticut state legislature enacted a bill to shield abortion providers and others who assist people in obtaining abortions from civil liability.[173] In July 2022, the Massachusetts state legislature enacted a bill that expanded access to abortion and shields providers from out-of-state prosecution.[174] The bill also makes emergency contraceptives available in vending machines and requires medication abortion availability at public colleges and universities.[175] The California state legislature is considering a similar bill.[176]

In addition to proposed state measures, in states where abortion is now illegal or heavily restricted some local officials are openly resisting those laws.[177] Some cities are creating safe havens in which local prosecutors pledge not to enforce anti-abortion laws within the city limits, including Charlotte, North Carolina, Atlanta, Georgia, and Indianapolis, Indiana.[178]In New Orleans, Louisiana, city council member Helena Moreno spoke in support of a non-prosecution resolution, "we cannot ease up, we must continue to fight, because we all know what is truly at stake . . . we're a blue dot here, a city that is fighting for its people, for all of its people."[179] These local officials are following in the footsteps of those in the Antebellum era who refused to assist with capturing people who were accused of being fugitives from slavery.[180]

As in the Antebellum era, networks of activists have formed to help people who are seeking abortions. Such networks existed long before the ruling in Dobbs, and are , operated primarily by and for women

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173. Caroline Kitchener, *Conn. lawmakers pass bill to be 'place of refuge' for abortion patients,* WASHINGTON POST (Apr. 30, 2022, 8:31 AM), https://www.washingtonpost.com/politics/2022/04/30/connecticut-abortion-rights/.

174. Matt Stout, *Baker signs abortion rights expansion bill into law*, BOSTON GLOBE (Jul. 29, 2022, 5:04 PM), https://www.bostonglobe.com/2022/07/29/metro/baker-signs-abortion-rights-expansion-bill-into-law/. According to a Suffolk University poll of Massachusetts residents, 78 percent of those responding believed that abortion should be legal in all or most cases. *Id.*

175. *Id*.

176. *See In Response to Supreme Court Decision, Governor Newsom Signs Legislation to Protect Women and Providers in California from Abortion Bans by Other States,* GOVERNOR GAVIN NEWSOM, https://www.gov.ca.gov/2022/06/24/in-response-to-supreme-court-decision-governor-newsom-signs-legislation-to-protect-women-and-providers-in-california-from-abortion-bans-by-other-states/ (last visited Sept. 12, 2024).

177. Scott Wilson, *Democratic cities in Republican states seek ways around abortion bans*, WASHINGTON POST (Jul. 13 2022, 9:00 AM), https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/.

178. *Id.*

179. *Id.*

180. *See, e.g.*, FINKELMAN, *supra* note 72, at 149.

of color[181] Over eighty organizations have been providing on the ground support for over thirty years.[182] The longevity of these organizations reflects the fact that, as noted above, even before *Dobbs*, access to abortion was limited in the United States, especially for already marginalized people.[183] The *Dobbs* ruling aggravates that history and expands hardship for millions of people in our country, necessitating an expanded network of activists aiding people seeking to assert their reproductive rights. Since *Dobbs*, the number of people and organizations joining these networks has blossomed.[184]

For example, in California, an organization called Access to Reproductive Justice has been providing funding, transportation, lodging, and childcare to promote access for people who lack the resources to obtain reproductive care on their own.[185] Similarly, the Brigid Alliance books, coordinates and pays for travel, expenses, and childcare for people seeking abortion care.[186] Other organizations focus on the needs of people in particular geographic areas, primarily in Southern and Midwestern states.[187] Cobalt Advocates, a Colorado based organization, provides funds for travel expenses for those who travel to Colorado for abortion care, with the goal of "guarantee(ing) comprehensive, universal access to reproductive healthcare, including abortion."[188] Indigenous Women Rising is an abortion fund for indigenous people in the United States and Canada.[189] The Agnes Reynolds Jackson Fund supports abortion access

181. ROBERTS, *supra* note 30 at 5; Pinkney, *supra* note 44; LAURA KAPLAN, THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE (2022).

182. *See* ACCESS REPRODUCTIVE JUSTICE, https://accessrj.org/ (last updated 2024); Pinkney, *supra* note 44.

183. Moreover, it is undeniable that, throughout our nation's history, women of color have historically been deprived of reproductive autonomy and borne the brunt of state restrictions on that autonomy. *See* Bridgewater, *supra* note 26, at 92.

184. *See* KAISER FAM. FOUND., *supra* note 150.

185. *See* ACCESS REPRODUCTIVE JUSTICE, https://accessrj.org/ (last updated 2024).

186. BRIGID ALLIANCE, https://brigidalliance.org/ (last visited Sept. 13, 2024).

187. *See* ACCESS REPROD. CARE SE., https://arc-southeast.org/ (last visited Sept. 13, 2024) (supporting people who live in Alabama, Florida, Georgia, Mississippi, South Carolina and Tennessee); LILITH FUND, https://www.lilithfund.org/ (last visited Sept. 13, 2024) (funding travel for people who live in Texas); MIDWEST ACCESS COALITION, httpls://www.midwestaccesscoalition.org (last visited Sep. 13, 2024) (helping people in North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Wisconsin, Michigan, Ohio, Illinois, Indiana, Iowa, and Missouri).

188. COBALT, https://cobaltadvocates.org/ (last visited Sept. 13, 2024).

189. *Abortion Fund*, INDIGENOUS WOMEN RISING, https://www.iwrising.org/abortion-fund (last visited Sept. 13, 2024).

in Toledo, Ohio and surrounding areas.[190] In addition, a number of corporations, including Target, Amazon, Bank of America, Citigroup, Dick's Sporting Goods, Procter & Gamble, and Walt Disney, have pledged to expand insurance coverage and provide funding for employees who must travel to obtain abortions.[191]

As in the Antebellum era, people are forming a new network of clandestine activists reminiscent of the Underground Railroad.[192] In addition to those organizations and companies that are openly providing support for people seeking abortions, grassroots organizers and activists are developing an informal, and sometimes private, network of support, including offering funding, transportation, and lodging.[193] These organizations often use coded language, for example, referring to obtaining an abortion as "camping."[194] Others set up private Facebook groups, such as the Guardians Network and Abortion Support, to protect the identity of their volunteers, and of people using their resources.[195]

People supporting abortion travel who post on those Facebook pages express concern over their safety and fear of reprisal. For example, Facebook user #1 posted in one such group stating, "Im [sic] in Wisconsin [unsafe state] . . . and [I am] at risk of having to go camping, even with safe sex practices . . . . I would rather have a plan in place, im so scared."[196] Facebook user #2 responded, "[i]f you are a person who suddenly find yourself with a need to go *camping* in another state friendly towards *camping*, just know that I will happily drive you, support you, and not talk about the *camping* trip to anyone ever."[197] Facebook user #3

190. AGNES REYNOLDS JACKSON FUND, https://www.aggiefund.com/ (last visited Sept. 13, 2024).

191. Kate Gibson, *These companies are paying for abortion travel*, CBS NEWS: MONEYWATCH, (July 2, 2022, 9:18 AM) https://www.cbsnews.com/news/abortion-travel-companies-paying-benefits-amazon-starbucks-target/.

192. Bader, *supra* note 165.

193. *See, e.g.*, *r/auntienetwork,* REDDIT, https://www.reddit.com/r/auntienetwork/ (last visited Sept. 13, 2024) (suspended due to safety concerns); *r/GoingCamping*, REDDIT, https://www.reddit.com/r/GoingCamping/ (last visited Sept. 13, 2024); ONLINE ABORTION RES. SQUAD, https://abortionsquad.org/ (last visited Sept. 13, 2024); MIDWEST ACCESS COALITION, https://www.midwestaccesscoalition.org (last visited Sep. 13, 2024); Ronda Kaysen, *How Volunteers Open Their Homes to Women Seeking Abortions*, N.Y. TIMES (Oct. 15, 2022), https://www.nytimes.com/2022/10/15/realestate/abortion-volunteer-homes.html?smid=nytcore-ios-share&referringSource=articleShare.

194. *r/Going Camping,* REDDIT, https://www.reddit.com/r/GoingCamping (last visited Sept. 13, 2024).

195. *Id.*

196. User post, FACEBOOK (June 27, 2022) (on file with author).

197. User post, FACEBOOK (June 26, 2022) (on file with author).

said they have "been an OR [operating room] nurse for over 20 years and if there are any places needed in protecting women's rights, count me in. Especially in or near Arkansas."[198] Facebook user #4 responded "Pm me" to a user who reported that they just found out that they are pregnant and need help.[199] Numerous posts ask for financial help to aid them in assisting people.[200] Another poster noted that they are helping a woman who is a victim of domestic violence to escape her abuser, as well as assisting her in obtaining an abortion.[201] The author of the post noted "we also help domestic violence victims to escape. We didn't plan on it but we quickly found a link between domestic violence and abortion."[202] The poster said that their network had helped fifteen women since *Roe* has been overturned.[203] Referring to the Facebook group, the poster wrote "this has been lifesaving, mentally, emotionally, financially, and for some physically."[204]

In addition to the relatively secret activity of abortion rights activists on private websites and other networks, some abortion rights activists are openly challenging laws and risking criminal prosecution.[205] For example, the Dutch doctor Rebecca Gomperts, the founder of an international group called Women on Waves, collaborated with doctors in the U.S. with the goal of creating a floating abortion clinic in the Gulf of Mexico to serve clients from the conservative states of Texas, Louisiana, Alabama, and Mississippi.[206] Dr. Gomperts and her partners hope to take advantage of the fact that the boat will be in international

198. User post, FACEBOOK (Aug. 1, 2022) (on file with author).

199. User post, FACEBOOK (Sept. 12, 2022) (on file with author) (pm is an abbreviation for Personal Message).

200. User post, FACEBOOK (Sept. 12, 2022) (on file with author).

201. User post, FACEBOOK (Aug. 6, 2022) (on file with author).

202. User post, FACEBOOK (Aug. 6, 2022) (on file with author). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 891–94 (1992) (noting the link between abortion and domestic violence when striking down a Pennsylvania law requiring spousal consent for an abortion as an "undue burden" on abortion rights); Christina C. Pallito, Claudia García-Moreno, Henrica A.F.M. Jansen, Lori Heise, Mary Ellsberg, & Charlotte Watts, *Intimate Partner Violence, abortion, and unintended pregnancy: Results from the WHO Multi-country study on Women's Health and Domestic Violence*, 120 INT'L J. OF GYNECOLOGY AND OBSTETRICS 3, 3–9 (2013).

203. User post, FACEBOOK (Aug. 6, 2022)) (on file with author).

204. *Id*.

205. *See infra* notes 213-215 and accompanying text.

206. *See* SemDem, *By ship, drone, or bulletproof van: Persecuted patients in abortion-banning states won't be deserted*, DAILY KOS (Sept. 30, 2022, 7:59:01 AM), https://www.dailykos.com/stories/2022/9/30/2111653/-By-ship-drone-or-bulletproof-van-Persecuted-patients-in-abortion-banning-states-won-t-be-deserted.

waters, thus free from restrictive state laws.[207] Another group of activists has created bulletproof mobile abortion clinics that patrol red states borders.[208] These providers are skirting legal boundaries and risking civil and criminal penalties by openly operating on the edges of the law. Abortion rights activists are engaged in a multifaceted combination of activism, lawmaking, and civil disobedience, both in secret and in the open, on behalf of people seeking to exercise their human rights.

IV. TRANSGRESSIVE CONSTITUTIONALISM AND CONSTITUTIONAL CONFLICT

As in the Antebellum era, people today are transgressing state borders to assert their rights. Their act of crossing borders generates conflicts between states with differing laws governing those rights. This section describes these efforts in the Antebellum era and today and notes the similarities between the constitutional conflicts generated by each movement. Then and now, people traveling across state boarders are generating constitutional conflict. They are asserting fundamental rights, like freedom of expression, the right to travel and the right to bodily autonomy. In doing so, they generate disputes over the existence of those rights. Now, as then, people who transgress state borders to assert their rights, and their allies, are in danger of suffering legal penalties.[209]

By crossing from slave states to free states, fugitives from slavery created tension over slave catchers efforts to kidnap and return suspected fugitives.[210] Officials from their home states insisted that fugitives were still enslaved even though they had left the state.[211] Officials and activists in free states argued that fugitives had attained freedom by crossing into their states.[212] As mentioned previously, Congress attempted to resolve the conflicts in 1850, enacting a Fugitive Slave Act that created a federal administrative state and police force to return suspected fugitives when local officials refused to do so.[213] Activists and local officials resisted the

207. *Id.*

208. *See* Ruth Conniff, *Abortion Care on Wheels,* WIS. EXAMINER (June 7, 2022, 7:00 AM), https://wisconsinexaminer.com/2022/06/07/abortion-care-on-wheels/.

209. *See* Zietlow, *Freedom Seekers, supra* note 19 at 1393.

210. *Id.* at 1394–95.

211. *Id.*

212. *Id.* at 1395.

213. *Id.* at 1397–98.

federal law, challenging our system of federalism.[214] These conflicts escalated and served as a major cause of the Civil War.[215] Today, people crossing state borders to obtain reproductive liberty are again serving as provoking conflict over interstate comity. The Biden administration's post *Dobbs* attempts to protect abortion rights challenged our system of federalism.[216] While the impacts of a federal abortion ban remain unknown, resistance to that ban is likely to escalate. Just as resistance to the Fugitive Slave Act escalated in the Antebellum era.[217]

A. *Disputes over Interstate Comity–Then and Now*

During the Antebellum era, and today, people crossing state borders to exercise their rights raise questions about the scope and very existence of those rights and inspire interstate conflict over those rights. In the Antebellum era, when fugitives from slavery crossed state borders from slave state to free, they asserted their right to freedom and tested the legality of slavery.[218] By transgressing state borders, fugitives created constitutional conflicts over interstate comity.[219] Today, people who cross borders seeking abortions are asserting their right to reproductive autonomy. Like the fugitives before them, they are provoking constitutional conflicts between states in which abortion is legal and those in which it is prohibited.

During the Antebellum era, fugitives from slavery raised the issue of whether the legal status of enslaved people changed when they entered states in which slavery was illegal.[220] Article IV, section two of the United States Constitution contained the so-called Fugitive Slave Clause. This clause required that persons "held to Service or Labour" in one state be "delivered up on Claim of the Party to whom Service or Labour may be due" if they escaped into another state.[221] Arguably, the Fugitive Slave Clause "was a tacit recognition that, absent constraint, local law could emancipate slaves who found their way across borders whatever the rule

214. *Id*. at 1393.
215. *See* BLACKETTE, *supra* note 61, at xv.
216. *See* FONER, GATEWAY, *supra* note 62, at 216.
217. See *id.*
218. *See* Zietlow, *Freedom Seekers, supra* note 19 at 1377.
219. *See* BLACKETTE, *supra* note 61, at xv; FINKELMAN, *supra* note 72, at 4.
220. *See* BLACKETTE, *supra* note 61, at 1403; FINKELMAN, *supra* note 72, at 4.
221. U.S. CONST. art. IV, § 2, cl. 3.

in their home state."[222] Anti-slavery activists argued that this was because freedom was the natural state of man, and only positive law could impose slavery.[223] Pro-slavery interests countered that the Fugitive Slave Clause recognized the legality of slavery, and that a person's enslaved status continued when they entered a free state.[224] As discussed below, Congress took the side of the pro-slavery activists when it enacted the 1793 and 1850 Fugitive Slave Acts.[225] Disputes over interstate comity led slave states to restrict the travel, not only of fugitives from slavery, but also of free Black people.[226]

Just as in the Antebellum era, people travelling across borders today are raising complex legal issues relating to interstate comity. These issues include the question of whether states have the power to penalize out of state conduct, including obtaining abortions and assisting people to obtain abortions, and whether states have the power to insulate their residents from out-of-state liability.[227] According to Seth Kreimer, our system of federalism "should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain."[228] However, like fugitives from slavery, people crossing state lines to obtain abortions may find it difficult to escape the laws of their state of residence.

Interstate comity also raises the question of whether states can criminalize aiding a person to travel out of state and receive an abortion.[229] Courts have generally held that states cannot use criminal laws to prosecute people for crimes committed to outside their borders.[230] However, states can prosecute someone for criminal actions outside the state if the crime has a strong enough effect on an in-state resident.[231] A state that outlaws all abortions might consider a person who travels out of state to get an abortion guilty of murdering a "living, distinct" resident of the state – the fetus.[232] If a state declares a fetus a separate life, that

222. *See* Kreimer, *supra* note 43, at 464.
223. *See* ZIETLOW, FORGOTTEN EMANCIPATOR, *supra* note 58, at 398.
224. *See* FINKELMAN, *supra* note 72, at 180.
225. *See id.* at 320; *see also* FONER, GATEWAY, *supra* note 62, at 24, 121.
226. *See supra* notes 222–30; *infra* note 232-39 and accompanying text.
227. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 22–23.
228. Kreimer, *supra* note 43, at 464.
229. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 21.
230. *See id.* at 22–23.
231. *Id.* at 31.
232. *Id.*

declaration "could result in almost endless criminal prosecutions related to out-of-state abortions."[233] Regardless of whether those prosecutions are ultimately ruled valid, the threat of prosecution has a strong chilling and deterrent effect on providers and others from helping people who are seeking abortions.[234]

States enacting abortion sanctuary laws also raise the issue of interstate comity. Can a state shield its residents from other states' imposition of civil liability or prosecution?[235] Article IV of the U.S. Constitution does not contain any provision that is directly on point, but the Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[236] Shielding residents from judicial proceedings in other states would appear to violate the principle behind this clause. All of these issues are raised by people crossing state borders in search of reproductive liberty, using their bodies and their actions to challenge restrictions imposed by the states in which they live. Their actions prompt not only litigation, but also political controversy as they make visible the harm that abortion bans cause not only to them individually, but also to our system of interstate comity.

B. *Disputes Over Federalism–Then and Now*

During the Antebellum era, conflicts over interstate comity escalated and Southern slaveholders became increasingly frustrated with their inability to capture suspected fugitives who fled into free states.[237] Many Northern officials simply refused to comply with the 1793 Fugitive Slave.[238] Slaveholders demanded stronger federal measures.[239] As mentioned, in 1850, Congress responded with a new Fugitive Slave Act which created a federal administrative system for capturing suspected

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233. *Id.* at 32.

234. *See* Jamelle Bouie, *The Limit Does Not Exist for Republicans*, NEW YORK TIMES (Aug. 15, 2023), https://www.nytimes.com/2023/08/15/opinion/abortion-republicans-ohio-idaho.html?smid=nytcore-ios-share&referringSource=articleShare.

235. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 44 (explaining that this would "strike at the heart of basic, fundamental principles of law in the United States' federalist system—interstate comity and cooperation.").

236. U.S. CONST. art. IV, § 1.

237. *See* BLACKETTE, *supra* note 61, at 4–5.

238. *See* Schmitt, *supra* note 105, at 1318.

239. *See* BLACKETTE, *supra* note 61, at xv.

fugitives and returning them to the states from which they had fled.[240] The 1850 Act created the first federal police system composed of federal magistrates who were tasked with assisting Southern slave catchers.[241] In the North, the anti-slavery movement evolved into a state's rights movement, resisting federal incursion on their states' anti-slavery laws.[242] The conflict escalated, and the country descended into civil war.[243]

For years, anti-abortion activists (and justices on the Supreme Court) have argued that overturning *Roe v. Wade* would have the salutary effect of returning the issue to the state legislatures and the democratic process.[244] As this article has described, overturning *Roe* has returned the issue of abortion rights to state governments, and it has also given rise to litigation in the courts.[245] It is possible that *Dobbs* could lead to the federalization of anti-abortion laws – an idea popular with anti-abortion activists.[246] Some anti-abortion members of Congress have already indicated that they intend to introduce a bill to create a federal abortion ban.[247] Moreover, a ruling by the Alabama Supreme Court that embryos are "children" raises the possibility that the United States Supreme Court may rule similarly in similar cases.[248] Such a ruling would create new

240. Fugitive Slave Act, ch. 60, 9. Stat. 462 (1850).

241. *See* BLACKETTE, *supra* note 61, at xv.

242. *See* Schmitt, *supra* note 105 at 1319.

243. *See* BLACKETTE, *supra* note 61, at xv.

244. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., concurrence in part) ("by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.").

245. *See, e.g.*, Zurowski v. Texas, No. 23-0629 (Tex. 2024) (rejecting a challenge to a Texas state abortion ban); Preterm-Cleveland v. Yost, No. 24 CV 2634 (Ohio C.P. 2024) (striking down a six-week abortion ban as violating the Ohio constitution).

246. *See* Ziegler, *supra* note 38; Cohen, Donley, & Rebouché, *supra* note 9, at 2 ("Antiabortion activists have made clear that overturning *Roe* is the first step toward their goal of making abortion illegal nationwide.").

247. Lisa Lerer & Elizabeth Dias, *Trump Allies Plan New Sweeping Abortion Restrictions*, N.Y. TIMES (Feb. 17, 2024), https://www.nytimes.com/2024/02/17/us/politics/trump-allies-abortion-restrictions.html?smid=nytcore-ios-share&referringSource=articleShare.

248. *See* Dan Rosenzweig-Ziff, *Alabama Supreme Court Rules Frozen Embryos are Children, Imperiling IVF*, WASH. POST (Feb. 20, 2024, 3:30 PM), https://www.washingtonpost.com/politics/2024/02/19/alabama-supreme-court-embryos-children-ivf/.

federal/state conflicts – with resistance coming from state officials that favor reproductive liberty.[249]

V. TRANSGRESSIVE CONSTITUTIONALISM AND THE RIGHT TO TRAVEL

This section considers the importance of the right to travel. Both for fugitives from slavery and free Black people in the Antebellum era, and for people today crossing state borders in search of abortion rights. In both eras, states enacted laws restricting the right to travel, thus restricting the exercise of other fundamental human rights.[250]

By transgressing state borders in search of their fundamental rights, fugitives from slavery, and people seeking abortions, are asserting the right to travel. While not expressly mentioned in the Constitution, courts have long recognized that the right to travel is an essential attribute of citizenship, linked to the structure of our federal government.[251] As the Supreme Court explained in the 1867 case of *Crandall v. Nevada*, Americans have a right to movement that is "in its nature independent of the will of any State over whose soil he must pass in the exercise of it."[252] Freedom of movement is a fundamental human right, recognized by international law.[253] The right to travel is essential to political freedom because it enables people to choose the government policies one wishes to live under.[254] The right to interstate travel is also a structural right, with its roots in interstate comity; a recognition that state governments are not

249. *See* Carolina Kitchener, *Roe's Gone. Now antiabortion lawmakers want more.*, WASH. POST (June 25, 2022, 7:52 PM), https://www.washingtonpost.com/politics/2022/06/25/roe-antiabortion-lawmakers-restrictions-state-legislatures/ (debating the question of whether Congress would have the power to legislate to regulate abortion); Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS L.J. 611, 622 (2007) (depends on the commerce clause doctrine).

250. *See infra* notes 266–276 and accompanying text (restrictions on travel of enslaved and free Black people in antebellum era); *infra* notes 295–301 and accompanying text.

251. *See* ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM (2020).

252. Crandall v. Nevada, 73 U.S. 35, 44 (1867).

253. *See* Williams v. Fears, 179 U.S. 27, 274 (1900) ("[T]he right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the 14th Amendment and by other provisions of the Constitution.")

254. *See* SOMIN, *supra* note 251, at 89 (arguing that people can exercise freedom of movement to "escape unwanted impositions" which "greatly reduce conditions of domination, even if not completely eliminate them.")

separate countries but part of the larger country.[255] Most importantly, the right to travel is essential not only to the exercise of rights, but travelling itself is an act of transgressive constitutionalism. Thus, people transgressing borders are asserting their right to bodily autonomy – not only to make decisions about their reproductive lives, but for freedom of movement itself.

In the Antebellum era, many states enacted laws restricting the rights of free Black people to travel as part of their effort against fugitives from slavery.[256] Free Black people risked being kidnapped and sold into slavery every time they traveled near slave states.[257] Today, even pregnant people who are not seeking abortions may hesitate to travel into states where abortion is not legal, because if they suffer a complication with their pregnancy they could endanger their health. Now, as in the Antebellum era, the right to travel to is under threat.

A. *Citizenship and the Right to Travel in the Antebellum Era*

Debates over the right to travel were central to the Antebellum controversy over slavery and the rights of free Black people. In the Antebellum era, states in which slavery was legal had the most stringent laws restricting movement.[258] In the 1830s and 1840s plantation owners feared that abolitionists, and their accompanying ideology, might incite their slaves to revolt.[259] In the 1850s, slaveholders felt a "sense of impending calamity" as anti-slavery activism grew in the North.[260] They created slave patrols and state militias to police the movement of enslaved people and free Blacks, and to hunt and capture fugitives.[261] Plantation owners established slave patrols, hiring poor whites, who weren't always enthusiastic about it, but felt vulnerable to competition from free Blacks.[262] In Texas, slaveholders recruited Texas law enforcement

255. *See* Kreimer, *supra* note 43, at 487 ("States, as members of a federal union, are not free to treat other states as foreign countries.")

256. *See* JONES, *supra* note 12, at 91–93.

257. *Id.* at 21; FONER, GATEWAY, *supra* note 62, at 21–23.

258. APTHEKER, *supra* note 51 at 74–76.

259. *Id*. at 50.

260. *Id*. at 51.

261. *Id*. at 67.

262. *See* Viola Fransziska Műller, *Illegal But Tolerated: Slave Refugees in Richmond, Virginia, 1800–1860*, *in* FUGITIVE SLAVES AND SPACES OF FREEDOM IN NORTH AMERICA 137, 145 (Damian Alan Pargas ed., 2018).

officials to capture and deliver fugitive slaves.[263] Because their movement was so restricted, most enslaved people had little sense of space or distance.[264] Enslaved people would try to get permission to run errands for their masters in order to gather information that they needed to plan their escape.[265] When they did escape, slave catchers would cross state borders to try to capture and re-enslave them.[266] Slave states enacted laws limiting the mobility of enslaved people and authorizing the forcible capture of those who sought to cross state lines.[267] Congress reinforced those laws with the Fugitive Slave Acts, which required Northern officials to cooperate with the capture of accused fugitives.[268]

Many Northern officials refused to cooperate with Southern slave catchers.[269] Some Northern states, including Pennsylvania, enacted "Personal Liberty Laws" which recognized due process rights for those accused of being fugitives.[270] At the same time, however, other Northern states, including Illinois and Indiana, enacted laws restricting the movement of free Black people. [271] Free Black people, especially those in border states, lived in constant fear that they might be kidnapped by slave catchers who mistook them (or pretended to mistake them) for people who were fleeing slavery.[272] The federal fugitive slave laws contained no procedural protections for people accused of being fugitives, so free Black people had little legal recourse when they were falsely accused.[273] Many restricted their own movement to protect themselves.[274] They also formed Vigilance Societies to protect free Blacks and fugitives from slavery and from being kidnapped by slave catchers.[275]

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263. See Mekala Audain, "*Design His Course to Mexico:" The Fugitive Slave Experience in the Texas-Mexico Borderlands, 1850–1853, in* PARGAS, *supra* note 268, at 232, 242.

264. *Id*. at 235.

265. *Id.*

266. *See* FINKELMAN, *supra* note 72, at 10.

267. *See* JONES, *supra* note 12, at 90.

268. *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

269. *See* MASUR, *supra* note 61, at 90; JONES, *supra* note 13, at 25.

270. *See* FINKELMAN, *supra* note 72, at 137; Prigg v. Pennsylvania, 41 U.S. 539 (1842) (striking down a Pennsylvania Personal Liberty Law as preempted by the 1793 Fugitive Slave Act).

271. *See* JONES, *supra* note 12, at 97; MASUR, *supra* note 61, at 88.

272. *See* MASUR, *supra* note 61, at 88.

273. *See* FINKELMAN, *supra* note 72 at 147.

274. *See* JONES, *supra* note 12, at 97.

275. *See* BLACKETTE, *supra* note 61, at xiii.

The question of whether free Black people had the right to travel safely into slave states was highly contested during the Antebellum era.[276] Civil rights activists in Northern states viewed claiming the rights of citizenship, including the right to travel, as central to their agenda.[277] Some free Black people sought U.S. passports to travel abroad and prove their citizenship.[278] Others claimed U.S. citizenship to resist the threat of being forced to travel out of the country by the popular colonization movement.[279] Still, other free Black people simply traveled without travel permits that were required in many border states, asserting the right to travel by exercising that right.[280] According to historian Kate Masur, the rights of citizenship, including the right to travel, became central to the free Black civil rights movements.[281] The concept of personhood had its foundation in the Bill of Rights and the Article IV citizenship clause.[282] The experience of fugitives from slavery and free Black people during the Antebellum era illustrates the fact that bodily autonomy, including freedom of movement, is essential to the right to be treated as human beings.

After the Civil War, the Fourteenth Amendment established the federal government as the protector of the right to travel, and made that right enforceable against state governments via the Privileges or Immunities Clause.[283] The Fourteenth Amendment re-established the Union as a country in which fundamental rights should not differ from state to state, and enabled people to travel between states to exercise those rights.[284] In the twentieth century, formerly enslaved people and their

276. *See* JONES, *supra* note 12, at 27 (pointing out that the debate over the Missouri compromise centered around issues of citizenship).

277. *See id.* at 11 (arguing that citizenship was considered a gateway to rights); BONNER, *supra* note 61, at 2–3 (From the 1820s–1860s Black people "relied on the concept of citizenship to challenge restrictions and seek specific rights and protections."); *Id.* at 4 ("By claiming rights as citizens, black people . . . made citizenship more important.").

278. *See* BONNER, *supra* note 61, at 81. *But see id.* (explaining how the Secretary of State sometimes refused to issue passports to Black people).

279. *See* JONES, *supra* note 12, at 38–40.

280. *See id.* at 101.

281. *See* MASUR, *supra* note 61, at xiii.

282. *See id.* at xviii.

283. Kreimer, *supra* note 43, at 462, 504 ("[t]he Framers of the Fourteenth Amendment inherited a legal landscape in which a state's sovereignty was limited to its own borders, and they established a supervening national citizenship which guaranteed the right to travel and to take advantage of the legal entitlements of neighboring jurisdictions.").

284. *But see* Fallon, *supra* note 249, at 635 (noting that another interpretation of the Privileges and Immunities Clause is that it is only a non-discrimination provision "prohibit[ing] host states from imposing hostile regulations on out-of-state visitors.").

ancestors continued to exercise their rights in search of a better life.[285] Between 1880 and 1920, over one million Black people migrated northward in a period known as the Great Migration. They did so to escape the violence and disenfranchisement of the Jim Crow South and in search of economic opportunities.[286] This history illustrates the fundamental importance of the right to travel to people asserting rights claims.[287]

B. *Disputes over the Right to Travel after-Dobbs*

In the summer of 2023, Texas passed S.B.8, which allowed county officials to deputize private citizens to bring lawsuits against anyone travelling through the county whom they believe to be aiding a person to obtain an abortion.[288] This enabled private citizens to act as vigilantes and block people seeking abortions from traveling.[289] The driving force behind these efforts, anti-abortion activist Mark Lee Dickson, explained, "[t]his really is building a wall" to stop what he calls "abortion trafficking."[290] In an article written while the Court was considering overruling *Roe* and *Casey*, legal scholar Richard Fallon predicted that in a post-*Roe* world, "the scope of freedom that currently attends national citizenship would diminish" as states adopted conflicting laws regulating abortions.[291] Fallon predicted that states would make competing claims about citizenship, with some states asserting the authority to "immunize their citizens from prosecution under the laws of another state for conduct occurring within the borders of the citizens' own state."[292] Since the *Dobbs* decision, Fallon's prediction is proving to be true. State and local officials in anti-abortion states are erecting barriers

285. SOMIN, *supra* note 251, at 47 (noting that "A 1917 publication of the National Association for the Advancement of Colored People (NAACP) explained that migration to the North was "the most effective protest against Southern lynching, lawlessness, and general deviltry.")

286. *Id.*

287. *Id.* at 3

288. *See* Texas Heartbeat Act of 2021, TEX. HEALTH & SAFETY CODE ANN. § 171.201.

289. Caroline Kitchener, *Highways are the next antiabortion target. One Texas town is resisting*. WASH. POST (Jan. 30, 2025), https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/.

290. *Id.*

291. Fallon, *supra* note 249, at 648.

292. *Id.* at 633–34.

to stop people from leaving their states in search of abortions.[293] In the post-*Dobbs* world, the right to travel is again at the forefront of rights claims, as people seeking abortions across state lines to assert their right to reproductive liberty.[294]

Texas is not alone in restricting the right to travel. Idaho and Tennessee have enacted statutes prohibiting "abortion trafficking," which they define as "recruiting, harboring or transporting" a pregnant minor to obtain an abortion or abortion medication without parental permission.[295] Congress has not yet acted, in part because Republican lawmakers rejected a bill which would affirm the right of people seeking abortions to travel.[296] A number of state legislatures, including Missouri, are considering adopting a National Right to Life Committee model law.[297] This law would impose criminal and civil penalties on anyone who obtains an abortion outside the state, as well as anyone who "conspires to cause an illegal abortion" or "aids or abets" them.[298] Laws authorizing bounty lawsuits against people obtaining an abortion and those who help them, such as Texas S.B.8, would also apply to out-of-state abortions.[299] These laws and actions by state officials are reminiscent of Antebellum era states restricting the travel of free Black people and fugitives from slavery.[300]

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293. *See supra* notes 261–62 and accompanying text.

294. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 6 ("Abortion travel will become an essential part of the post-Roe reality.").

295. *See* Anna Claire Vollers, *Helping a minor travel for an abortion? Some states have made it a crime*, IDAHO CAPITAL SUN (Aug. 26, 2024, 4:20 AM), https://idahocapitalsun.com/2024/08/26/helping-a-minor-travel-for-an-abortion-some-states-have-made-it-a-crime/. A federal judge has temporarily enjoined the enforcement of the Idaho law as violating the First and Fourteenth Amendments. *See* Matsumoto v. Labrador, 701 F. Supp. 3d 1032, 1053 (D. Idaho Nov. 8, 2023).

296. *See* Jamelle Bouie, *Republicans Are Already Threatening the Right to Travel,* N.Y. TIMES, https://www.nytimes.com/2022/07/15/opinion/abortion-rights-travel.html?referringSource=articleShare (last updated July 15, 2022).

297. Memorandum from The Bopp Law Firm, PC to National Right to Life Comm. on NRLC Post *Roe* Model Abortion Law 1, 6 (June 15, 2022) (https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf.

298. *Id*.

299. *See* Michael Hiltzik, *Column: Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s America*, YAHOO! (July 12, 2022), https://www.yahoo.com/video/column-threats-criminalize-state-abortions-205811448.html.

300. *See id.*

In his concurrence to *Dobbs*, Justice Brett Kavanaugh opined that laws restricting the right to travel would be unconstitutional.[301] It remains to be seen if this prediction is correct.[302] In the 2024 case of *Yellowhammer Fund v. Attorney General of Alabama*, a federal district court enjoined the Alabama Attorney General from prosecuting those who aid people to leave Alabama to obtain abortions for conspiracy to commit a crime.[303] The court held that such a prosecution would violate the constitutional right to travel of those seeking abortions.[304] According to the court, "the right to travel is one of our most fundamental constitutional rights . . . (because) [i]t cultivates national citizenship and curbs provincialism, and thus was key to fusing a league of states into a true federal union."[305] The state of Alabama argued that the right did not extend to those travelling to engage in criminal activity.[306] However, the court pointed out that people leaving the state of Alabama to obtain abortions in other states were travelling to engage in activity that was legal in the state to which they were travelling.[307] According to the court, the right to travel "includes both the right to move physically and to do what was legal in the destination state."[308] While the *Yellowhammer* ruling strongly upholds the right to travel to receive an abortion, how it will fare on appeal is still unknown. In the meantime, people who can become pregnant will live in uncertainty over whether they can travel to obtain what they believe to be a fundamental right.[309]

Restrictions on travel heighten the inequities already experienced by people seeking abortions. Financial barriers make it difficult for

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301. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J. concurring).

302. *See* Cohen, Donley & Rebouché, *supra* note 9, at 26 ("[S]tates may struggle to enforce their laws extraterritorially against providers who refuse to appear at a summons or participate in a lawsuit.").

303. *See* Yellowhammer Fund v. Marshall, 733 F. Supp. 3d 1167, 1201 (M.D. Ala. May 6, 2024) (enjoining the attorney general from proceeding with such prosecutions on the grounds that they would violate the First and Fourteenth Amendments).

304. *Id.*

305. *Id*. at 1185.

306. *Id.* at 1195.

307. See *id.* at 1185 ("[T]ravel has consistently been protected precisely so that people would be free to engage in lawful conduct while travelling.").

308. *Id.* at 1186.

309. Jerusalem Demsas, *The Right to Move is Under Attack,* ATLANTIC (May 4, 2022), https://www.theatlantic.com/ideas/archive/2022/05/red-state-abortion-ban-help-people-move/629756/.

people to move to states where abortion is legal.[310] In addition, we are already starting to see the type of scrutiny and monitoring of people reminiscent of the Antebellum era.[311] People who suffer miscarriages are suspected of attempted abortions, and some are already being criminally prosecuted.[312] State laws, such as Texas S.B.8, impose civil penalties on out-of-state doctors and others who aid in-state residents to obtain medication for abortions.[313] In 2024, the United States Supreme Court heard a challenge to the FDA approval of mifepristone, a drug used in medically induced abortions, even though there is no credible evidence that the drug causes any harm.[314] The Court dismissed the case for lack of justiciability, but left open the possibility of considering the challenge again in a future case.[315] Officials in anti-abortion states monitor the mail, email and social media of people to identify possible abortions.[316] This raises the threat of a police state in which people of childbearing age live in constant fear of prosecution.[317] Moreover, as mentioned previously, people who are pregnant may be reluctant to travel, even temporarily, to states with complete abortion bans, fearing the consequences if they suffer an emergency health crisis.[318] As New York Times columnist Jamelle Bouie has argued, "[w]hen a state claims the right to limit your travel on account of your body — when it claims one of the most fundamental aspects of your personal liberty in order to take control of

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310. *Id.*

311. Jolynn Dellinger & Stephanie K. Pell, *The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World,* BROOKINGS INSTITUTION (Apr. 18, 2024), https://www.brookings.edu/articles/the-criminalization-of-abortion-and-surveillance-of-women-in-a-post-dobbs-world/.

312. Layla Quran, Maea Lenel Buhre, & Amna Nawaz, *The Increasing Risk of Criminal Charges for Women Who Experience a Miscarriage,* PBS NEWS (Jan. 9, 2024, 6:25 PM), https://www.pbs.org/newshour/show/the-increasing-risk-of-criminal-charges-for-women-who-experience-a-miscarriage.

313. *See supra*, notes 303–10 and accompanying text.

314. *See* FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024); Kierra Frazier & Alice Miranda Ollstein, *Supreme Court Sets Date for High-stakes Abortion Pill Oral Arguments,* POLITICO (Jan. 29, 2024, 12:30 PM), https://www.politico.com/news/2024/01/29/supreme-court-abortion-pill-00138347; Laura Ungar & Matthew Perrone, *Studies Cited in Case over Abortion Pill Retracted Due to Flaws And Conflicts of Interest,* ASSOCIATED PRESS (Feb. 7, 2024, 4:05 PM), https://apnews.com/article/abortion-pill-mifepristone-redacted-studies-supreme-court-ebd60519fd44dc69c5ac213580d1c1ba.

315. *All. for Hippocratic Med.,* 602 U.S. at 396.

316. *See* Lea Anne Fowler & Michael Ulrich, *Continuous Reproductive Surveillance*, 51 J. LAW MEDICAL ETHICS 570–74 (2023).

317. Dellinger & Pell, *supra* note 311.

318. Bouie, *supra* note 296.

your reproductive health — then that state has rendered you little more than another form of property."[319]

VI. FREEDOM OF SPEECH

Freedom of speech is the first foundational right that is essential for advocates of reproductive liberty. Freedom of speech is widely recognized as essential to functioning democracy and democratic citizenship.[320] This section considers the extent to which people advocating against slavery in the Antebellum era, and people supporting abortion rights today, rely on freedom of speech to enable their advocacy. Political actors need to express their opinions and communicate with each other to engage in effective collective action.[321] During the Antebellum era, anti-slavery activists often exercised their freedom of speech to criticize slavery.[322] Officials in slave states imposed restrictions on their freedom of speech to silence their anti-slavery pleas.[323] Today, supporters of reproductive rights must rely on freedom of speech to advocate for those rights in the political sphere. In response, anti-abortion activists are seeking restrictions on speech.[324]

A. *Disputes over Freedom of Speech in the Antebellum Era*

In the Antebellum era, anti-slavery activists relied on their freedom of speech to advocate forcefully against slavery.[325] Perhaps the most significant divide between free and slave states in the Antebellum era was their respective laws on anti-slavery speech.[326] Anti-slavery activists believed that if they had the freedom to speak, they would vanquish their pro-slavery foes.[327] Former slave and noted abolitionist, Frederick Douglass, published an anti-slavery newspaper, *The North Star*, which "became the voice of [B]lack abolitionism."[328] Activist and

319. *Id.*
320. *See* BHAGWHAT, *supra* note 164, at 9.
321. *Id.* at 5.
322. *See* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1072 n.26 (2021).
323. *Id.* at 1072, 1084.
324. *See infra*, notes 347–50.
325. *See* Carter, supra note 322 at 1107.
326. *Id.*
327. *Id.*
328. SINHA, *supra* note 82, at 426.

former slave, Henry Bibb, moved to Canada and published his paper, *The Voice of the Fugitive*, in which he encouraged other enslaved people to follow in his footsteps.[329] Douglass and other formerly enslaved people also published narratives of the lives of enslaved people, which were widely read and appreciated, serving as "the movement literature of abolitionism."[330] Some of the most powerful narratives were written by women, including anti-slavery activists Sojourner Truth and Harriet Jacobs.[331] According to historian Manisha Sinha, "[f]ugitive slaves created an authentic, original and independent critique of slaveholding, one which made their narratives potent anti-slavery material."[332] As former slave William Brown explained, his narrative was part of the battle of ideas regarding slavery.[333] Abolitionist authors also wrote fictionalized accounts of slavery to advocate against the institution, including Harriet Beecher Stowe's *Uncle Tom's Cabin*.[334] This published literature of the anti-slavery movement was highly effective at recruiting new adherents to the movement.[335]

State and local laws in slave states often prohibited anti-slavery speech.[336] Laws in slave states prohibited enslaved people from learning to read and write, and enslaved people's ability to communicate with each other was greatly restricted.[337] Southern states criminalized anti-slavery speech and banned the importation of abolitionist literature.[338] In Congress, representatives from slave states sought to suppress anti-slavery speech.[339] Notably, South Carolina Representative Preston Brooks attacked Massachusetts Senator Charles Sumner on the Senate floor and beat Sumner "nearly to death" after Sumner's fiery 1856 anti-slavery speech "Crime Against Kansas."[340] Brooks and other pro-slavery

329. *Id.* at 431; FONER, GATEWAY, *supra* note 62, at 24, 136–37.

330. SINHA, *supra* note 82, at 421. *See, e.g.,* NORMAN R. YETMAN, WHEN I WAS A SLAVE: MEMOIRS FROM THE SLAVE NARRATIVE COLLECTION (2002); FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1849).

331. *See* SINHA, *supra* note 82, at 433–34, 456.

332. *Id.* at 421.

333. Carter, *supra* note 322, at 1107.

334. *See* SINHA, *supra* note 82, at 441.

335. *Id.*

336. *See* Carter, *supra* note 327, at 1072 ("One incident of the Slave Power was the denial of freedom of speech. . . .").

337. *See id.* at 1093–94.

338. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30 (1986).

339. *See* Carter, *supra* note 327, at 1086–87.

340. *Id.* at 1087.

members of Congress expressly sought to limit speech in order to preserve slavery.[341]

Gathering anti-slavery petitions was another important form of activism.[342] Northern abolitionists organized a widespread campaign to petition Congress as Southerners doubled down on their pro-slavery views.[343] In 1836, the South Carolina Senator John C. Calhoun led an effort to ban petitions in the United States Senate, arguing that criticizing slavery dishonored Southerners.[344] This provoked a firestorm of opposition, led by John Quincy Adams.[345] But Calhoun succeeded.[346] In 1836, the House of Representatives adopted a resolution requiring the automatic tabling of any petition about slavery, and in 1840, the House banned such petitions. In 1844 the House repealed the ban but precedent for ignoring petitions had been set.[347]

Abolitionists chafed against these restrictions and championed their right to freedom of expression. In his groundbreaking anti-slavery treatise, *Walker's Appeal*, activist David Walker discussed the cost and danger of speaking out against slavery. The essay discusses how enslaved people were kept in "abject ignorance and wretchedness."[348] In his speeches, Frederick Douglass objected to the fact that the master would tell enslaved people "when and to whom he should speak."[349] Republicans included freedom of speech as one of their central principles in their early party platforms.[350]

B. *Freedom of Speech after Dobbs*

Today, the *Dobbs* decision has sparked a new, heated debate over the right to abortion and reproductive liberty.[351] Without a constitutional

341. *Id.* at 1087–88.
342. BHAGWAT, *supra* note 164, at 77.
343. *Id.*
344. *Id.* at 77-78.
345. *Id.* at 78.
346. *Id.*
347. *Id.*
348. Carter, *supra* note 327, at 1094.
349. *Id.* (citing Frederick Douglass, Slavery and America's Bastard Republicanism*, in* THE FREDERICK DOUGLASS PAPERS: SPEECHES, DEBATES, AND INTERVIEWS VOLUME 1: 1841–1846 (1979)).
350. *See* CURTIS, *supra* note 338, at 32.
351. *See, e.g.*, Dessie Otachliska, *Free Speech Post-Dobbs: The Constitutionality of State and Federal Restrictions on the Dissemination of Abortion-Related Information*, N.Y.U. J. LEGIS. & PUB. POL'Y (Feb. 5, 2023), https://nyujlpp.org/quorum/otachliska-free-speech-

right to an abortion, the matter is left up to the democratic political process, which requires free and open debate to function. However, like the right to reproductive liberty itself, freedom of speech is under attack from anti-abortion advocates.[352] As mentioned, Model National Right to Life Committee legislation would subject people to criminal and civil penalties for "[a]iding and abetting" an abortion, including "hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion."[353] As discussed in the previous section, Idaho and Tennessee have enacted laws criminalizing aiding and abetting minors to obtain abortions without their parents consent.[354] State officials, like the Attorney General of Alabama, threaten prosecution of those aiding and abetting interstate travel to obtain abortions.[355] All of these examples discourage speech about abortion. As Richard Fallon predicted in 2007, there is a danger that overruling *Roe* has "inaugurate[d] a regime in which First Amendment rights to engage in abortion-related speech would vary from state to state" – just as in the Antebellum era.[356]

In *Yellowhammer Fund v. Attorney General of Alabama*, plaintiffs argued that the attorney general's threat to prosecute those aiding people to cross state borders in search of abortions violated their rights to freedom of speech under the First Amendment.[357] The court agreed that prosecuting plaintiffs for providing information counseling and material support would violate the First Amendment.[358] In *Matsumoto v. Labrador*, Idaho abortion access groups sued the Idaho attorney general, arguing that the Idaho statute made it a crime for them

post-dobbs/; Raymond Shih & Ray Ku*, Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood*, 43 CARDOZO L. REV. 2105 (2022).

352*. See* Rose Mackenzie, *Abortion is Our Right, and We Won't Be Silenced*, ACLU NEWS & COMMENT. (Apr. 3, 2023), https://www.aclu.org/news/reproductive-freedom/abortion-is-our-right-and-we-wont-be-silenced.

353. NAT'L RIGHT TO LIFE COMM., *supra* note 297, at 6.

354*. See* Matsumoto v. Labrador, 701 F. Supp. 3d 1032, 1042 (D. Idaho Nov. 8, 2023), aff'd in part, rev'd in part and remanded, 122 F.4th 787 (9th Cir. 2024) (order granting preliminary injunction) (discussing the Idaho law); Welty v. Dunaway, No. 3:24-CV-00768, 2024 WL 3245612 (M.D. Tenn. June 28, 2024) (denying the preliminary injunction) (discussing the Tennessee law).

355*. See* Yellowhammer Fund v. Marshall, 733 F. Supp. 3d 1167, 1177–78 (M.D. Ala. May 6, 2024).

356. Fallon, *supra* note 249, at 640.

357*. Yellowhammer Fund*, 733 F. Supp. 3d. at 1193–95.

358*. Id.* at 1196.

to advise their clients who were seeking abortions.[359] The court agreed and issued a preliminary injunction restraining the state from enforcing the law because to do so would likely violate the First Amendment.[360] The Tennessee state legislature enacted a similar law, which is also being challenged in court.[361] Litigation is likely to continue over the constitutionality of restrictions on speech of those who seek to aid others in obtaining abortions.

The attack on freedom of speech over abortion has reached the academy, despite the strong tradition of academic freedom in that realm. As mentioned previously, in 2020 the Idaho state legislature enacted a law that banned abortion and prohibiting the aiding and abetting of abortions .[362] The Idaho "trigger law" went into effect after the Court issued the Dobbs opinion.[363] In the fall of 2022, the University of Idaho released a legal memorandum requiring all university employees to be "neutral" in any discussions of abortion rights or face possible felony prosecution.[364] Surprisingly, and chillingly, the university administration did not mention the First Amendment or principles of academic freedom.[365] All of these laws contribute to a greater chilling effect on pro-abortion rights speech.

CONCLUSION: COURTS, CONSTITUTIONAL ALLIES, AND THE CONSTITUTION OF LIBERTY

Like fugitives from slavery in the Antebellum era, people today are once again crossing state borders to exercise fundamental rights.

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359. *Matsumoto*, 701 F. Supp. 3d at 1050 ("[p]laintiffs' activities aimed at providing information, support, and assistance about reproductive health options, including legal abortion services, to pregnant individuals constitute protected speech.").

360. *See id.* at 1062.

361. *See* Welty v. Dunaway, No. 3:24-CV-00768, 2024 WL 3245612 (M.D. Tenn. June 28, 2024), at *1 (denying the preliminary injunction).

362. Andrew Baertlein, *Restrictive Idaho Abortion Law Won't Be Enacted Following Texas' Latest Abortion Bill,* KBTV 7 (Sept. 2, 2021, 7:12 PM), https://www.ktvb.com/article/news/politics/restrictive-idaho-abortion-law-wont-enacted-following-texas-abortion-bill/277-d4ce8b3a-a8bf-4a35-8f37-9206e837ebe0.

363. IDAHO CODE § 18-622(1)(a) (2022) (stating that the ban will take effect thirty days after "the issuance of the judgment . . . of the United States Supreme Court" which took place on July 28, 2022).

364. Aysha Qamar, *Staff Who Talk About Abortion at University of Idaho Can Be Terminated, Face Up to 5 Years in Jail*, DAILY KOS (Sept. 27, 2022, 12:54 PM), https://www.dailykos.com/stories/2022/9/27/2124400/-University-of-Idaho-warns-staff-to-stop-providing-birth-control-and-reproductive-health-services.

365. *See id.*

People seeking abortions today, like fugitives from slavery before them, are engaging in transgressive constitutionalism, provoking constitutional conflict over interstate comity, federalism, and the scope of their reproductive rights. Abortion seekers and activists are asserting their right to travel and there right to free speech.

In the Antebellum era conflict over slavery strained our country's constitution and our democracy.[366] On the eve of the Civil War, in its *Dred Scott* decision, the Supreme Court struck down the Missouri Compromise because the law restricted slavery in federal territories.[367] The Court held that the law violated the fundamental right of slaveholders to own slaves.[368] The Court's decision in *Dred Scott* precluded any political resolution of the conflict over slavery.[369] Today, a similar absolutist cloud hangs over the debate over abortion rights – the possibility that the Court could hold that a fetus is a person with constitutional rights. As legal historian Mary Ziegler has observed, the next step in the anti-abortion movement is an all-out fight for fetal personhood.[370] For example, in 2022, the state of Georgia enacted a law defining a "natural person" as "any human being including an unborn child," and authorizing tax exemptions for pregnancies after only 6 weeks of gestation.[371] Similarly, the Arizona state legislature attempted to enact a law recognizing "personhood" at fertilization.[372] These laws could result in murder charges being filed against anyone in these states who receives an abortion.

If a fetus is recognized as a person, any person who obtained an abortion could be charged with murder.[373] If nationalized, this absolutist measure could end legal abortion anywhere in the country. The ultimate success of "abortion abolitionists" would be to convince the Supreme Court to hold that a fetus is a person.[374] By doing so, the Court might be attempting to end the political debate over abortion once and for all – just

366. *See* FINKELMAN, *supra* note 72, at 4.

367. Dred Scott v. Sandford, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

368. *Id.* at 451.

369. *See* FINKELMAN, supra note 72, at 283.

370. Ziegler, *supra* note 38.

371. H.B. 481, 115th Gen. Assemb., Reg. Sess. (Ga. 2020).

372. *Judge Blocks Arizona Law Recognizing 'Personhood' at Fertilization,* REUTERS (July 12, 2022, 12:18 PM), https://www.reuters.com/world/us/judge-blocks-arizona-law-recognizing-personhood-fertilization-2022-07-12/.

373. Ziegler, *supra* note 38.

374. *Id.*

as Justice Taney thought when he wrote the *Dred Scott* opinion. However, the opposite would likely be true. Just as *Dred Scott* inflamed anti-slavery sentiment in the Antebellum era, a Supreme Court ruling recognizing fetal personhood would not end the debate over abortion. Instead, it would inspire more people to go underground in support of reproductive liberty, giving strength and motivation to abortion rights activists. *Dobbs* did not end the involvement of federal courts in abortion rights disputes,[375] but the ruling certainly has sparked increased political activism in favor of reproductive liberty.[376] Like fugitives from slavery and their anti-slavery allies before them, people seeking abortions and their allies today will serve at the forefront of enforcing a constitution of liberty.

375. *See* Cohen, Donley, & Rebouché, *supra* note 9, at 24–25, 32, 82, 87.
376. *See supra* notes 213–14, 223–32 and accompanying text.

FEEDING THE FIRE: THE FEEDBACK LOOP CREATED BY MASS INCARCERATION AND CLIMATE CHANGE AND WHY ABOLITION IS THE ONLY WAY TO A STABLE CLIMATE*

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Possible futures pour like loud blues from too-small headphones.
I know mine is not murdered.
Let me say it again: I know my future is not murdered.
A wrench heavies through, tumors hours into years.
Divorced from peers, entire legs become teeth, then clamshells, then solid crystal.
I see people freeze, then melt, then freeze.
I would like to ask for home's number, take her to dinner sometime.
Sixty each pull-ups, chin-ups, and push-ups premeditate a glistening out there.
-Freeland: An Erasure, Leigh Sugar[1]

With climate change and record-breaking heat every day and heat domes and heat waves . . . we sit around here and talk about, 'Are we going to be alive in five years?'[2]

INTRODUCTION

During July 2023, the average global temperature rose 1.5 degrees Celsius above pre-industrial temperatures for the first time.[3,4,5] The 1.5-degree threshold is a tipping point, beyond which lie much more frequent and severe climate events including cases of extreme heat, flooding, and drought.[6] These threats are not distributed equally, but

1. This poem is an erasure of letters received from Justin Rovillos Monson between 2014-2017 while serving a sentence in the Michigan Department of Corrections. Leigh Sugar, *Freeland: An Erasure*, *in* POETRY (Feb. 2021), https://www.poetryfoundation.org/poetrymagazine/poems/155224/freeland-an-erasure.

[2] Anonymous Prisoner at the Hobby Unit prison in Marlin, Texas[2]

3. Rachel Ramirez, *July Hit a Crucial Warming Threshold that Scientists Have Warned the World Should Stay Under*, CNN (Aug. 8, 2023, 4:00 AM), https://www.cnn.com/2023/08/08/world/july-climate-record-paris-agreement/index.html.

4. The significance of 1.5 degrees is based on the 2015 Paris agreement. *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement (last visited Jan. 11, 2024).

5. The summer of 2024 was even hotter, breaking the record for the hottest day ever recorded twice over. Derrick Bryson Taylor, *Planet Sets Record for Hottest Day Twice in a Row*, N.Y. TIMES (July 24, 2024), https://www.nytimes.com/2024/07/24/climate/hottest-day-earth-record.html.

6. Ramirez, *supra* note 3.

instead follow familiar patterns along race and class discrimination.[7] Those with less resources will find themselves unable to afford to leave highly dangerous environments, while those with the financial capability to seek housing in areas that are climate resilient will do so.[8]

The U.S. prison population is a critical example of a vulnerable community reflecting class and race discrimination with impoverished and Black populations being vastly overrepresented in these communities.[9] Prison populations have no control over their risk for natural disaster due to their incarcerated status. Already these populations are left behind during hurricanes and flooding while free populations evacuate.[10] In 2024, the year prior to this publication, over five hundred men were left in flooded cells at Mountain View Correctional Institute in North Carolina without lights, running water, or any outside contact for five days in the wake of Hurricane Helene.[11] Although cases of extreme heat or cold have been recognized as unconstitutional conditions of confinement,[12] many prisons in areas of high heat still do not have air

7. *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States*, EPA (Sept. 2, 2021), https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable.

8. Chloe Reichel, *Why People Choose to Stay in Areas Vulnerable to Natural Disasters*, JOURNALIST'S RESOURCE (June 18, 2018), https://journalistsresource.org/environment/relocation-climate-change-flooding-research/ (describing personal, cultural, and economic reasons why residents of dangerous areas may resist relocation).

9. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html.

10. For example, prisoners in Orleans Parish Prison were left in flooded prisons during Hurricane Katrina in 2005. Hannah Hauptman, *Prisons and Floods in the United States*, 2017 CHI. J. HIST. 99, 99. *See also* Gary K. Farlow, *When You Sit in the Path of a Hurricane—And Can't Move*, PRISON JOURNALISM PROJECT (Feb. 15, 2023), https://prisonjournalismproject.org/2023/02/15/how-do-you-prepare-for-hurricane-prison/.

11. Schuyler Mitchell, *Hurricane-Struck North Carolina Prisoners Were Locked in Cells With Their Own Feces for Nearly a Week*, INTERCEPT (Oct. 4, 2024, 12:56 PM), https://theintercept.com/2024/10/04/hurricane-helene-north-carolina-mountain-view-prison/.

12. *See* Wilson v. Seiter, 501 U.S. 294, 304 (1991); Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015); Chandler v. Crosby, 379 F.3d 1278, 1294 (11th Cir. 2004); Walker v. Schult, 717 F.3d 119, 128 (2d Cir. 2013); Graves v. Arpaio, 623 F.3d 1043, 1049 (9th Cir. 2010); Vasquez v. Frank, 209 Fed. App'x 538, 541 (7th Cir. 2006).

conditioning.[13] Furthermore, as temperatures rise, these conditions will only worsen.[14]

On the other side of this cycle, mass incarceration contributes in many ways to climate change. Examples include the construction and maintenance of prison facilities, the consumption of goods within the prison, and the use of incarcerated work forces as low-cost labor to create unsustainable economic growth. This creates a feedback loop where rising temperatures create unconstitutional prison conditions while the production and maintenance of prison systems contribute to climate change.[15] As described herein, solutions aimed at designing climate resilient prisons are likely to further contribute to climate change, making unconstitutional prison conditions inescapable; this is especially true if the rate of incarceration continues to rise as expected. This paper will draw from abolitionist theory to explore the relationship between the carceral state and climate change; and ultimately argue that mass incarceration cannot exist alongside a future with a clean planet.

Part I of this paper will discuss the ways in which prison systems contribute to climate change, both directly through the construction and maintenance of facilities, and indirectly through the exploitation of prison populations as both low-cost laborers and a captive class of consumers. Part II of this paper will discuss the other half of this phenomenon by addressing how rising temperatures contribute to unconstitutional conditions of confinement. This section will also explain how present constitutional doctrine fails to address the resulting increased risk of climate-related illness and death. Part III will examine and respond to

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13. Alexi Jones, *Cruel and Unusual Punishment: When States Don't Provide Air Conditioning in Prison*, PRISON POLICY INITIATIVE (June 18, 2019), https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning/.

14. Alleen Brown, *Boiling Behind Bars*, INTERCEPT (Feb. 12, 2022), https://theintercept.com/2022/02/12/prisons-texas-heat-air-conditioning-climate-crisis/ [hereinafter Brown, *Boiling Behind Bars*] ("Texas is ground zero in the fight over air conditioning in prisons . . . . With the climate crisis raising temperatures across the nation, the battle being waged in Texas will spread.").

15. A feedback loop is used in climate science to describe a system in which one change triggers further changes that leads to a cycle of warming. *Climate Feedback Loops Project*, ALL. OF WORLD SCIENTISTS, https://scientistswarning.forestry.oregonstate.edu/climate_feedbacks (last visited Oct. 22, 2024). This paper argues that prisons act as such a loop in that the maintenance and construction of prisons creates green house gas emissions which accelerate global warming, leading to worse prison conditions due to heat and natural disasters. In turn, solutions other than prison abolition will require further prison construction and maintenance and creating more emissions—completing the feedback loop.

proposals grounded in the status quo and explain why these solutions fail to address the feedback loop of prisons and climate. Finally, Part IV will argue for prison abolition as a solution to the problems discussed and include actionable steps towards the abolition of prisons.

While there are many definitions of prison abolition, in this article, "prison abolition" means either the complete end of any imprisonment or the end of mass incarceration and the dramatic reduction of prison populations.[16] Furthermore, abolition will be presented as a roadmap of actionable steps that addresses the feedback loop of prisons and climate. These steps include *moratorium*—the end of new prison construction; *decarceration*—getting people out of prison and reducing incarceration rates; and *excarceration*—creating alternatives to incarceration.[17]

Throughout this note, I have incorporated words and poetry from people who are incarcerated. These voices are too often missing from scholarly writing on the carceral state. Because I cannot personally bring this perspective forward, I decided to use this space to amplify their voices. It has been said that it is easier to imagine the end of the world than it is the end of capitalism; in her book discussing capitalist incentives for incarceration, Jackie Wang suggests the same thing to be true of prisons.[18] Both systems are equally ingrained into our world to a point where their existence is thought to be inevitable. Wang describes abolition as "a mode of thinking that does not capitulate to the realism of the Present[.]"[19] I want to suggest that the incarcerated voices included in this note are from people living that state of paradox. Their bodies are forced into subjection by the realities of the Present, but their voices imagine worlds beyond this reality. This paper presents abolition as an

16. There is debate even within the abolitionist community on the scope of abolition. *See* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 265 (2023). An estimated 40% of the prison population is "unnecessarily incarcerated." Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 136 HARV. L. REV. 2013, 2019 (2022). Furthermore, some have argued that prison populations could be reduced by as much as 90% with no danger to public safety. *Id.* Because such a reduction would have a dramatic effect on the issues discussed in this paper, we need not reach the question of whether forcible confinement has any role to play in a post-mass incarceration world. Nonetheless, it's worth noting that even assuming there is a dangerous population and that population could be defined, the current system of incarceration is not at all effective at dealing with it. *See id.*

17. John Washington, *What is Prison Abolition?*, NATION (July 31, 2018), https://www.thenation.com/article/archive/what-is-prison-abolition/.

18. JACKIE WANG, CARCERAL CAPITALISM, 297–98 (2018).

19. *Id.*

alternative way forward, with practical steps for dismantling prison systems. The voices that frame this paper remind us of the human realities impacted by the systems we create.

I. THE PRISON SYSTEM'S CONTRIBUTION TO CLIMATE CHANGE

Abolitionist thought asks "who gains from and who pays for, who benefits from and who suffers from" the systems we create.[20] Similarly to other systems of oppression such as slavery, policing, and natural resource overextraction, prisons create profit for a wealthy white elite, while racialized minorities, poor communities, indigenous cultures, and the surrounding environment all suffer.[21] A central tenant of prison abolition is that the current carceral system "can be traced back to slavery and the racial capitalist regime it relied on and sustained."[22] Similarly, environmental injustice[23] can be traced back to exploitation of land and people. From the colonial seizure of native lands and genocide of indigenous people, to plantation wealth built on the labor of enslaved peoples, to the extraction of oil and coal by workforces of poor Black and white laborers, racial capitalism has simultaneously exploited both natural resources and people.[24]

The operation of prison systems perpetuates this exploitation of land and people by contributing to global emissions and furthers climate disaster through (A) the construction and maintenance of prison facilities, (B) the consumption of goods within prison populations, and (C) the use of incarcerated workers as low-cost labor. The effect U.S. prison systems have on the climate crisis is the first step in the feedback loop whereby the operation of prison systems furthers climate disaster.

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20. *Id.*

21. Allegra M. McLeod, *Abolition and Environmental Justice*, 69 UCLA L. R. 1536, 1562 (2023).

22. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARVARD L. REV. 1, 7 (2019).

23. "Environmental injustice is experienced through heightened exposure to pollution and corresponding health risks, limited access to adequate environmental services, and loss of land and resource rights." *Environmental Justice Factsheet*, U. MICH. CENTER SUSTAINABLE SYSTEMS, https://css.umich.edu/publications/factsheets/sustainability-indicators/environmental-justice-factsheet (last visited Jan. 1, 2025).

24. *See* Nik Heynen, *Toward an Abolition Ecology*, ABOLITION J. (Dec. 29, 2016), https://abolitionjournal.org/toward-an-abolition-ecology/.

A. *Fossil Fuel Emissions and other Pollutants Created in Building and Maintaining Prison Facilities*

The high rate of incarceration in the U.S. makes the issue of fossil fuel emissions especially significant. Only three countries in the world have a higher incarceration rate than the U.S.[25] Every U.S. state has incarceration rates that outpace most nations—even more democratic-leaning states such as New York and Massachusetts.[26] Furthermore, rollbacks of criminal legal reform and the end of slowdowns in court proceedings caused by the 2020 COVID-19 pandemic have led to a recent rise in prison populations.[27] At least 19 states and the Federal Bureau of Prisons are expected to continue to incarcerate more people in the coming years.[28]

As incarcerated populations grow, so does demand for construction and maintenance of prisons. Commercial and residential emissions, including fossil fuels burned for heating and cooling buildings, accounted for 13% of U.S. greenhouse gas emissions in 2021.[29] When emissions from electricity use are included, commercial and residential emissions accounted for 31% of greenhouse gas emissions.[30] Prisons in particular consume more energy and natural resources than other commercial businesses including schools, hospitals, and shopping malls.[31] Unlike other commercial buildings, prisons are typically built with materials that are not easily insulated in the name of safety and security constraints.[32] Prisons also have a continuous need for heat,

25. Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), https://www.prisonpolicy.org/global/2024.html (In previous years the U.S. has had the highest incarceration rate of all countries. However, political turmoil in El Salvador has resulted in a dramatic increase in incarceration.).

26. *Id.*

27. Wendy Sawyer, *Why Did Prison and Jail Populations Grow in 2022–And What Comes Next?*, PRISON POL'Y INITIATIVE (Dec. 19, 2023), https://www.prisonpolicy.org/blog/2023/12/19/bjs_update_2022/.

28. *Id.*

29. *Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Feb. 28, 2024).

30. *Id.*

31. FRANCIS T. CULLEN, CHERYL LERO JONSON, & MARY K. STOHR, THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE 193 (2017).

32. Yvonne Jewkes & Dominique Moran, *The Paradox of the 'Green' Prison: Sustaining the Environment or Sustaining the Penal Complex?*, 19 THEORETICAL CRIMINOLOGY 451, 456 (2015); HANDBOOK FOR ENERGY CONSERVATION IN CORRECTIONAL FACILITIES 8 (1981) [hereinafter HANDBOOK FOR ENERGY CONSERVATION].

ventilation, air conditioning, and security systems, as well as self-sustaining operations including laundry, cooking, and administrative systems—all of which require large amounts of electricity.[33] Even in hospitals, the closest energy consumers to prisons, only parts of the facility remain in 24/7 usage. Prisons, on the other hand, have increased energy needs throughout the day, all days of the year.

The maintenance of prison buildings alone presents challenges to energy efficiency. As facilities age, building materials degrade, leading to energy inefficiency.[34] Older buildings are unlikely to be climate-resilient.[35] Increases to humidity caused by climate change can accelerate degradation of building materials such as stone, fabric materials, and limestone.[36] These conditions can lead to building collapse, especially in coastal areas.[37] In North Carolina, at least eight correctional facilities are on the coast and thus face risk of degradation and collapse.[38] However, newer buildings also have unique problems. Newer prison construction, adopted during the rise of mass incarceration in the 1970s and 80s, used more metal construction which creates higher heat indices and more rapid heating in these facilities when compared with concrete-based facilities.[39]

Aside from the building itself, activities within a prison facility often produce large amounts of water and air pollution. Environmental concerns arise when prisons are built on, or themselves become, sources of toxic waste.[40] The maintenance of these facilities presents environmental concerns and potential hazards in "heating and cooling, wastewater treatment, hazardous waste and trash disposal, asbestos

33. HANDBOOK FOR ENERGY CONSERVATION *supra* note 32, at 4–5.

34. N. Cavalagi, A. Kita, V.L. Castaldo, A.L. Pisello, & F. Ubertini, *Hierarchical Environmental Risk Mapping of Material Degradation in Historic Masonry Buildings: An Integrated Approach Considering Climate Change and Structural Damage*, 215 CONSTR. & BLDG. MATERIALS 998, 999 (2019).

35. Laurie L. Levenson, *Climate Change and the Threat to U.S. Jails and Prisons*, 33 VILL. ENVTL. L.J. 143, 147–50 (2022).

36. Cavalagli, Kita, Castaldo, Pisello, & Ubertini, *supra* note 34, at 999.

37. Levenson, *supra* note 35, at 147–50.

38. *Id.* at 148–49.

39. Joseph Torey Nalbone, Evaluation of Building and Occupant Response to Temperature and Humidity: Non-Traditional Heat Stress Considerations 69–70 (Dec. 2004) (unpublished Ph.D. dissertation, Texas A&M University), https://oaktrust.library.tamu.edu/handle/1969.1/1504.

40. Candice Bernd, Maureen Nandini Mitra, & Zoe Loftus-Farren, *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, TRUTHOUT (June 1, 2017), https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/.

management, drinking water supply, pesticide use, vehicle maintenance and power production."[41] Journalists at *Truthout* and *Earth Island Journal* collected data from the EPA that showed state and federal agencies brought 1,149 informal enforcement actions and 78 formal actions against prisons, jails, and detention centers under the Safe Drinking Water Act over a five-year period.[42]

There are multiple examples of prisons creating water pollution by discharging contaminated water into nearby rivers and wetlands and air pollution from on-site prison labor industrial activity, power generation, and prison-related traffic.[43] For example, wastewater from the California Men's Colony state prison (CMC) has been polluting a state-designated marine protected estuary for over two decades.[44] Despite facing penalties due to water quality violations as early as 2004, the facility has a long history of documented sewage spills and clean water violations.[45] In fact, a 2023 Administrative Order has required the facility to undergo assessments followed by policy and infrastructure changes to address over 6,000 gallons of sewer overflows and violations of permit effluent limits for multiple toxic pollutants.[46]

As well as producing waste, prisons are often built on or near toxic waste sites. According to a 2010 dataset, over five hundred facilities in the United States were located within three miles of a Superfund cleanup site.[47] At one of these facilities, SCI Fayette in Pennsylvania, more than 80% of inmates suffered from exposure to coal ash causing respiratory, throat, sinus, gastrointestinal, and skin conditions.[48]

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41. *Id.*

42. *Id.* This data is incomplete. About 83% of facilities were not included in the report. Data may be missing due to (1) lack of infraction history, (2) incomplete data sets, or (3) pending actions not yet reported. Undetected or unreported violations would also not be included.

43. *Id.*

44. *Id.*

45. *Id.*

46. Andrew Gillies, *CA Department of Corrections Accepts Agreement Over Clean Water Act Violations in SLO County*, NEWS CHANNEL 3–12 (Sept. 19, 2023), https://keyt.com/news/2023/09/19/ca-department-of-corrections-accepts-agreement-over-clean-water-act-violations-in-slo-county/.

47. Candice Bernd, Maureen Nandini Mitra, & Zoe Loftus-Farren, *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, TRUTHOUT (June 1, 2017), https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/.

48. *Investigation Reveals Environmental Dangers in America's Toxic Prisons*, EQUAL JUST. INITIATIVE (June 16, 2017), https://eji.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons/.

Therefore, when more waste is created, it is often the residents of the prison who suffer most.

These concerns will only increase as prisons continue to grow and resources become more scarce. The large, 24/7 living spaces within prisons create financial and energy strains for heating and cooling.[49] The energy required to adequately heat and cool these spaces will become increasingly more difficult to meet as the world's oil supply decreases.[50] Decommissioning prisons would force the U.S. to incarcerate less people and would use fewer resources in the construction and maintenance of prison buildings.[51]

B. *Prisons Create a Captive Class of Consumers*

between fourth and fifth grade, I wasted 250,000
gallons of water, flushing urinals in the
boys bathroom, chewed up
a forest of wood in the
pencil sharpener,
ticonderogas
down to
the nubs
all to
believe at forty-
five, with a criminal
history of wasting resources,
the most precious of which is time,
that it's out of my system and somehow this life
sentence is for being a victim before I created one.

\- Michael McCoy[52]

While consumer choice for more sustainable and environmentally friendly products has been proposed as one way to address climate

49. MICHAEL LYNCH, BIG PRISONS, BIG DREAMS: CRIME AND THE FAILURE OF AMERICA'S PENAL SYSTEM 212 (2007).

50. *Id.*

51. CULLEN, *supra* note 31, at 193.

52. Micheal McCoy, *The Conservationist*, PRISON JOURNALISM PROJECT (Feb. 8, 2024), https://prisonjournalismproject.org/2024/02/08/concrete-poem-waste-conservationist/ (Micheal McCoy is incarcerated in North Carolina).

change, there is no free market in prison. Incarcerated populations may not choose their beds, their clothing, their food, or what items are available at the prison commissary. Instead, prisons and private commissary operators hold legal monopolies and profit from incarcerated spending within prisons.[53] Prisons thus create a captive class of consumers. Rather than engaging in fair labor practices and trade, people within prisons are forced into exploitative labor practices and markets. Furthermore, items sold in prison commissionaires are subject to high price markups even for basic necessities such as hygiene products and food.[54] The cost of these items places an economic strain on incarcerated people and their families, most of whom are low income, while the correctional institutions and private companies selling the items profit.[55] This provides yet another example of how systems of incarceration perpetuate racial capitalism. Private institutions—who rely on the continued exploitation of incarcerated people—profit, while racial minorities—who represent a disproportionate portion of the prison population—suffer.

Additionally, there is a high degree of waste within prisons. Prisons typically use single-use disposable food and drink containers, often made with non-recyclable materials such as Styrofoam.[56] Food waste is also a large problem. California, for example, estimates that between 0.5 to 1.2 pounds per inmate is generated in food waste each day.[57] Although these issues can be mitigated through programs such as composting, we should be careful not to fall into "greenwashing"[58]. The

53. Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html; Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, APPEAL (Apr. 17, 2024), https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices/.

54. Ahmed Jallow, *Burden of High Prices Behind Bars in NC*, WUNC (Jan. 5, 2024, 9:51 AM), https://www.wunc.org/news/2024-01-05/burden-of-high-prices-behind-bars-in-nc.

55. *Id.*

56. Ryan M. Moser, *How Prisons and Jails Can Go Green*, PRISON JOURNALISM PROJECT (Feb. 20, 2023) https://prisonjournalismproject.org/2023/02/20/how-prisons-and-jails-can-go-green/.

57. *Id.*

58. The United Nations has defined greenwashing as tactics that "promote[] false solutions to the climate crisis that distract from and delay concrete and credible action." One way in which greenwashing manifests is by "[e]mphasizing a single environmental attribute while ignoring other impacts." *Greenwashing – the deceptive tactics behind environmental*

issue of consumption within prisons is a result of creating a captive class of consumers exploited by legal monopolies. This requires more than can be addressed by worm bins or reducing plastic use in prisons.[59]

A closer look at prison commissaries may be helpful in illustrating how exploitation and waste exist within prisons. Food and beverages make up the majority of prison commissary sales, followed by hygiene items.[60] Incarcerated people spend their money not on luxury items, but on basic necessities that are either not provided or not sufficient to meet their needs.[61] There are regular reports of prisons serving spoiled and rotten food or providing small portions, forcing incarcerated populations to turn to the processed foods offered at commissaries to supplement their diet.[62] Despite the necessity of these items, they are often sold for significantly more than they are available for outside of the prison.[63] Even when the prices in commissaries are comparable to free-world retail, people in prisons may have trouble affording these items on meager prison "wages", especially individuals that do not have support systems outside the prison that are able to subsidize their earnings.[64] It is important to remember that even when prices are low, prison commissaries are still profiting. The prison commissary does not incur costs such as advertising and price competition that retailers in a free-world market incur.[65] Furthermore, prisons and private companies are increasingly profiting from electronic sales.[66] Companies such as GTL contract with prisons to provide "free" tablets to each member of the incarcerated population.[67] Though the tablet is free, most of its uses are

claims, UNITED NATIONS, https://www.un.org/en/climatechange/science/climate-issues/greenwashing (last visited Jan. 27, 2025).

59. Although these improvements have their benefits, they fall short of addresses the larger issue and may distract from meaningful change. *See* Jewkes & Moran, *supra* note 32.

60. Raher, *supra* note 53.

61. *Id.*

62. Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: Commissary Database*, APPEAL, https://theappeal.org/commissary-database/ (last visited Apr. 14, 2025).

63. Weill-Greenberg & Corey, *supra* note 53.

64. Raher, *supra* note 53.

65. *Id.*

66. *Id.*

67. Mack Finkel & Wanda Bertram, *More States are Signing Harmful "Free Prison Tablet" Contracts*, PRISON POL'Y INITIATIVE (Mar. 7, 2019), https://www.prisonpolicy.org/blog/2019/03/07/free-tablets/.

costly.[68] Pricing for communication, games, music, and other digital content is either based on usage or on a subscription basis, resulting in continuous fees charged to their users.[69]

High commissary prices can also be a barrier to attempts to stay cool within the prison environment. Within North Carolina, four prison facilities have no air conditioning and another twenty have only partial air conditioning.[70] According to the NC Department of Adult Corrections, 23% of beds in all prisons do not have air conditioning.[71] However, the price to stay cool is often steep; items such as towels, cold water, and ice are unaffordable for many living in Southern prisons.[72] In North Carolina, the average prison work program pays between $0.40 to $1.00.[73] A single bottle of water can cost anywhere between $0.24 to $1.90 depending on the facility and the size of the bottle, with the median price being $0.38.[74] This means that buying a single bottle of water may cost most or all of a day's worth of work. In other states, fans may be sold for around $30-$40 dollars, a price that typically takes over a month or more of work to afford.[75] In North Carolina, a journalist housed in FCI Butner Medium I, in Butner, NC, reported prison staff confiscating fans during cell searches.[76] Fans are no longer sold in North Carolina prisons, so the inmates cannot buy new ones.[77] Instead, inmates must rely on staff following the Department of Adult Correction's Heat Stress Management Plan which states that facilities without air conditioning "should possess

68. Stephen Raher, *The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor*, PRISON POL'Y INITIATIVE (July 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets/.

69. *Id.*

70. *Prison System Air Conditioning Upgrades*, NC DEP'T ADULT CORR., https://www.dac.nc.gov/divisions-and-sections/support-services/prison-system-air-conditioning-upgrades (last visited Apr. 14, 2025).

71. *Id.*

72. Gary K. Farlow, *The Consequence of Sweltering Prisons in the Carolinas*, PRISON JOURNALISM PROJECT (May 15, 2024), https://prisonjournalismproject.org/2024/05/15/extreme-heat-nc-sc-prisons-deadly/.

73. With approval from the Secretary, assignments requiring special skills or training may pay as much as $3.00. *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/wage_policies.html (last visited Aug. 8, 2024).

74. Weill-Greenberg & Corey, *supra* note 53.

75. *Id.*

76. Prison Journalism Project Contributors & Aala Abdullahi, *How We Survived Extreme Heat in Prison*, MARSHALL PROJECT (Sept. 19, 2024, 6:00 AM), https://www.themarshallproject.org/2024/09/19/prison-journalists-how-to-survive-extreme-heat (quoting Ryan Green, 33, currently incarcerated in North Carolina).

77. *Id.*

fans" and "should make ice water available at least once per day."[78] However, with high staff vacancies at prisons and an especially vulnerable incarcerated population, such measures may be inadequate to protect against heat-related illness and injury.[79] When inadequate protection is provided by the facility, inmates are forced into a coercive market just to maintain a minimum level of comfort and prevent heat-related injury.

C. *Use of Incarcerated Workers as Low-Cost Labor*

> *When Ruthie Wilson Gilmore and I sat down for a conversation, we spoke about how the PIC [(Prison Industrial Complex)] not only exploits the labor of imprisoned folx (mainly via reproductive labor of the prison), but also extracts value from us. I came to this conclusion because I knew that our labor wasn't the only or even major source of value the PIC was after. The PIC extracts our lives, our life time. Ruthie helped me to see each person as a territory that the PIC extracts value from via a time-space hole that imprisonment creates. Incarceration creates a mechanism through which money/capital can flow through a person and into the pockets of the PIC. This all sounds abstract. I know. But since coming to SCI Dallas, I clearly and concretely see how extraction, not exploitation, is the big game the PIC is using. And we need to get hip.*

\- Letter from Stevie Wilson while incarcerated in The State Correctional Institution—Dallas in Pennsylvania[80]

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78. *2024 Heat Stress Management Plan*, NC DEPT. ADULT CORR. https://www.dac.nc.gov/news/press-releases/2024/06/26/state-prisons-prepared-extreme-temperatures.

79. Lisa Philip, *Thousands of NC Prisoners Don't Have AC. And Scientists Predict Summers Here Could Get Hotter.*, WUNC (Dec. 9, 2018), https://www.wunc.org/news/2018-12-09/thousands-of-nc-prisoners-dont-have-ac-and-scientists-predict-summers-here-could-get-hotter.

80. Stevie Wilson, *Thoughts on Extraction*, DREAMING FREEDOM, PRACTICING ABOLITION (Apr. 11, 2023), https://abolitionistsstudy.wordpress.com/category/letters-from-dallas/.

The use of incarcerated workers as low-cost labor contributes to climate change by reducing the cost of labor for highly exploitative industrial activities. First, incarcerated workers in state facilities do not have the same rights to safety as non-incarcerated workers. Therefore, incarcerated labor can be used to continue resource extraction in environments where ordinarily the dangers would be too high to continue to employ workers—at least at the same cost. Second, incarcerated labor has been used to clean up environmental disasters, such as oil spills and wildfires, thus sheltering the companies responsible for this damage from the true cost of their mistakes. Finally, lowering the cost of labor generally allows companies to devote more money and labor to mining natural resources. Incarcerated workers produce billions of dollars of goods and services, but are paid, on average, between $0.13 and $0.52 an hour.[81] Exploitative labor practices shelter manufacturers from paying the true cost of producing the goods they profit from, therefore allowing these companies to produce more goods and use more natural resources.

The use of incarcerated labor to prepare for and respond to natural disasters presents a great irony. Prison populations are being used for low to no-cost labor to respond to and protect the greater public from dangers to which the inmates themselves are most vulnerable. For example, in Florida and Texas, unpaid incarcerated labor has been used to prepare for and clean up after hurricanes.[82] In at least thirteen states, including North Carolina, incarcerated firefighters fight wildfires, often for little or no pay.[83] Furthermore, incarcerated workers are rarely protected from dangerous or hazardous conditions. The Occupational Health and Safety Administration ("OSHA"), as well as many state-level health and safety workplace statutes, does not cover incarcerated labor in state facilities.[84] Research in California has shown that incarcerated firefighters are more likely to be injured than professional firefighters.[85] Incarcerated labor

81. *Captive Labor: Exploitation of Incarcerated Workers*, ACLU (2022), https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers.

82. *Id.* at 30.

83. *Id.* at 30–31. Federal prisons, however, must comply with OSHA standards because the Federal Bureau of Prisons is part of the Department of Justice, an Executive Branch Agency. Occupational Safety and Health Admin., Opinion Letter on Clarification on Whether an Employer with Multiple Facilities Needs a Separate ECP for Each Facility (Dec. 13, 2011).

84. *Id.* at 61.

85. *Id.* at 63.

also risks exposing workers to heat-related injury and death when working outside or inside buildings without air conditioning. In fact, incarcerated firefighters in California have fallen ill and died from heat exposure during routine training.[86] This is yet another way in which rising temperatures increase the risk to prison populations. Furthermore, incarcerated labor is often obtained by force or coercion, such as by the need to pay for basic necessities, the threat of disciplinary action, being the only alternative to being confined in cells, or the promise of a reduced sentence.[87] The result of this system is that incarcerated workers are used to fight natural disasters but rarely benefit from the public safety that they ensure.

Using incarcerated labor to respond to climate disaster also insulates highly polluting industries from the cost of their mistakes. One example is the use of incarcerated labor to clean up BP's oil spill in the Gulf of Mexico in 2010.[88] BP saved money by using inmate labor because the company did not have to pay inmates minimum wage, was not required to provide inmates with proper protective equipment, and secured government-funded compensation for hiring "local labor."[89] Furthermore, while there were non-incarcerated workers that were willing to work, they did not get jobs on the clean-up because incarcerated workers were used instead at a lower wage.[90] Use of incarcerated workers exacerbates conditions of poverty in the communities where these workforces are used, as it prevents local workers from being hired at a full wage.

Incarcerated labor is also used to sustain highly polluting industries such as oil and gas. Incarcerated workers in the Gulf Coast and Deep South have been used to operate offshore drilling rigs.[91] Thus incarcerated labor is used to perpetuate pollution that contributes to climate change in the areas most vulnerable to climate disaster.[92] In

86. *Id.* at 64.

87. *Id.* at 47-48.

88. Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), https://www.thenation.com/article/archive/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle/.

89. *Id.*

90. *Id.*

91. Carly Berlin, *How Louisiana's Oil and Gas Industry Uses Prison Labor*, SCALAWAG (Mar. 24, 2020), https://scalawagmagazine.org/2020/03/powerlines-prison-labor-oil/.

92. *Id.*

addition, in some of these facilities, prisoner wages are withheld to pay for room and board, thus allowing the facility to retain much of the cost of the labor.[93] Another highly polluting industry that benefits from incarcerated labor is industrial farming.[94] Workers on industrial farms also face risks such as extreme heat and exposure to toxic pesticides.[95] By facilitating industrial growth through cheap labor and industrial activity within prisons, the carceral labor system increases fossil fuel use and emissions, thus accelerating climate disaster.[96]

II. RISING TEMPERATURES AND UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT

> *I would be so hot that my vision would blur. I couldn't hear for some reason. I would flood the toilet. And I would lay in about an inch of cold running water with my band propped over me.*
>
> \- Jason Crawford[97]

Rising global temperatures will lead to increasing dangerous and unconstitutional prison conditions across the US South. Based on evidence from historical heat data, in North Carolina, 103 facilities face severe or extreme heat conditions.[98] In Texas, this number is more than quadrupled at 478 carceral facilities.[99] Texas, a state that already experiences extreme heat, can serve as an early predictor of conditions that will become common throughout the South as temperatures continue to rise due to climate change. Since 1998, at least 23 prisoners have died

93. At one facility in Louisianna, despite paying 50 cents higher than the federal minimum wage, the facility retained 64% of prison wages to pay for room and board. *Id.*

94. *Id.*

95. *Id.*

96. Julius Alexander McGee, Patrick Trent Greiner, & Carl Appleton, *Locked into Emissions: How Mass Incarceration Contributes to Climate Change*, 8 SOCIAL CURRENTS 326, 327 (2021).

97. Jason Crawford spent over fourteen years in the Texas Prison System. John Yang, Andrew Corkery, Azhar Merchant, & Satvi Sunkara, *People in Prison Struggle to Survive Unrelenting Heat Without Air Conditioning*, PBS (July 15, 2023, 5:40 PM), https://www.pbs.org/newshour/show/prison-inmates-struggle-to-survive-unrelenting-heat-without-air-conditioning.

98. Brown, *Boiling Behind Bars*, *supra* note 14.

99. *Id.*

in Texas from injury or illness caused by extreme heat.[100] Northern states will also face risk as temperatures rise. Though these states may not experience the long heat spells of the South, brief, but acute, periods of heat can present serious risk where prison infrastructure is not prepared to respond.[101] Research into the climate crisis and prison mortality has seen the highest increase of mortality rates in recent years from prisons in the Northeast.[102] For instance, a heat index above 90 degrees Fahrenheit can increase overall mortality by as much as 18% in the Northeast.[103] The impact of heat may be greater where people are not acclimated to the weather.[104] Furthermore, there are multiple examples of Northeast prisons lacking the proper infrastructure to respond to heat risk.[105] Northeastern cities such as Boston; Hartford, Connecticut; and Chicago, as well as high elevation cities such as Elkins, West Virginia, broke longstanding heat records in 2024.[106] Prisons in these areas will increasingly face problems as global temperatures rise. Furthermore, prisoners lack access to survival strategies such as moving to air-conditioned public spaces, seeking shade, or taking a cold shower.

In 1991, the Supreme Court recognized that warmth was an "identifiable human need," the deprivation of which can constitute an unconstitutional condition of confinement.[107] Similar logic has led at least five federal circuits to find that extreme heat can constitute an unconstitutional condition of confinement.[108] No binding law exists for

100. Emily C. Gribble & David N. Pellow, *Climate Change and Incarcerated Populations: Confronting Environmental and Climate Injustices Behind Bars*, 49 FORDHAM URB. L.J. 341, 353 (2022).

101. Brown, *Boiling Behind Bars*, *supra* note 14.

102. Alleen Brown, *Study: Extreme Heat is Driving Deaths in U.S. Prisons*, GRIST (Mar., 1, 2023), https://grist.org/equity/new-study-people-dying-extreme-heat-in-prisons-us/.

103. *Id.*

104. *Id.*

105. Inmates in New York, Wisconsin, and Washington have reported unbearable heat due to a lack of air conditioning. *Id.*; Amanda Hernádez, *Stifling Prison Heat Used to be Just a Southern Problem. Not Anymore.*, STATELINE (Aug. 14, 2023, 5:00 AM), https://stateline.org/2023/08/14/stifling-prison-heat-used-to-be-just-a-southern-problem-not-anymore/.

106. Tim Balk, *The Heat Wave Has Set Records in Boston, Chicago, and Other Cities*, N.Y. TIMES (June 20, 2024), https://www.nytimes.com/live/2024/06/20/us/heat-wave-news?smid=url-share#the-heat-wave-has-set-records-in-boston-chicago-and-other-cities.

107. Wilson v. Seiter, 501 U.S. 294, 304 (1991); Daniel W. E. Holt, *Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change*, SABIN CENTER FOR CLIMATE CHANGE LAW 34 (2015), https://ssrn.com/abstract=2667260.

108. *See* Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015); Chandler v. Crosby, 379 F.3d 1278, 1294 (11th Cir. 2004); Walker v. Schult, 717 F.3d 119, 128 (2d Cir. 2013); Graves

the Fourth Circuit, though some district courts in the Fourth Circuit have held that plaintiffs failed to prove claims of excessive heat causing unconstitutional conditions of confinement.[109] As temperatures continue to rise, heat creates substantial risk of illness and injury that the prison system is not prepared to address. First, current prisons lack the resources to deal with cases of extreme heat. Second, prison populations are uniquely vulnerable to heat-related illnesses and injuries. Finally, as cases of severe heat become the norm, claims of unconstitutional prison conditions will increase, leading to increased litigation costs.

A. *Prisons Lack the Resources to Respond to Severe Heat*

> *We're in here during the hottest parts of the day . . . . There will be times I can't put my back on the concrete wall because it's so hot. The toilets we sit on are stainless steel. When we sit on those, sometimes the back of the toilet will burn your back because it's so hot.*
>
> - Anonymous Prisoner at the Hobby Unit prison in Marlin, Texas[110]

As mentioned previously, according to the NC Department of Adult Corrections, 23% of beds in state correctional facilities are not air conditioned.[111] Comparatively, 95% of households in the South have air conditioning, including 90% of households with $20,000 or less in annual income.[112] Thirteen of the hottest states in the U.S. do not have universal air conditioning in all their prisons.[113] In Alabama, no prisons had air conditioning in 2019.[114]

While some hesitations to install life-saving temperature relief may be cost-related, tough on crime ideologies may also be at play. This

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v. Arpaio, 623 F.3d 1043, 1049 (9th Cir. 2010); Vasquez v. Frank, 209 Fed. App'x 538, 541 (7th Cir. 2006).

109. *See infra* notes 157–64 and accompanying text.

110. Buchele, *supra* note 2.

111. *Prison System Air Conditioning Upgrades*, *supra* note 70.

112. Jones, *supra* note 13.

113. *Id.*

114. *Alabama State Sen. Cam Ward Discusses DOJ Report on Unsafe Prison Conditions*, NPR (Apr. 4, 2019), https://www.npr.org/2019/04/04/709999368/alabama-state-sen-cam-ward-discusses-doj-report-on-unsafe-prison-conditions.

is evidenced by Louisiana paying more than one million dollars in legal bills fighting legal battles brought by inmates on death row bringing claims of dangerous heat and humidity.[115] A quarter of that money would have been sufficient to install air conditioning on death row.[116]

Installing air conditioning in all of Texas' state prisons would cost millions of dollars.[117] The head of Texas' state prison system claims this is too much to consider asking the state legislature to cover.[118] However, the state has paid over half a million dollars in workers compensation claims to correction officers for heat related illness and injury.[119] Furthermore, the Texas prison system has also spent seven hundred and fifty thousand dollars to air condition barns where pigs are kept for food.[120] The prison system's policy required pigs, but not prisoners, to be kept in environments with temperatures not exceeding 85 degrees.[121] While the cost of installing air conditioning for all prisons may be high, political will, in addition to cost, seems to prevent remedial action.

B. *Vulnerabilities to Heat-Related Illness Within Prison Population*

> *We're just really trying to survive. It gets to the point where, like, I'll have headaches from dehydration. I have a problem using the restroom because I'm so dehydrated.*
>
> *Just the other day, somebody was picked up in a wheelchair because they were having heat stroke symptoms. She looked extremely pale. She was sweating profusely. She couldn't even get up, put herself in the*

115. Michael Kunzelman, *Louisiana Spends $1 Million to Fight Air Conditioning on Death Row*, PORTLAND PRESS HERALD (June 14, 2016), https://www.pressherald.com/2016/06/13/louisiana-spends-1-million-to-fight-air-conditioning-on-death-row/.

116. *Id.*

117. *Cruel and Unusual? The Lethal Toll of Hot Prisons*, WEATHER CHANNEL (Oct. 11, 2017), https://www.youtube.com/watch?v=jUhjI_qgEpk.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

> *wheelchair. They had to pick her up. Luckily, she made it through.*
>
> *But we have to do something about this heat. I mean, dogs in a dog pound have air conditioning.*

- Anonymous Prisoner at the Hobby Unit prison in Marlin, Texas[122]

Prisoners are especially vulnerable to rising temperatures for several reasons: the increasing age of the prison population; physical health conditions that make prisoners more susceptible to heat-related illnesses; and the use of medications, particularly psychotropic drugs used to treat mental illnesses, increases susceptibility to heat.[123] Prolonged exposure to extreme heat can result in dehydration and heat stroke, and can also impact the ability of kidneys, livers, hearts, brains, and lungs to function properly.[124]

There are a disproportionate number of people with chronic health conditions within prison populations when compared with the general U.S. population.[125] About half of all those incarcerated within both state and federal prison systems report currently or previously having a chronic health condition.[126] Vulnerabilities are more likely to affect Black residents as the Black incarcerated population is more likely to come to prison medically vulnerable and is more likely to reside in the U.S. South where the effects of climate change will be most felt.[127]

C. *Constitutional Challenges to Conditions of Severe Heat*

Even before current rates of climate change exacerbated extreme heat conditions, people restrained in extremely hot facilities and prison yards were successfully bringing claims that such conditions constituted

122. Buchele, *supra* note 2.

123. Brown, *Boiling Behind Bars*, supra note 14.

124. Jones, *supra* note 13.

125. Paloma Wu & D. Korbin Felder, *Hell and High Water: How Climate Change Can Harm Prison Residents and Jail Residents, and Why COVID-19 Conditions Litigation Suggests Most Federal Courts Will Wait-And-See When Asked to Intervene*, 49 FORDHAM URB. L.J. 259, 272–74 (2022).

126. *Id.*

127. *Id.* at 281–84.

cruel and unusual punishment. Starting in 1991, the Supreme Court recognized warmth as an essential human need and held that extreme cold could amount to an Eighth Amendment violation.[128] In *Gates v. Cook*, a 2004 case from the Fifth Circuit, multiple people incarcerated on Death Row in Mississippi brought an action alleging unconstitutional conditions of confinement due to "profound isolation, lack of exercise, stench and filth, malfunctioning plumbing, high temperatures, uncontrolled mosquito and insect infestations, a lack of sufficient mental health care, and exposure to psychotic inmates in adjoining cells."[129] Regarding the claims of high temperatures, the trial court found that the Death Row facility was not air conditioned and, despite use of industrial and personal fans, there was not proper ventilation to provide a "minimum level of comfort" during the hot summer months.[130] The court recognized that mental illness often inhibited behaviors that would help the plaintiffs tolerate the heat and that psychotropic medications also interfered with the body's ability to regulate its internal temperature.[131] Finally, the court found that no efforts were made to mitigate the heat such as providing extra showers, ice water, or fans to the plaintiffs.[132]

The trial court issued an injunction requiring prison officials to provide fans, ice water, and daily showers on days where the heat index was higher than 90 degrees, which the appellate court affirmed for the Death Row unit, but not for the entire prison facility.[133] Although this case is important in that it recognizes extreme heat as an unconstitutional condition of confinement, it is also notable that the injunction was limited to providing heat mitigating comfort and did not require that the prison keep internal temperatures below a certain threshold. It also did not require any structural changes to the prison itself such as improving ventilation or installing air conditioning.

The Eighth Amendment prohibits "cruel and unusual punishment".[134] This prohibition has been interpreted to require humane conditions of confinement.[135] To assert a successful claim of unconstitutional conditions of confinement, a plaintiff must establish (1)

128. Wilson v. Seiter, 501 U.S. 294, 304 (1991).
129. Gates v. Cook, 376 F.3d 323, 327 (5th Cir. 2004).
130. *Id.* at 334.
131. *Id.*
132. *Id.*
133. *Id.* at 339.
134. U.S. CONST. Amend. VIII.
135. *Gates*, 376 F.3d at 332.

a "substantial risk of serious harm" and (2) that prison officials were "subjectively aware" of the risk and acted with "deliberate indifference" to the plaintiff's safety.[136] In cases of extreme heat, the first element is usually simple to prove, but the "subjectively aware" and "deliberate indifference" standard is harder to meet.

Within the last five years, at least three reported cases from district courts in the Fourth Circuit held that the plaintiff failed to show deliberate indifference by prison officials.[137] Despite clear evidence of heat-related injury—such as heat rashes and dizziness in one case[138] and vomiting, headaches, and difficulty breathing in another[139]—in both cases the court held that the plaintiff failed to show that the defendant acted with a "sufficiently culpable state of mind in imposing such conditions as punishment."[140] While symptoms of heat induced illness satisfy the first prong of a condition of confinement claim, that there is a substantial risk of serious harm, the conditions must also be "open and obvious" such that the lack of an adequate response by prison officials is unreasonable.[141] This standard can be difficult to meet in cases where there are short periods of intense heat, as compared to longer periods of excessive heat because it is harder to show that the risk was "open and obvious." Furthermore, the prison official's actions must be "more blameworthy than negligent."[142] Evidence of complaints of heat-related symptoms can show that the prison official knew of and openly disregarded heat-related risk. As temperatures rise and more prisons are subject to extended periods of severe heat, it will be less likely that prison officials will be able to argue that the risk of heat-related injury and illness was not open and obvious.

Although rising temperatures will increase the potential for heat-related illness and death, it will also make these conditions more apparent. Based on data collected by the Intercept as part of their

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136. *Id.*; Gribble & Pellow, *supra* note 100, at 357–58.

137. Yancey v. Davis, No. 21-CV-1115, 2022 U.S. Dist. LEXIS 125281 (E.D. Va. July 13, 2022); Ross v. Warden, No. JKB-18-2078, 2020 U.S. Dist. LEXIS 166860 (D. Md. Sept. 11, 2020); Price v. Jackson, No. 20-2141-SAL-SVH, 2021 U.S. Dist. LEXIS 103109 (D.S.C. Apr. 20, 2021).

138. *Ross*, 2020 U.S. Dist. LEXIS 166860 at *8.

139. *Price*, 2021 U.S. Dist. LEXIS 103109 at *14.

140. *Ross*, 2020 U.S. Dist. LEXIS 166860 at *8; *Price*, 2021 U.S. Dist. LEXIS 103109 at *14.

141. *See Price*, 2021 U.S. Dist. LEXIS 103109, at *5; *Gates*, 376 F.3d at 339-40.

142. Farmer v. Brennan, 511 U.S. 824, 834 (1994).

"Climate and Punishment" project, 2292 prisons out of 5936 prisons (about 39%) operating as of June, 2020 had a heat risk of "severe" or "extreme".[143] For each of these prisons, based on historic heat indexes from 1971 to 2000, an average of 50 days or more per year were over 90 degrees Fahrenheit.[144] That means that almost half of existing prisons are at risk of severe or extreme heat that prison officials have no reason not to anticipate. Furthermore, this number can be expected to grow as climate change leads to more extreme temperatures across the U.S.

Finally, the "subjectively aware" and "deliberate indifference" standards in an Eighth Amendment analysis focuses too much on the individual victim over systemic harm. In her critique of the Supreme Court's Equal Protection jurisprudence, Dorothy Roberts makes a similar argument regarding the "discriminatory purpose" requirement.[145] This requirement imagines an "individualized understanding of racism" in which a biased perpetrator discriminates against an individual victim, rather than a racialized community experiencing legal repression.[146] Furthermore, Roberts argues, such an understanding imagines oppression as a "system malfunction" rather than a deliberate and central purpose of the carceral system.[147] That the current carceral system grew out of slavery and the racial capitalist regime created and sustained by slavery is a central tenet of abolitionist philosophy.[148] Therefore, discrimination within the system does not require a malfunction of the system or deliberate discriminatory actions by the system's agents; it only requires that the system operate as normal.[149]

The "subjectively aware" and "deliberate indifference" standards of the Eighth Amendment suffer from similar issues as the "discriminatory purpose" doctrine of the Fourteenth Amendment. These standards require an individual perpetrator to know of, and ignore,

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143. Severity is based on the daily maximum heat index for the county in which the prison is located. A risk of "severe" means the county had, on average, fifty-one to one hundred days per year where the daily maximum heat index was over ninety degrees. A risk of "extreme" means that the county had, on average, over one hundred days per year where the daily maximum heat index was over ninety degrees. Alleen Brown and Akil Harris, *Climate and Punishment*, INTERCEPT (Feb. 12, 2022), https://projects.theintercept.com/climate-and-punishment/.

144. *Id.*

145. *See* Roberts, *supra* note 22 at 85–86.

146. *Id.*

147. *Id.*

148. *Id.* at 7.

149. *Id.* at 85–86.

potential harm to a victim. It does not imagine structural or systemic harms inherent to the carceral system.

III. ADDRESSING ALTERNATIVE SOLUTIONS OTHER THAN ABOLITION

To some, abolition may seem an extreme solution. There are almost two million incarcerated people in over five thousand prisons across the United States.[150] Ending such an expansive program will certainly not be easy. However, for various reasons, solutions that do not address abolishing or at least scaling down existing prisons systems fall short in addressing the feedback loop described above.

A. *Air Conditioning is Not Enough*

Providing air conditioning in the prisons that do not have it is essential, but due to rising temperatures, it will likely not be enough to combat the unconstitutional conditions caused by climate change. First, air conditioning alone will fail to adequately protect prison populations from excessive heat. Second, the cost of installing air conditioning given the number of prisons that do not have it will likely be too high to be practical without reducing the size and number of prisons.

Even if air conditioning was installed in all facilities, this would not prevent all risks created by climate disaster. Climate change has drastically increased the rate of extreme weather conditions such as hurricanes or wildfires.[151] Extreme heat is also likely to result in droughts, making essential water scarce.[152] Finally, even with systems such as heating and cooling in place, blackouts and extreme weather events can increase the chances that these systems fail.[153] If air conditioning fails outside of prisons, people can take cool showers, drink cold water, move to the shade, or go to a place that is air conditioned. If air conditioning fails in prisons, inmates have no such recourse.

In February 2021, widespread power outages across Texas resulted in severe cold, understaffing, and shortages of food, water, and

150. Sawyer & Wagner, *supra* note 9.

151. *See* Ramirez, *supra* note 3.

152. Tiffany Means, *Climate Change and Droughts: What's the Connection?*, YALE CLIMATE CONNECTIONS (May 11, 2023), https://yaleclimateconnections.org/2023/05/climate-change-and-droughts-whats-the-connection/.

153. *See id.*

medication in prisons.[154] No access to water means that toilets become unflushable and eventually start overflowing with waste.[155] Similarly, in Brooklyn, New York, a federal class action lawsuit was brought by prisoners after a winter storm caused a power outage that lasted for seven days.[156] This outage resulted in lockdown conditions, lack of light to see or eat by, severe cold temperatures without adequate clothing, lack of access to hot food or water, and disruptions to medical care.[157]

Even if air conditioning was enough to facilitate constitutional prison conditions, the cost of installing air conditioning in all prisons has been said to be prohibitively expensive. The cost to "upgrade the HVAC system of a prison to make it habitable is $38,414 per inmate."[158] With almost two million people currently incarcerated,[159] and at least 44 states lacking universal air conditioning,[160] the cost would certainly be high. However, Texas State Senator John Whitmore, responding to an interview in 2011, said about installing air conditioning in Texas prisons: "We couldn't afford to do it if we wanted to. But number one we just don't want to."[161] Thus even if the cost was not prohibitive, political resistance to making prisons more habitable might hinder efforts to prevent unconstitutional conditions of confinement.

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154. Keri Blakinger, *Inside Frigid Texas Prisons: Broken Toilets, Disgusting Food, Few Blankets*, MARSHALL PROJECT (Feb. 19, 2021), https://www.themarshallproject.org/2021/02/19/inside-frigid-texas-prisons-broken-toilets-disgusting-food-few-blankets.

155. Jolie McCullough, *Texas Jails and Prisons See Brutal Cold and Overfilled Toilets in Winter Storm*, TEXAS TRIBUNE (Feb. 18, 2021), https://www.texastribune.org/2021/02/18/texas-jails-prisons-winter-storm/.

156. Kevin Bliss, *Lawsuit Over Winter Power Outage at Brooklyn's Troubled Federal Detention Center Granted Class Certification*, PRISON LEGAL NEWS (Feb. 1, 2022), https://www.prisonlegalnews.org/news/2022/feb/1/lawsuit-over-winter-power-outage-brooklyns-troubled-federal-detention-center-granted-class-certification/.

157. Scott v. Quay, 338 F.R.D. 178, 183–86 (E.D.N.Y. 2021).

158. Levenson, *supra* note 35, at 153.

159. Sawyer & Wagner, *supra* note 9.

160. Additionally, many southern states lack air conditioning in a majority of prison facilities, including Texas where 30% of facilities have full air conditioning and Florida with only 24% of facilities having air conditioning. Jeanine Santucci & Maria Aguilar, *Most US States Don't Have Universal Air Conditioning in Prisons. Climate Change, Heat Waves are Making it 'Torture'*, USA TODAY (Sept. 12, 2022), https://news.yahoo.com/most-us-states-dont-universal-090006461.html.

161. Maurice Chammah, *"Cooking Them to Death": The Lethal Toll of Hot Prisons*, MARSHALL PROJECT (Oct. 11, 2017), https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons.

B. *"Green" Prisons*

Because retrofitting old prisons to be resilient to climate disasters would be costly, states may be tempted to build new, better prisons. However, this solution would still require new construction that would create more emissions. Furthermore, building new prisons would require setting aside more land for this construction that could alternatively be conserved or put to another more sustainable purpose. Too much emphasis on creating sustainable prisons can distract from important conversations regarding the scale of the prison system itself and addressing not only climate issues, but also social justice issues.[162] This phenomenon parallels "greenwashing" of material goods, which masks important considerations of whether certain goods should continue to be produced at current rates. It is too easy to think of the challenge of building a large, continuously operating building, with security requirements that prohibit the use of certain materials, as a problem to be solved by clever construction, rather than a fault with U.S. prison policy.[163] These discussions overshadow arguments that prisons need not exist at the current scale,[164] or at all.

Focusing on sustainability alone allows both conservative and liberal policy makers to avoid addressing the systemic issues of incarceration. On the conservative side, sustainable prisons can be more profitable, more efficient, and can perpetuate "tough on crime" policies.[165] On the liberal side, "green" prisons suggest a healthier and more environmentally friendly prison system.[166] This line of thinking paints "green" prisons as an attractive option, ignoring institutional harms that continue to exist and aren't rectified by clean energy. Therefore, a focus on "green" prisons allows both sides of the political adversarial system to ignore larger issues of social harm and climate disaster perpetuated by the prison system. Notably, the U.S. Department of Justice's own report on "greening" the corrections system does not make any mention of decreasing the scale of the prison system itself.[167] Instead,

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162. *See* Jewkes & Moran, *supra* note 32, at 463.
163. *See id.* at 456.
164. *See id.* at 463.
165. *Id.*
166. *Id.*
167. Mindy Feldbaum, Frank Greene, Sarah Kirschenbaum, Debbie Mukamal, Megan Welsh, & Raquel Pinderhughes, *The Greening of Corrections*, U.S. DEP'T JUSTICE (2011),

the report concludes that the number of incarcerated individuals that has "grown so greatly so quickly" is what makes a "holistic" approach that teaches personal responsibility and "green skills" so important.[168] Even the language of "sustainable prisons" indicates that it is not only increasing the efficiency of energy use within prison buildings but sustaining the prison system itself at its current scale.[169]

While prison growth has slowed since the 1970s, more prisons are still being built.[170] Even a prison built with sustainable materials, efficient heating and cooling, and "green" consumer practices will still produce emissions. Furthermore, most existing prisons fall very short of sustainable standards. The destruction of old prisons and the creation of new prisons would contribute significantly to greenhouse gas emissions even using the best practices. We must confront whether building more prisons—including "green" prisons—is a desired solution rather than a degrowth[171] of the prison industry.

Furthermore, a focus on building "green" prisons fails to respond to systemic racial and class discrimination within the U.S. prison population. The U.S. Department of Justice's report on "greening" the corrections system also does not make any mention of addressing race and class within the corrections system.[172] Although the government has recognized the racial inequity in climate justice,[173] it has done little to address how mass incarceration has had profound effects on the risk posed to Black, Latinx, and poor Americans within the U.S. prison system.

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https://nicic.gov/resources/nic-library/all-library-items/greening-corrections-creating-sustainable-system.

168. *Id.* at 52.

169. Jewkes & Moran, *supra* note 32, at 463.

170. *See supra* notes 25–28 and accompanying text.

171. "Degrowth is an idea that critiques the global capitalist system which pursues growth at all costs, causing human exploitation and environmental destruction. The degrowth movement of activists and researchers advocates for societies that prioritize social and ecological well-being instead of corporate profits, over-production and excess consumption. This requires radical redistribution, reduction in the material size of the global economy, and a shift in common values towards care, solidarity and autonomy. Degrowth means transforming societies to ensure environmental justice and a good life for all within planetary boundaries." *What is Degrowth*, DEGROWTH, https://degrowth.info/degrowth (last visited Mar. 3, 2025).

172. Feldbaum, Greene, Kirschenbaum, Mukamal, Welsh, & Pinderhughes, *supra* note 168.

173. *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited Jan. 12, 2024).

Shifting the focus away from the "green" prison does not require abandoning necessary reform of the existing system. As discussed in Part II of this paper, there are unconstitutional conditions affecting people in Southern U.S. prisons today. These people need relief, they need air conditioning, access to water, and access to medical care. Balancing reforms needed to protect people in prison today and progress towards abolishment of prisons is one of the biggest challenges facing abolitionists.[174]

IV. ABOLITION AS A SOLUTION

> *We are firm in our resolve and we demand, as human beings, the dignity and justice that is due to us by our right of birth. We do not know how the present system of brutality and dehumanization and injustice has been allowed to be perpetrated in this day of enlightenment, but we are the living proof of its existence and we cannot allow it to continue.*

\- From the Attica Prisoner's Manifesto of Demands (1971)[175]

> *I just want people to remember that, while I made a mistake, I'm still somebody's daughter and somebody's sister. I feel like anybody could be sitting where I'm at. I made a choice. I made a decision. It was a bad one. But I'm you, just one decision away.*
>
> *Remember that we're humans. I did commit a crime . . . I'm still being punished. But this is torture. If that's what they wanted to do . . . why didn't they just kill us?*

174. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOCIAL JUSTICE 212, 216 (2000).

175. In July 1971, the inmates of Attica Prison submitted a manifesto with 27 demands to the Commissioner of Corrections. *Attica Prisoners Manifesto of Demands (1971)*, ABOLITION NOTES, https://abolitionnotes.org/attica-prisoners-manifesto-of-demands (last visited Feb. 29, 2024).

- Anonymous Prisoner at the Hobby Unit prison in Marlin, Texas[176]

As explained in Part I and II of this paper, the current system of incarceration will continue to accelerate climate change and risk the health and safety of incarcerated individuals, even with remedial action. As current temperatures continue to rise, incarceration will both perpetuate current conditions of cruel and unusual punishment in the Southern U.S. while also risking other areas of the country. Incremental change will therefore prove insufficient to address both the climate crisis and unconstitutional prisons. Abolition is the only solution for breaking this cycle. First, constitutional arguments for abolition should be continuously raised by petitioners making Eighth and Fourteenth Amendment claims against incarceration. Second, there are tangible steps to be taken towards the complete abolition of prisons.

A. *Constitutional Arguments for Prison Abolition*

Before discussing the practical steps to affect prison abolition, it is worthwhile discussing the constitutional basis for challenging the carceral system. Both the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's equal protection guarantees are legitimate avenues for arguing that our current system of incarceration is unconstitutional.

The plaintiff's argument in *McCleskey v. Kemp* provides a framework for such an argument. After being convicted and sentenced to death in Georgia, Warren McCleskey filed a petition for a writ of habeas corpus that, among other claims, challenged Georgia's capital sentencing as racially discriminatory in violation of the Eighth and Fourteenth Amendments.[177] In support of his constitutional claims, McCleskey presented rigorous statistical evidence showing that the race of a defendant affected the risk of a death sentence, with Black defendants accused of killing white victims having the highest risk of a death sentence.[178] Despite the strength of the data and the Court's limited acceptance of statistical evidence as proof of discrimination,[179] the Court

176. Buchele, *supra* note 2.
177. McCleskey v. Kemp, 481 U.S. 279, 285–86 (1987).
178. Roberts, *supra* note 22, at 91.
179. McCleskey, 481 U.S. at 293.

held that McCleskey had not shown that the Georgia State Legislature enacted or maintained its capital punishment laws for a discriminatory purpose.[180] Similarly, although a risk of racial bias can be an Eighth Amendment violation, the Court found the statistical evidence was not "constitutionally significant."[181] The Court suggested that too many factors exist to show that race influences capital sentencing.[182] Furthermore, the Court held up the importance of discretion as integral to our criminal justice system and providing benefits to defendants.[183] Finally, the Court's opinion, written by Justice Powell, remarked that McCleskey's claim "taken to its logical conclusion" would apply not just to capital sentencing, but to all criminal penalties.[184] Abolitionist Dorothy Roberts characterizes this reasoning as "animated by a desire to avoid the radical change an abolitionist constitutionalism would require" or a "fear of too much justice."[185] However, whether the requirements of the constitution require the abolition of criminal punishments due to the disparate impact and severity of those punishments is a question the Court can, and should, contend with, rather than favoring the status quo simply out of fear that the change required would be too extreme.

Despite the majority's rejection of McCleskey's argument, hope remains for future challenges under similar claims. In Justice Brennan's dissent, he points to the sophistication of the multiple-regression analysis presented by McCleskey in rebutting the majority's claim that McCleskey failed to show a constitutionally significant risk that his sentence was influenced by his race.[186] Furthermore, the dissent also engages with the death penalty's racist history and held that this history supports McCleskey's claim.[187] Thus, even as most members of the Court clung to the existing racial regime, four more members expressed a willingness to engage with the realities of the system. Nor should it be a deterrence that the Court ruled against an abolitionist reading of the

180. *Id.* at 299–300.

181. *Id.* at 313.

182. *Id.* at 294–95.

183. *Id.* at 311–12. It should be argued, however, discretion within the criminal justice system only benefits defendants where it acts to improve the overall fairness of proceedings. However, the very statistical evidence that McCleskey provided to challenge the constitutionality of Georgia's death penalty shows that discretion within the system has not had this effect.

184. *Id.* at 315–16.

185. Roberts, *supra* note 22, at 90–92.

186. *McCleskey*, 481 U.S. at 327–28 (Brennan, J., dissenting).

187. *Id.* at 328–33.

Constitution in this case. In *Dred Scott v. Sandford*, the Court relied on an existing system built on racial discrimination rather than looking to fundamental principles of equality and democracy.[188] Yet, it was the abolitionist movement to end slavery that drove national conversation regarding the Constitution's stance on slavery and led to the eventual passing of the Reconstruction Amendments.[189] Similarly, prison abolitionists must continue to hold that the fundamental values of the Constitution, including equal protection and the prohibition on cruel and unusual punishment, will not tolerate caging human beings. George Jackson, an abolitionist and member of the Black Panther Party, said abolitionists must "hold the legal pigs to the strictest interpretation of the Constitution possible."[190] Following this call means to uphold the Constitution as a document of freedom that will not allow for the exploitation of her people.

B. *Steps to a Society Without Cages*

The first step in prison abolition, *moratorium*, is to "stop building cages."[191] The number of correctional facilities increased by 43% from 1990 to 2005, and even though prison construction has slowed since, new prisons are still being built.[192] Stopping construction on new prisons helps to lower the fossil fuel emissions caused by prison construction and maintenance. This step also requires policymakers to abandon ideas of "green" prisons as an alternative to reducing the scale of the prison system. As discussed earlier, even prisons built and maintained using sustainable practices will still create emissions. The prison system simply

188. Roberts, *supra* note 22, at 53-55.

189. Although many abolitionists saw the Constitution as an antislavery document, even before the Reconstruction Amendments, another group of thinking (referred to as the Garrisonians after William Lloyd Garrison) repudiated the document because it permitted slavery. Roberts, *supra* note 22, at 54–55. Today as well, many abolitionists do not seek support in constitutional law. *Id.* at 8. Given the current constitutional jurisprudence as well as the composition of the current Supreme Court, it is understandable not to expect immediate success from a constitutional argument. I argue not that the document should be defended as untainted by racial capitalism, for it is not, but for its use as a tool towards abolition. For a more nuanced discussion of abolitionist constitutionalism, see Roberts, *supra* note 22, at 7.

190. *Id.* at 110–11 (quoting Letter from George Jackson to Fay Stender (Mar. 31, 1970), in GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON, at 231 (1970)).

191. John Washington, *What is Prison Abolition?*, NATION (July 31, 2018), https://www.thenation.com/article/archive/what-is-prison-abolition/.

192. *See supra* notes 25–28 and accompanying text.

cannot continue to operate at its current scale without perpetuating the cycle of emissions, climate change, and unconstitutional prison conditions.

Abolitionists and environmentalists have already collaborated to form coalitions opposing new prison construction. About twelve years following the completion of United States Penitentiary Big Sandy in Martin County, Kentucky, the federal government allocated $444 million towards another federal prison in Letcher County, Kentucky.[193] In response, community members formed the Letcher Governance Project (LGP).[194] Members of the coalition immediately began vocalizing their concerns and demanding sustainable economic and environmental justice investments instead of building a prison.[195] The coalition partnered with environmental groups to raise concerns about the threat to nearby old growth forests and the effects of air, water, noise, and light pollution that would result from building the prison.[196] The groups filed a lawsuit along with incarcerated people that were likely to be transferred to the prison.[197] During the Federal Environmental Impact Statement Process,[198] the public filed over 2,000 comments opposing the project.[199] After a two year delay in the planned construction, federal officials formally cancelled construction and abandoned the plan to build a prison in Letcher County.[200] The work of the community in Letcher County shows the potential for collaboration between the environmental justice and abolition movements.

The second step in prison abolition, *decarceration*, is about getting people out of prisons.[201] In the 1980s, the growth of the prison industry coincided with declines in farming, mining, timberwork, and manufacturing and the transition to a service economy.[202] Many rural

193. Vaidya Gullapalli, *Fighting Against a New Prison—And Winning—In Letcher Couty, Kentucky*, APPEAL (July 1, 2019), https://theappeal.org/fighting-against-a-new-prison-and-winning-in-letcher-county-kentucky/.

194. McLeod, *supra* note 21, at 1556.

195. *Id.* at 1557.

196. *Id.* at 1558.

197. *Id.*

198. Under the National Environmental Policy Act, federal agencies must prepare an Environment Impact Statement for any action "significantly the quality of the human environment." 42 U.S.C. § 4332(C).

199. McLeod, *supra* note 21, at 1558–59.

200. *Id.* at 1559.

201. Washington, *supra* note 192.

202. Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT 197 (Marc Mauer & Meda Chesney-Lind eds., 2002).

Americans sought jobs in prisons as these jobs were considered to be more stable.[203] Getting people out of prisons and shutting down prisons will create a new population of people that need jobs, both those previously incarcerated and those that previously worked in the prison industry. This new workforce should be harnessed to advance truly sustainable efforts. Furthermore, with decreased government spending on prisons, more money will be available to go towards these projects.

By limiting access to exploitative labor in the form of incarcerated labor, this step also forces oil and gas industries to begin paying the true cost of labor. Furthermore, it will stop industries and the government from avoiding the cost of natural disasters, forcing a focus on preventative action and building resilient communities.

During this phase, priority should go towards shutting down older prisons built before the 1990s since these prisons are the most likely to deteriorate as humidity and temperatures increase. Rather than building new "green" prisons, prison services, to the extent they exist at all, can be concentrated in the most efficient buildings that currently exist.

Throughout these first two phases, efforts should be focused on decommissioning prisons and decreasing rates of incarceration towards a complete end of the carceral system. However, no abolitionist truly expects that such changes will happen overnight. Therefore, some attention must still be given to harm reduction within the carceral system while the process of ending the system is ongoing. Prison abolitionists pursue "non-reformist reforms" that focus on changes within the carceral system that reduces harm to individuals and the system's capacity for harm.[204] Examples include the elimination of cash bail, decriminalization of drug use and other non-violent crime, and ending police stop-and-frisk practices.[205] Similarly, installing air conditioning in all prisons, lowering commissary prices through regulation, and requiring fair wages for incarcerated labor would all reduce the harm caused by prisons and reduce the power of the state and the for-profit corrections market from profiting off of the exploitation of incarcerated populations.

The third and final step in prison abolition, *excarceration*, is about diverting people from prisons.[206] This step requires responding to

203. *Id.*
204. Roberts, *supra* note 22, at 114.
205. *Id.* at 115–16.
206. Washington, *supra* note 192.

social problems and injustices. This step will require environmental justice initiatives that decrease the burden put on poor and minority communities and avoid further entrenching wealth and racial divides.

Efforts towards decriminalization in other countries have seen great social and environmental benefits. In the Netherlands and Portugal, the decriminalization of drugs has led to much smaller prison populations and greater household incomes by allowing families to stay together.[207] German and Dutch prison systems operate on a principle of "normalization" where prison life is structured to be as close to life outside the prison as possible with the goal being reintegration.[208] These countries also use diversion programs to avoid prosecution altogether.[209] These countries are both able to maintain incarceration rates that are just over a tenth of the U.S.'s incarceration rate.[210] Improved living conditions within prisons in Belize and the Dominican Republic have decreased recidivism rates, leading to less cost per prisoner when compared with U.S. prisons.[211] By addressing the societal and political issues that have led to mass incarceration in the first place, we can prevent large prison populations thus decreasing the need for high-emitting construction and maintenance of prisons. By treating inmates with humanity by improving prison conditions and decreasing extreme security measures, we can also reduce recidivism.

Excarceration acknowledges that prison abolition is not just about the negative goal of dismantling prison systems, but also includes the positive goals of addressing social, economic, and political conditions that cause crime.[212] One of these goals includes the end of capitalism[213] which is at the same time responsible for both deep racial and class divides, as well as a leading cause of climate disaster. Factors that reinforce poverty and mass incarceration also contribute to the climate crisis. For example, automation of industrial labor erodes the working

207. Elijah Baker, *A Path Forward: Global Success in Decriminalization, Reform, and Re-entry into Society* in ENVIRONMENTAL JUSTICE STRUGGLES IN PRISONS AND JAILS AROUND THE WORLD, GLOBAL ENV'T JUSTICE PROJECT 90, 93–94 (2020).

208. Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, VERA INSTITUTE OF JUSTICE, 7 (Oct. 2013), https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states.

209. *Id.* at 8.

210. *Id.* at 7.

211. Baker, *supra* note 208 at 96.

212. Barkow, *supra* note 16, at 264.

213. *Id.* at 249.

class, while also increasing emissions.[214] The Black Panther Party's theory of "lumpenization" described this phenomenon as early as the 1970s as they witnessed the erosion of the working class due to increased automation.[215] Automation progressively reduces the need for certain jobs, making the working class continually less employable.[216] These lumpen, or surplus populations, are then forced into prisons.[217] Through this process, power is maintained in the white proletarian class and Black Americans are continually subjugated.[218] Besides further entrenching racial divides, automation also comes at an environmental cost. Newer technologies, such as A.I., require large amounts of computing power and electricity, leading to increased emissions.[219] While technology itself is not necessarily bad, automation paired with exploitative labor practices and a capitalist philosophy is bad for both people and the climate.

Abolition is more than the ending of mass incarceration. Abolition, as envisioned by abolitionists such as Angela Davis, is a "feminist, anti-racist, anti-oppressive, decolonial and ultimately, [a] democratic socialist project."[220] Part of abolition's radical philosophy requires imagining a society that no longer has a need for prisons.[221] This work requires that abolition's restorative and transformist vision expands beyond the prison walls. Working toward abolition requires working toward liberty and protection for all people, providing material security such as housing and healthcare.[222] Abolition also requires protection from natural disaster and environmental degradation.[223] Some modern movements have also recognized that the protections needed for carceral reform also require access to a clean environment. For instance, the Green New Deal, proposed in 2019, requires "providing all people of the United States with— (1) high quality health care; (ii) affordable, safe, and

214. Jude Coleman, *AI's Climate Impact Goes Beyond Its Emissions*, SCIENTIFIC AMERICAN (Dec. 7, 2023), https://www.scientificamerican.com/article/ais-climate-impact-goes-beyond-its-emissions/.

215. Lumpenization builds off the Marxist idea of the lumpen, unemployed workers who keep labor costs down and weaken labor unions. WANG, *supra* note 18, at 57–58.

216. *Id.*

217. *Id.* at 64.

218. *See id.* at 58-59.

219. Coleman, *supra* note 215.

220. Ti Lamusse, *Doing Justice Without Prisons: A Framework to Build the Abolitionist Movement*, 35 SOCIALISM & DEMOCRACY 300, 2-3 (2021).

221. Roberts, *supra* note 22, at 119-20.

222. Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U.L. REV. 685, 712-13 (2022).

223. *Id.* at 713.

adequate housing; (iii) economic security; and (iv) clean water, clean air, healthy and affordable food, and access to nature."[224] Similarly, the Red Nation Program recognizes that "[e]veryone deserves free housing, food, clean drinking water, education, mobility, employment, . . . healthcare[,] . . . spiritual freedom[,] and a livable earth."[225] These programs argue for "the right to live, not simply exist" which requires shelter, but not captivity.[226]

Abolition requires a holistic solution because drastically reducing the prison population is unhelpful if society is not prepared to meet the needs of the reentry population. We must address structural issues that cause crime while dismantling the prison system. Addressing climate disaster is necessary to create the societal change required to obfuscate the need for prisons. At the same time, ending mass incarceration is necessary to prevent climate disaster.

CONCLUSION

Outside my window
Outside my window, a new day I see,
And only I can determine what kind of
Day it will be.
It can be busy and sunny, laughing and gay,
Or barren and cold, unhappy and gray.
My own state of mind is the determine key
For I am only the person I let myself be
I can enjoy what I do and make it seem fun
Or gripe and complain and make it hard on someone
But have faith in my self and believe what I say
And personally I intend to make the best of each day

\- *Untitled,* by a California prisoner[227]

224. H.R. 109, 116th Cong. (2019).

225. *The Red Nation Program*, RED NATION, https://therednation.org/10-point-program/ (last visited Feb. 29, 2024).

226. Hasbrouck, *supra* note 223, at 712.

227. A California Prisoner, *Untitled*, PRISON CENSORSHIP (May 2006), https://www.prisoncensorship.info/archive/etext/agitation/prisons/poetry/.

The current U.S. prisons system contributes significantly to climate change. At the same time, prison populations suffer due to rising global temperatures caused by climate change. If we want to break this cycle of emissions and unconstitutional prisons, we must consider solutions that dismantle the structure of the prison system, not just the prisons themselves. "Green" prisons are not cost-effective or even possible at the current scale of U.S. prisons. Furthermore, we need to carefully consider what we are sustaining. Solutions that do not address the inequality within the U.S. criminal system miss an opportunity to create both a more environmentally friendly and a more equitable society.

THE TRUMPET THAT SHALL NEVER SOUND RETREAT: THE ENDURING RELEVANCE OF SECTION THREE OF THE FOURTEENTH AMENDMENT IN PRESERVING THE LEGACY OF RECONSTRUCTION POST-*TRUMP V. ANDERSON*[*]

PATRICK BRADEY[**]

** ** J.D. Candidate, University of North Carolina School of Law, Class of 2025. The title of this piece is taken from the lines of "Battle Hymn of the Republic," a folk marching song popularized among Union troops during the Civil War. A fuller excerpt of a variation of the line reads: "He has sounded forth the trumpet that shall never call retreat / He is sifting through the hearts of men before his judgment seat." The author holds these particular words of special relevance in the contemporary moment. *Battle Hymn of the Republic: The Story Behind the Song*, THE KENNEDY CENTER, https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/media-and-interactives/media/music/story-behind-the-song/the-story-behind-the-song/the-battle-hymn-of-the-republic/.

INTRODUCTION

Two days after the Confederate attack on Fort Sumter that marked the beginning of the American Civil War, North Carolina militiamen arrived to seize Fort Macon, a Union garrison at the eastern end of Bogue Banks constructed to guard Beaufort Inlet.[1] Barely a year later, Union forces surrounded and laid siege to the fort, offering the Confederate commander multiple opportunities to surrender, all of which were rebuffed.[2] Negotiations having failed, federal troops, encamped along the coast adjacent to Fort Macon, opened fire on its brick fortifications with a new variety of more accurate rifle-barreled artillery.[3] Subjected to precise cannon shots that devasted the brick masonry construction of the fort, the Confederate commander surrendered after less than twelve hours, ceding control of Fort Macon back to the Union Army and ending barely a year of its occupation by insurrectionary forces.[4]

Like this rifle-barreled artillery, Section 3 of the Fourteenth Amendment to the federal Constitution, which bars from office any person who has previously engaged in rebellion against the lawful government of the United States or of any State,[5] is a precise tool designed for the defense of our Republic. Though narrowed in scope following the Supreme Court's decision in *Trump v. Anderson*, this mechanism of constitutional disqualification remains a powerful tool for protecting the integrity of state and local elections and governments.

This Recent Development explores the history, operation, and contemporary utility of this disqualification provision in the wake of the

1. *History of the Fort,* FRIENDS OF FORT MACON, https://web.archive.org/web/20240419204428/https://friendsoffortmacon.org/what-do-the-friends-do/history/ (at Part VI. Confederate Occupation).
2. *Id.*
3. *Id.*
4. *Id.*
5. U.S. CONST. amend. XIV, § 3.

US Supreme Court's decision in *Trump v. Anderson*.[6] Part I briefly surveys the history and text of Section 3, especially within the context of its passage with other amendments to the Constitution following the Civil War. Part II explains the narrowed meaning of Section 3 following *Trump v. Anderson*, while Part III explores its continued viability using the Fourth Circuit's (largely undisturbed) framework set out in their 2022 decision *Cawthorn v. Amalfi*, particularly how Section 3 disqualification may still be pursued in the federal courts against state officers in the face of recalcitrant state electoral bodies or even state courts. Part IV elaborates on the vital function served by Section 3 in our democratic, constitutional system of self-government before turning, in Part V, to the particular relevance of Section 3 and this analysis to North Carolina.

I. THE RECONSTRUCTION AMENDMENTS AND SECTION 3

Following the Civil War, Congress undertook a sustained and far-reaching project of rebuilding both the defeated South, and the constitutional order which the conflict had torn asunder. The era of Reconstruction was one of profound legal, social, political, and economic change that was premised on the realization of the Union's motivations for victory, and the fundamental reordering of the power of the states within the federal structure of our government.

A. *The Reconstruction Amendments*

Following the end of the Civil War, Congress passed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the federal Constitution.[7] The Thirteenth Amendment outlaws slavery in the United States;[8] the Fourteenth Amendment protects American citizenship and ensures equal protection before the law;[9] and the

6. Trump v. Anderson, 142 S. Ct. 662 (2024).

7. Alexander Tsesis, *Enforcement of the Reconstruction Amendments,* 78 WASH. & LEE L. REV. 849, 851 (2021).

8. U.S. CONST. amend. XIII.

9. U.S. CONST. amend. XIV.

Fifteenth Amendment protects the right of suffrage.[10] Together, they responded to a need to reimagine constitutional protections as a "vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government."[11]

The Fourteenth Amendment, in which Section 3 appears, was specifically passed by Congress in order to enshrine the core principles of the Union's victory in the Civil War "beyond the reach of . . . shifting political majorities"[12] after certain political actors, including the President himself, acted to subvert the success of the Civil Rights Act, passed by Congress to enforce the guarantees of the Thirteenth Amendment.[13] Likewise, even the passage of the Fifteenth Amendment failed to curb state-level efforts to suppress the voting rights of Black people,[14] requiring additional federal supports to correct the states' failure in this regard.[15]

B. *Section 3 of the Fourteenth Amendment*

The Fourteenth Amendment reads as a somewhat dissonant collection of provisions that cover citizenship and equal protection,[16] congressional apportionment,[17] and the public debt,[18] but includes in relevant part:

> "[n]o person shall . . . hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any

10. U.S. CONST. amend. XV.

11. Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L. J. 2003, 2006 (1999).

12. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 251 (2d ed. 2014).

13. *Id.* Said one Congressman in reference to President Andrew Johnson's persistent efforts to sink Black civil rights by vetoing Congress's bills providing for their enforcement by the federal government, "the President has gone over to the enemy." *Id*. at 251–53.

14. *Id.* at 423.

15. *Id.* at 454–55 (discussing the federal intervention embodied in the 1870 and 1871 Enforcement Acts).

16. U.S. CONST. amend. XIV, § 1.

17. U.S. CONST. amend. XIV, § 2.

18. U.S. CONST. amend. XIV, § 4.

> State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[19]

That provision thus functions to disqualify–by an apparently automatic constitutional mechanism–any current or former public officeholder from continuing in or regaining their public position if they have previously engaged in insurrection against the United States. Indeed, its express purpose was to bar former Confederates from ever again holding public office,[20] prohibiting them from wielding the power of the government they had previously sought to overthrow–a purpose the post-Civil War populace evidently felt strongly enough about to permanently enshrine in the text of our Constitution.

C. *The Amnesty Act*

Congress would exercise its option under Section 3 to remove the disqualification of former Confederates in 1872 with the passage of the Amnesty Act.[21] Proponents of this forgiveness for those who had first prosecuted the Civil War argued that alienating them from government would "encourage them to make terrorist mischief"[22] since they could not reasonably be expected to "give wholehearted support to the public authority that labeled them political outlaws."[23] By bringing them back into the fold, supporters hoped that "harmony and stability" would result,[24] treating the Confederacy's rebellion as "an error rather than [] a crime."[25] In the background of their advocacy for their sanctioned comrades, though, was the desire of certain members of

19. U.S. CONST. amend. XIV, § 3.

20. JOANNA LAMPE, CONG. RSCH. SERV., LSB10750, THE INSURRECTION BAR TO HOLDING OFFICE: APPEALS COURT ISSUES DECISION ON SECTION 3 OF THE FOURTEENTH AMENDMENT 1 (2022).

21. FONER, *supra* note 12, at 504–05.

22. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION: 1869–1879 60 (1979).

23. *Id.*

24. *Id.*

25. *Id.*

Congress to bolster their number in opposition to many of the key initiatives of Reconstruction, including Black suffrage.[26]

In opposition to such an amnesty, many Republicans recognized the naivete of such confidence in the good faith of former Confederates, and predicted that it would lead to Southern states again falling victim to reactionary white governments–a prospect that would render Reconstruction "a confessed failure."[27] Those fears were realized nearly immediately. Within a year, Reconstruction was "visibly unraveling,"[28] with Republican governments too weak in Southern states to effectively control racist mobs unleashing "spectacular atrocities" on Black voters and integrated communities.[29] By 1877 the victory of former Confederates was complete, with Rutherford B. Hayes concluding the "Corrupt Bargain" with Southern Democrats to seal his Presidential victory by withdrawing federal troops from the South, ending Reconstruction and representing the "culminating betrayal of civil rights."[30] The era of Redemption–the reassertion of a violent racialized government led by white men–was at hand.[31]

II. TRUMP V. ANDERSON

Section 3 has been deployed throughout its history,[32] but in general has been largely forgotten since the Amnesty Act, and as the events of the Civil War faded into the background of history. Following the insurrection at the Capitol on January 6th, 2021,[33] however, Section 3 has taken on a renewed legal relevance.

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26. *See id.* at 59–60.

27. *Id.* at 60–61.

28. MICHAEL W. FITZGERALD, SPLENDID FAILURE: POSTWAR RECONSTRUCTION IN THE AMERICAN SOUTH 179 (2007).

29. *Id.* at 178.

30. *Id.* at 206.

31. STEPHEN KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 2 (2000).

32. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENTARY 87, 110 (2021) (discussed at greater length *infra* Part V).

33. On January 6, 2021, a large mob of supporters of President Trump marched from a rally at which he spoke outside the White House to the United States Capitol building. There, they initiated a prolonged, violent assault on the building aimed at preventing Congress from certifying the results of the 2020 presidential election and declaring Joe Biden the President-Elect. Gaining access to the Capitol, the mob sought out various members of Congress and Vice President Mike Pence for violent reprisals in support of President Trump. The mob forced a six-hour delay in the certification of the presidential

A. *State Court Proceedings*

In the fall of 2023, a group of Republican voters in Colorado brought a challenge in state court to the legitimacy of Donald Trump's candidacy for President on the basis that his participation in the January 6th, 2021 Capitol riots disqualified him from holding public office under the terms of Section 3.[34] When Trump attempted to have the case removed to federal district court, the federal court remanded the case back to the state court nearly immediately, finding that the challengers lacked standing to sue to disqualify Trump.[35] The state trial court proceeded to find that Donald Trump did engage in insurrection as that term is used in Section 3, but nonetheless refused to bar him from the ballot on the notion that the President of the United States is not an "officer of the United States," and is therefore outside the scope of Section 3's disqualifying powers.[36]

On appeal, the Colorado Supreme Court disagreed with the trial court's disposition of the challengers' claims, holding in relevant part that (1) the state Election Code provided the challengers with the avenue for litigating their claims in state courts; (2) Donald Trump engaged in insurrection as that term is used in Section 3; and (3) Donald Trump is barred from the ballot in Colorado as a result.

Since the Election Code—a state law—makes it unlawful for the Colorado Secretary of State to list on the ballot anyone who is not a "qualified candidate," to include constitutional as well as statutory qualifications,[37] the state courts properly had jurisdiction over the matter as an action grounded in state law.[38] And because the Election Code is the method by which Colorado exercises its delegated authority from the federal government to administer elections for federal offices, it is likewise proper for the case to remain within the state's jurisdiction.[39]

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election as Senators and Representatives were evacuated to undisclosed locations for several hours. Jay Reeves, Lisa Mascaro, & Calvin Woodward. "Capitol assault a more sinister attack than first appeared," ASSOCIATED PRESS (Jan. 11, 2021), https://apnews.com/article/us-capitol-attack-14c73ee280c256ab4ec193ac0f49ad54.

34. *See* Anderson v. Griswold, 543 P.3d 283, 296 (Colo. 2023).

35. *See id.* at 298.

36. *Id.* at 296.

37. *Id.* at 300.

38. *See id.* at 304–05.

39. *Id.* at 305–06.

And while the Colorado Supreme Court declined to provide a precise definition of "insurrection," it concluded that that term would "encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country,"[40] a bar cleared by the events of January 6th.[41] It further concluded that by continuing to spread election misinformation which Trump knew to engender threats of violence against state and federal officials by his supporters[42] and by statements on January 6th that "literally exhorted his supporters to fight at the Capitol,"[43] that he had "engaged in" insurrection for the purposes of Section 3.[44]

B. *Supreme Court Decision*

Having been barred from the Colorado ballot, Trump appealed the Colorado Supreme Court's determination of the meaning of Section 3 to the Supreme Court of the United States in *Trump v. Anderson.*[45] In its decision reversing the Colorado court's judgment, the United States Supreme Court radically narrowed the scope of Section 3's operation, holding that in order for Section 3 to be made useable against federal officeholders Congress must first pass an enabling statute that permits such an action to be brought.[46] Similarly, the Court held that the states may not independently design or administer statutory schemes that would operate to disqualify federal candidates under Section 3[47]—foreclosing the challengers' claims against Trump as a Presidential candidate.[48]

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40. *Id.* at 330.
41. *Id*.
42. *Id.* at 332–34
43. *Id.* at 334–35.
44. *Id.* at 336.
45. Trump v. Anderson, 601 U.S. 100, 106 (2024).
46. *Id.* at 110–11.
47. *Id.* at 115.
48. Implicit in this rationale is the conclusion that, absent an express statutory authorization by Congress, and absent the apparent power of the states to act in this capacity, Section 3 claims against federal officeholders cannot be heard by any court or tribunal of any kind, anywhere. The Court seems to have rendered the text of Section 3 utterly meaningless in that they have closed off all avenues of possible enforcement. While this is but one of the many glaring holes in the majority's rationale in *Anderson,* a full exploration of those inconsistencies is beyond the scope of this article.

The Court takes pains in *Anderson* to point out, however, that states may still enforce Section 3 with respect to state officeholders or candidates for state office.[49] Having thus disposed of the Colorado challengers' claims, the Court declined to address any additional points about the meaning of "insurrection" or the original concerns about challengers' standing first raised by the federal district court.

III. CAWTHORN V. AMALFI

Two years prior to the Supreme Court's decision in *Trump v. Anderson,* a group of North Carolina voters used Section 3 to assert that Madison Cawthorn, then a sitting member of the United States House of Representatives, was ineligible to seek reelection because of his role in the January 6th insurrection[50] in "advocating for political violence" to "intimidate" Congress and the Vice President into taking unlawful actions.[51] The challengers brought their claim before the North Carolina Board of Elections, and Representative Cawthorn sued in federal court to enjoin the Board from continuing its proceedings.[52] The challengers' motion to intervene as defendants alongside the Board was denied by the district court,[53] and the district court granted Representative Cawthorn's motion to enjoin the Board from continuing to assess his fitness for office.[54]

In its ruling, the district court emphasized that its holding was narrow, and rested not on the challengers' constitutional claims, but solely on its conclusions about the meaning and construction of the Amnesty Act, which Cawthorn had raised as protecting any insurrectionary acts he may have committed.[55] In its ruling, the district court read the Amnesty Act to not only remove constitutional ineligibilities from all persons who had engaged in insurrection against the United States by the time of the Act's passage, but also all person who would *ever* do so in the future.[56] The Board declined to appeal the

49. *Anderson,* 601 U.S. at 110.

50. Cawthorn v. Circosta, 590 F. Supp. 3d 873, 890–91 (E.D.N.C. 2022).

51. Complaint at 2–4, *In re* Challenge to the Constitutional qualifications of Rep. Madison Cawthorn (North Carolina State Board of Elections, Jan. 10, 2022).

52. *Circosta,* 590 F. Supp. at 878–79.

53. Cawthorn v. Amalfi, 35 F.4th 245, 249 (4th Cir. 2022).

54. *Id.* at 250.

55. *Id.*

56. *Circosta*, 590 F. Supp. at 890–92.

district court's ruling,[57] and the challengers again made a motion to intervene as defendants,[58] which the district court again denied.[59] The challengers appealed that ruling, as well as the court's underlying ruling on the merits, to the United States Court of Appeals for the Fourth Circuit, decided as *Cawthorn v. Amalfi*.[60]

A. *Interpreting the Amnesty Act*

Like the district court, the Fourth Circuit centered its analysis around the Amnesty Act, relying on its interpretation of the Act as the key dispositional element of the case. In its decision, the Fourth Circuit focused on the Act's use of the past tense to indicate that it was only meant to have retroactive effect, rather than an indefinite prospective impact as asserted by the district court.[61] The Fourth Circuit also found that to read the Act as having so broad a function as the district court's reading would be contrary to the purpose of Congress in granting the amnesty,[62] reasoning that "having specifically decided to withhold amnesty from the actual Jefferson Davis, the notion that the 1872 Congress simultaneously deemed any future Davis worthy of categorical advance forgiveness seems quite a stretch."[63]

However, by the time of the Fourth Circuit's decision, Representative Cawthorn had lost his primary for a second term in Congress, mooting the issue of his qualification for office.[64]

B. *Challengers' Standing to Appeal*

Considering that the voters who first brought the challenge against Cawthorn's candidacy were not party to the original lawsuit due to the district court's denial of their motion to intervene as defendants, a substantial portion of the Fourth Circuit's decision is dedicated to its

57. *Amalfi*, 35 F.4th at 250.
58. *Id.*
59. *Id.* at 251.
60. *Id.*
61. *Id.* at 258–59.
62. *Id.* at 259.
63. *Id.* at 260.
64. Gary D. Robertson, *After Cawthorn's loss, candidate challenge ruling reversed*, ASSOCIATED PRESS (May 24, 2022), https://apnews.com/article/2022-midterm-elections-congress-north-carolina-primary-126d31acbcae9c10357e27c968728083.

conclusion that the voters had standing to mount their appeal. The question of standing, broadly, inquires into whether the plaintiff has a "personal stake in the outcome of the controversy"[65] sufficient to assert that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[66]

In so finding, the Fourth Circuit determined that the challengers' claim was greater than a "generalized grievance shared by all voters in their district"[67] since they had a "personal stake" as litigants in the pendency of their complaint before the North Carolina Board of Elections.[68] And the harm with which the challengers were threatened by the district court's injunction of their proceedings before the Board were not simply procedural in nature in preventing them from making their case as they wished to, but substantive.[69] The substantive injury arises from the function of the denial of the motion to intervene to "[prevent] them, personally, from exercising their rights [under state law] to engage in discovery and participate in a hearing that would result in a binding adjudication of their claims" against Representative Cawthorn.[70]

IV. CONSTITUTIONAL DISQUALIFICATION IS A CRITICAL LEGAL RATHER THAN POLITICAL PROTECTION

Important to Section 3's continued relevance as a tool for upholding the constitutional system is its function not as a tool of politics, but a tool of law. That is, its sole use is for the enforcement of the constitutional text, rather than as a device for political distraction or policy disagreement. In its operation, it protects the integrity of the constitutional order of government and the civil rights of vulnerable voters, and remains a robust tool under the *Cawthorn v. Amalfi* appellate framework.

65. Baker v. Carr, 369 U.S. 186, 204 (1962).
66. *Flast v. Cohen,* 392 U.S. 83, 101 (1968).
67. *Amalfi*, 35 F.4th at 251.
68. *Id.* at 252.
69. *Id.* at 253.
70. *Id*.

A. *Disqualification Protects the Integrity of the Constitutional System*

That many opponents of amnesty saw it to "presage a complete abandonment of Reconstruction" is no hyperbole.[71] Reconstruction was not just a process of rebuilding the defeated South and the weakened North–it was a monumental effort to reorder the constitutional system of the United States. The Reconstruction Amendments presented a sweeping guarantee of rights for free Black people[72] and completely reconfigured the balance of power between the federal government and the states.[73] As such, Section 3 operates to protect that rebuilt nation and democratic order by barring from its leadership anyone who has previously taken up arms against it, or otherwise encouraged its overthrow.

The federal courts have said as much before. Prior to the Supreme Court's decision in *Trump v. Anderson*, barring state enforcement of Section 3 against federal candidates, and more or less in parallel with the North Carolina-based proceedings in *Cawthorn v. Amalfi,* Georgia voters brought a challenge to Representative Marjorie Taylor-Green's candidacy on a similar premise to the challenge in *Cawthorn*. In *Greene v. Raffensperger,*[74] the federal district court found that Section 3, rather than just being a mechanism for *dis*qualification, was itself a qualification for office under the Constitution.[75] That is, it isn't just a way to be taken off of the ballot, but is a minimum standard to hold office in the United States that candidates could be made to prove, similar to age or residency.[76]

Further, once Greene appealed the ruling of the trial court permitting the challenge to her candidacy to proceed, the appeal was dismissed as moot since the state elections board finished its review

71. FONER, *supra* note 12, at 504.

72. It goes without saying, of course, that many of these guarantees have yet to be fully realized. It is the author's hope that this article may one day be supportive of continuing to advance that work.

73. Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976).

74. Greene v. Raffensperger, 599 F. Supp. 3d 1283 (N.D. Ga. 2022).

75. *Id.* at 1315-16.

76. *Id.* at 1318 (referencing United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 787 n.2 (1995)).

(and ruled in her favor) in the interim.[77] There, the Eleventh Circuit noted that:

> "[T]he state proceedings under the Challenge Statute have concluded, and Rep. Greene has prevailed at each stage: the ALJ [Administrative Law Judge] ruled in Rep. Greene's favor, Secretary Raffensperger adopted the ALJ's conclusions, the Superior Court of Fulton County affirmed the Secretary's decision, and the Supreme Court of Georgia denied the Challengers' application for discretionary review."[78]

Thus, challengers had a state law right under Georgia's statutory candidate challenge procedures to argue their case to the limit of their procedural guarantees. The merit of those procedures, and plaintiffs' rights to engage them, remains undisturbed following the Eleventh Circuit's review of *Greene* similar to the process at issue in *Cawthorn.*

B. *Disqualification Protects the Civil Rights of Vulnerable Voters*

In addition to providing a mechanism that protects the Constitution and the democratic system that it defines, Section 3 is built around protecting the individual rights of voters themselves, especially those who are already electorally vulnerable.

The Constitution contains a number of counter-majoritarian protections, necessary to protect the civil rights of minority groups, and to prevent the retrenchment in power of certain majority groups.[79] These include, among others, the composition of the Senate, Presidential term limits, impeachment, and supermajority requirements for Constitutional amendments.[80] Section 3 is an oft-forgotten part of that list, presenting a check against a runaway majority that would grant the power of the state to someone who has previously sought its overthrow.

Certainly this is true in the context of Section 3's origin. The primary antagonists against Black equality and especially Black voting

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77. Greene v. Sec'y of State, 52 F.4th 907, 910 (11th Cir. 2022).

78. *Id.*

79. Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991, 1998 (2022).

80. *Id.*

rights—the Ku Klux Klan, the Knights of the White Camellia, and the Red Shirt movement, which all used intense violence to haunt the Reconstruction South as a phantom of antebellum white dominion[81]—were often composed of many former Confederate officers and government officials.[82] If Reconstruction were ever to succeed in its attempt to build a multiracial democracy or in breaking the power of white supremacist violence in the South, it could not surrender itself to the mastery of those who first made it necessary.

That same kind of protection for vulnerable minority groups remains necessary, not least because of the context in which these Section 3 challenges have so far been deployed. The three challenged candidates surveyed so far in this article all espouse radically anti-minority views. Donald Trump, in announcing his first campaign for President, fueled racialized fears about immigration by famously denouncing Latin American immigrants as "rapists."[83] Representative Majorie Taylor Greene has posted to social media—and refused to disavow—antisemitic conspiracy theories about a worldwide Jewish cabal controlling major institutions and events.[84] Madison Cawthorn, in a speech on the floor of the House of Representatives, mocked the hardships of extraordinarily vulnerable transgender youth with crass remarks about trans children's genitalia.[85]

That is not to say, of course, that Section 3 operates with a partisan lens, only serving to disqualify candidates with reactionary views about minority communities. Rather, Section 3 was born in an era when the nation was reeling from the violent impacts of intense, minority-directed animus whipped up by powerful actors to consolidate

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81. KANTROWITZ, *supra* note 31, at 57-64.

82. FITZGERALD, *supra* note 28, at 92; 204.

83. Amber Phillips, *"They're rapists:" President Trump's campaign launch speech two years later; annotated,* WASH. POST: THE FIX (June 16, 2017) https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/.

84. Eric Hananoki, *Majorie Taylor Greene penned conspiracy theory that a laser beam from space started deadly 2018 wildfire,* MEDIAMATTERS (Jan. 28, 2021, 1:15 PM), https://www.mediamatters.org/facebook/marjorie-taylor-greene-penned-conspiracy-theory-laser-beam-space-started-deadly-2018.

85. John Bowden, *Madison Cawthorn mocked for defining a woman as someone with 'no tallywacker,'* INDEPENDENT (April 4, 2022, 2:32 PM), https://www.the-independent.com/news/world/americas/us-politics/madison-cawthorn-woman-tallywhacker-speech-b2050750.html.

their political and economic power—and remains just as relevant now as we face a new era of that familiar pattern of politics.[86]

C. *Navigating the Continued Relevance of* Cawthorn v. Amalfi's *Protection of Disqualification Challenges following* Trump v. Anderson

While the utility of *Cawthorn*'s analytical approach is certainly narrowed by *Anderson's* prohibition on state enforcement of Section 3 challenges against federal candidates, it remains a critical tool in upholding constitutional democracy in the states. Indeed, *Anderson* goes out of its way to declare that states maintain the power to remove state officers under state statutes in order to enforce Section 3.[87]

Undisturbed by *Anderson,* however, is *Cawthorn*'s holding that candidacy challenges brought under state laws give rise to a right to litigate those claims to their statutory limit. That is, these statutes do not simply confer process rights, but meaningful substantive rights, too. Likewise undisturbed by *Anderson* is *Cawthorn*'s assertion that that right confers standing upon challengers to litigate their federal constitution claims in federal courts when a violation of their ability to fully bring those claims in state courts or other proceedings is violated or imminently threatened.

In cases that may follow the *Cawthorn* pattern then, where a candidate sues to enjoin the disqualification proceeding against them and obtains a ruling that the state elections board declines to appeal, the challengers themselves are permitted to intervene and appeal that ruling. Not only does this provide an additional safeguard for challengers' claims in federal courts, but it also provides a framework that challengers might also cite to assert standing to intervene on appeal in state courts that have similar or even more permissive standing rules than the federal system. It might additionally be deployed to obtain a federal order mandating a state hearing of the challengers' claims in the face of a recalcitrant state elections authority. Each of these pathways is

86. The pattern of violence and discrimination in the antebellum and Reconstruction period was directed specifically against Black people, and Reconstruction responded to the specific problem of the centuries-long subjugation of Black people. The author wishes to draw attention to the increasingly intersectional nature of the continuing struggle for racial equality with that of other groups and includes the relevant examples to that effect.

87. Trump v. Anderson, 601 U.S. 100, 110–111 (2024).

supported by the supremacy of the constitutional text—including Section 3—on which our system of government rests, rather than submission to legislative or judicial mastery over our fundamental charter,[88] and the principle that public officers at every level of government are duty-bound to enforce that text, no matter how inconvenient.[89]

This mechanism will be especially useful to litigants seeking to disqualify state candidates before state elections boards that might summarily reject those challenges or otherwise fail to faithfully investigate challengers' claims. Even in North Carolina, the board that had scheduled the complaint against Madison Cawthorn for a hearing on the merits summarily dismissed a similar complaint against Donald Trump in late 2023, in the lead up to the North Carolina Republican primary for President.[90] While Trump is a federal candidate, and one now protected by the Supreme Court's ruling in *Trump v. Anderson,* the Board's decision to jettison the complaint without so much as any semblance of an independent hearing[91] (even before *Anderson* was decided) is indicative of the risk of allowing elections boards alone to hear these challenges, and a marker of the usefulness of the *Cawthorn* appellate mechanism to vindicate challengers' hearing rights.

V. BATTLEGROUND: NORTH CAROLINA

Like the artillery trained at Fort Mason that forced its surrender to the Union, the legislation of the post-Civil War Congress is "laser-

88. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,* 605 U. PA. L. REV. 605, 623 (2024).

89. *Id*. at 628–29. This point might be all the truer for the way federal lawmakers have proved increasingly unable or unwilling to observe or enforce the constitutional safeguards we already have in place to prevent a tumble into tyranny. *See generally* Michael Gerhardt, *The Trump Impeachments: Lessons for the Constitution, Presidents, Congress, Justice, Lawyers, and the Public,* 64 WM. & MARY L. REV. 1309, 1309–26, 1329–30 (2023).

90. Will Doran, *Trump will be on NC ballots for 2024 primary after election officials dismiss complaint*, WRAL (Dec. 19, 2023, 4:03 PM), https://www.wral.com/story/trump-will-be-on-nc-ballots-for-2024-primary-after-elections-officials-dismiss-complaint/21202559/.

91. Press Release, North Carolina State Bd. of Elections, State Board Meeting (Dec. 18, 2023) https://www.ncsbe.gov/news/press-releases/2023/12/14/state-board-meeting-dec-19-2023 (meeting agenda noting that the Board heard this candidate challenge at a regularly scheduled board meeting and among routine Board business).

focused" in serving narrow, defined purposes.[92] Section 3 is no different. Indeed, after the Supreme Court's narrowing of States' ability to enforce its terms against state officers only, it has become an even more precise tool. But that narrowness does not subvert its utility.

Section 3 remains effective against state officers, and in North Carolina that remains a particularly relevant consideration. In 2024, elections in North Carolina included candidates for the state legislature who personally attended and took part in the January 6th insurrection,[93] and others who are members of the far-right anti-government militia group known as the Oath Keepers.[94] Statewide, voters had the option of electing a Superintendent of Public Instruction who was also at the January 6th insurrection,[95] has openly called for the public execution of Barack Obama, Joe Biden, and other Democratic officeholders,[96] and advocates for a "race[]-based discipline system" in public schools.[97] One of the major-party nominees for Governor had likewise spoken approvingly of violence directed against Nancy Pelosi, praised the philosophy of Adolph Hitler, including by calling himself a "black NAZI" [sic],[98] called the Holocaust "hogwash," gay people "maggots," and opined for days before women could vote.[99] Not only do these

92. Cawthorn v. Amalfi, 35 F.4th 245, 259 ("To the contrary, the available evidence suggests that the Congress that enacted the 1872 Amnesty Act was, understandably, laser-focused on the then-pressing problems posed by the hordes of former Confederates seeking forgiveness.") (citations omitted).

93. Travis Fain, *Incoming NC lawmaker was at Jan. 6 US Capitol protests, riot*, WRAL (Nov. 1, 2021, 5:45 PM), https://www.wral.com/story/incoming-nc-lawmaker-was-at-jan-6-us-capitol-protests-riot/19938994/.

94. Issac Arnsdorf, *Oath Keepers in the State House: How a militia movement took root in the Republican mainstream*, NC NEWSLINE (Oct. 21, 2021, 10:55 AM), https://ncnewsline.com/briefs/oath-keepers-in-the-state-house-how-a-militia-movement-took-root-in-the-republican-mainstream/.

95. T. Keung Hui, *Homeschooling, 'indoctrination,' Jan. 6: A look at NC's new GOP superintendent candidate*, NEWS & OBSERVER (March 30, 2024, 4:18 PM), https://www.newsobserver.com/news/politics-government/election/article286325695.html.

96. Martin Pengelly, *North Carolina schools candidate who called for Obama's death put on the spot*, GUARDIAN (March 21, 2024), https://www.theguardian.com/us-news/2024/mar/21/north-carolina-gop-michele-morrow.

97. Michele Morrow (@MicheleMorrowNC), X (March 16, 2024, 9:16AM), https://twitter.com/michelemorrownc/status/1768989610627965338?s=42&t=AWsTYM5kPCtkuvC3yofiGQ.

98. Andrew Kaczynski & Em Steck, *'I'm a black NAZI!': NC GOP nominee for governor made dozens of disturbing comments on porn forum,* CNN (Sept. 19, 2024, 3:21 PM), https://www.cnn.com/2024/09/19/politics/kfile-mark-robinson-black-nazi-pro-slavery-porn-forum/index.html.

99. Nikki McCann Ramirez & Ryan Bort, *N.C. GOP Nominee Mark Robinson's Most Reprehensible Comments*, ROLLING STONE (March 9, 2024),

comments and activities suggest a sympathy for (if not active engagement in) efforts to subvert the lawful constitutional order, they also betray a distinctly anti-civil rights animus that the Reconstruction Amendments in general and Section 3 in particularly were designed specifically to combat.[100] And while none of these is likely to directly lead to the overthrow of North Carolina's democratic system of government, together they contribute to a normalization of the same kind of "violence and political intimidation that help[] accomplish that end" that was the downfall of Reconstruction at the hands of unrepentant rebels-turned-rulers in the former Confederacy.[101]

One need only look at the Amnesty Act's aftermath in North Carolina to see the promise betrayed by abandoning Section 3—and the specter of its continued failure. Having been elected to but denied a seat in the United States Senate because of Section 3 ineligibility in 1871, Zebulon Vance, the Confederate Governor of North Carolina,[102] was later re-elected as Governor and took office in 1877,[103] after the Amnesty Act's passage. North Carolina was thus "redeemed" from its experiment with multiracial democracy.[104]

Emboldened by the victories of Redemption politics in the era of amnesty, white supremacist groups terrorized the 1898 elections with a pattern of intense and violent intimidation.[105] A brutal coup seized control of the port city of Wilmington and installed its leader—a former Confederate officer—as Mayor only days after voting had ended, declaring that the "grave crisis" of Black freedom was at an end.[106] The

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https://www.rollingstone.com/politics/politics-features/north-carolina-gop-mark-robinson-worst-comments-1234984155/.

100. The mechanism by which a Section 3 challenge might be filed and adjudicated will necessarily vary from state to state depending on the particularities of that state's election laws. See Myles S. Lynch, *Disloyalty and Disqualification: Reconstruction Section 3 of the Fourteenth Amendment,* 30 WM. & MARY BILL OF RTS. J. 153, 183–95 (2021) for an explanation of these various mechanisms.

101. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 113 (2001).

102. Magliocca, *supra* note 32, at 100.

103. Micahel Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisted 1870-1905 and 2011-2013*, 33 LAW & INEQ. 53, 82 (2015).

104. *Id*. at 71.

105. DAVID ZUCCHINO, WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY 162-174 (2020).

106. *Id*. at 189, 226. *See id*. 140–41 (identifying coup leader as a former Colonel in cavalry forces of the Confederate Army).

Governor acquiesced to this overthrow of the democratically-elected local government since the coup leaders managed to seize power by forcing the resignation of the Mayor and the Board of Aldermen (albeit through the instigation of widespread and horrific racial violence in all quarters of the city),[107] even though only a few years previous these new masters of Wilmington would have been barred from office by the letter, and the power, of the federal constitution. As our present condition now well indicates, these efforts were successful at "[weaving] strong threads of Confederate tradition into the fabric of American life" long after the rebellion's end.[108]

And though the unpredictability of contemporary statewide primaries or the results of gerrymandered elections may suggest an acquiescence by North Carolinians to a renewal of the norms of Redemption by candidates, rather the opposite is true.[109] Voters continue to file challenges against candidates on the ballot in North Carolina under Section 3,[110] and another group of North Carolinians is litigating a claim that the state constitution encompasses a guarantee to "fair" elections.[111] That is, North Carolinians care deeply about upholding constitutional rules of fairness that protect our constitutional government and defend our constitutional rights, and North Carolina will continue to be a place where such battles are waged.

CONCLUSION

This article does not suggest that contemporary candidates, or their comments or activities, rise to the same level as the racial terror of the post-Reconstruction era, or to the same magnitude as the concerted efforts of the Confederate states. Nor does it advance a theory that Section 3 should be deployed as frequently as possible simply to target candidates whose policy positions on civil rights diverge from those we

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107. *Id.* at 223–24, 226–27.

108. WILLIAM B. HESSELTINE, CONFEDERATE LEADERS IN THE NEW SOUTH vii (1970).

109. See Gene Nichol, *The Impossibility of Separating Race and Politics in a White People's Party,* 1 N.C. C. R. L. REV. 69 (2021) for a survey of continuing civil rights struggles in North Carolina, and especially their persistent racialized dimensions.

110. Doran, *supra* note 90.

111. Mehr Sher, *Does election district plan violate NC voters' constitutional rights? Heavy hitters back lawsuit claiming it does*, WFAE (Feb. 6, 2024), https://www.wfae.org/politics/2024-02-06/does-election-district-plan-violate-nc-voters-constitutional-rights-heavy-hitters-back-lawsuit-claiming-it-does.

might prefer. Rather, it illustrates the enduring importance of Section 3 in combatting a second era of Redemption, especially where Reconstruction's first defeat was worked by a unique combination of violent anti-government sentiment and violent anti-civil rights agitation.

Further, it demonstrates that even in the face of a reticence by the federal courts to abide by the express terms of Section 3, their interpretation of its text still retains important meaning in the context of regulating the conduct of elections for state and local governments, where so much of the fundamental work of civil rights is won or lost. And in the battle to preserve those rights, as well as the constitutional order on which they depend, Section 3 will continue to be as important a tool as the Union's artillery at Fort Mason in the arsenal that defends our Republic.

RELEVANT EVIDENCE MADE IRRELEVANT: *STATE V. ABBITT* AND NORTH CAROLINA'S UNCONSTITUTIONAL TEST FOR ADMISSIBILITY OF THIRD-PARTY CULPABILITY EVIDENCE*

HUNTER D. NORDBERG**

> *"I thought it was a way to exclude me even further from the case, reduce me to nothing, and, in a sense, substitute himself for me."*[1]

INTRODUCTION

The issue of identity is always paramount in any criminal trial,[2] but prosecutors and jurors can get it wrong. Since 1989, as of this paper's publication, there have been 3,586 exonerations of wrongfully convicted individuals in the United States.[3] The number of wrongful

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1. ALBERT CAMUS, L'ÉTRANGER, 103 (Matthew Ward trans., Vintage International, 1989) (1942).

2. *See* State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 257 (2023) (quoting State v. Jeter, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990)) ("Plainly, 'the identity of the perpetrator of the crime charged is always a material fact.'").

3. *The National Registry of Exonerations: Exonerations by State*,

convictions is almost certainly even higher because many petty or less serious charges don't get the attention or resources that would allow those wrongfully accused to fight against or overturn their wrongful convictions.[4] These wrongful incarcerations create a cascading set of direct and collateral consequences for victims, including years—if not decades—lost to wrongful incarceration, social stigma, marginalization, and various economic costs.[5]

There are many reasons that individuals suffer from wrongful convictions.[6] And although there are many ways to mitigate and reduce wrongful convictions, one possible avenue is the trial narrative.[7] The narrative plays a crucial role as juries deliberate the evidence before them and try to make sense of it.[8] Prosecutors have near total free reign to "tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."[9] They are, of course, subject to the limitations of the rules of evidence.[10] But in the absence of the ability to freely present a case, the prosecutorial interest in preserving security is harmed.[11] Thus, it makes sense for the limitations on the prosecution's ability to present a case to be the exception, not the rule.[12]

The right to make one's case is not limited to the State either. Defendants have a constitutional right to a meaningful opportunity to make their case and present their story to the jury.[13] It is essential to the

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THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Apr. 15, 2025).

4. Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L.R. 1265, 1292 (2018).

5. *Id.* at 1293.

6. See generally Clanitra Stewart Nejdl & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography*, 37 N. ILL. U. L. REV. 401 (2017) for an overview of scholarly work discussing such factors.

7. *See* John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L.R. 599, 612–13 (2005); John H. Blume, Sheri L. Johnson, & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1091 (2007).

8. *See* Blume, Johnson, & Paavola, *supra* note 7, at 1088.

9. Old Chief v. United States, 519 U.S. 172, 188 (1997).

10. *See, e.g.*, FED. R. EVID. 403; FED. R. EVID. 404; FED. R. EVID. 410(a).

11. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

12. *Old Chief,* 519 U.S. at 189.

13. *See* Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Anderson, 350 N.C. 152, 176, 513 S.E.2d 296, 310 (1999).

adversarial system of justice that criminal defendants be given this equal right. If defendants could not freely defend themselves before a criminal tribunal, their life and liberty would be trampled by the power of the State.[14] This is precisely why defendants have, *inter alia*, the constitutional right to counsel,[15] right to cross-examine witnesses against them,[16] and right to be heard.[17] But this crucial right is weakened by rules surrounding third-party culpability evidence that systematically disfavor criminal defendants.[18]

Although the third-party culpability defense has been referred to by many names,[19] the idea surrounding this defense is the same. It is a trial theory whereby the defense attempts to identify another person as the perpetrator of an offense as a means to vindicate the defendant's innocence.[20] Professor David McCord of Drake University Law School traces the American origins of the third-party culpability defense back to *State v. May*,[21] a North Carolina case from 1833.[22] Since the decision of the *May* court, evidence supporting third-party culpability defenses

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14. *See* Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution",* 9 OHIO ST. J. ON DISP. RESOL. 203, 218 (1994) (writing that "powerful states inevitably curtail individual rights").

15. *See* Gideon v. Wainwright, 373 U.S. 335, 344–45 (1963); *see also* State v. Simpkins, 373 N.C. 530, 535–36, 838 S.E.2d 439, 446 (2020) (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)) ("The purpose of the right to counsel 'is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society.'").

16. *See* Davis v. Alaska, 415 U.S. 308, 316 (1974); *see also* State v. Gregory, ___ N.C. ___, 912 S.E.2d 357, 359 (2025) (Riggs, J., dissenting) (quoting State v. Legette, 292 N.C. 44, 53, 231 S.E.2d 896, 901 (1977)) ("The right to confront and cross-examine one's accusers is central to an effective defense and a fair trial.").

17. *See Crane*, 376 U.S. at 690.

18. *See* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WISC. L. REV. 337, 338–39 (2016).

19. *See, e.g.,* David McCord, *"But Perry Mason Made it Look so Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917, 920 (1996) ("alleged alternative perpetrator" or "aaltperp"); Schwartz & Metcalf, *supra* note 18, at 338 ("third-party guilt evidence"); Edward J. Imwinkelried, *Evidence of a Third Party's Guilt of the Crime that the Accused is Charged With: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 LOY. U. CHI. L.J. 91, 92 (2015) ("Some Other Dude Did It" or "SODDI"); Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. CIV. RTGS. L.J. 1, 8 (2013) ("wrong-person defense" and "other-suspect defense").

20. *See* Hemphill v. New York, 595 U.S. 140, 144–45 (2022) (where defendant attempted to enter evidence suggesting that the victim's best friend committed the crime); *see also* Holmes v. South Carolina, 547 U.S. 319, 323 (2006) (where defendant's theory sought to enter evidence suggesting another man killed the victim).

21. McCord, *supra* note 19, at 921.

22. State v. May, 15 N.C. (1 Dev.) 328 (1833).

has been subjected to evidentiary rules that are skeptical of the evidence's admissibility. This has resulted in the proliferation of evidentiary rules that "impose a higher barrier to admission of [ ] third-party guilty evidence than is placed on other relevant evidence."[23] These rules have been criticized for their questionable constitutionality and their detrimental effect on criminal defendants seeking to preserve their life and liberty.[24] As one scholar put it:

> [When] the judge prevents defense counsel from presenting evidence of innocence at trial, no legitimate, competing interest is served. If the defendant is convicted without presenting a defense, everyone loses. When the jury hears only the government's evidence and theory of the case, there is no assurance that the proper result was reached. And again, the risk remains that an innocent individual was wrongly convicted, and the true perpetrator remains at large.[25]

The questions surrounding such impactful evidentiary burdens facing criminal defendants are renewed in North Carolina following the North Carolina Supreme Court's recent third-party culpability evidence decision in *State v. Abbitt*.[26] This recent development will consider *Abbitt* and how North Carolina courts review the admissibility of third-party culpability evidence. It will proceed by analyzing North Carolina's rule in the context of a defendant's constitutional right to present a defense. I contend that North Carolina's unique demand for third-party culpability evidence to functionally exonerate the defendant is arbitrary and disproportionate to the underlying purposes of the relevancy standard, and therefore unconstitutional under U.S. Supreme Court precedent. This recent development will conclude by identifying

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23. Schwartz & Metcalf, *supra* note 18, at 347.

24. *See* Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Somone Else Committed the Crime Charged: Is it Constitutional?*, 76 NEB. L. REV. 272, 299 (1997); Robert Hayes, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in* State v. Mitchell, 63 ME. L. REV. 531, 533 (2011); Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129, 161–62 (2009); Imwinkelried, *supra* note 19, at 98–99; Cicchini, *supra* note 19, at 7.

25. Cicchini, *supra* note 19, at 5.

26. State v. Abbitt, 385 N.C. 28, 891 S.E.2d 249 (2023).

solutions to analyzing the relevancy of third-party culpability evidence in North Carolina.

I. *STATE V. ABBITT*

As law students typically learn during their first week in Evidence classes, evidence probative towards a fact at issue is relevant and admissible while irrelevant evidence is inadmissible.[27] Although identity is a crucial fact in every trial and third-party culpability evidence would be probative and relevant in determining the identity of the culprit, courts across the United States examine the relevance of third-party culpability evidence under rules stricter than what is required under Rule 401.[28] The dominant approach to analyzing whether third-party culpability evidence is admissible is known as the "direct connection test."[29] Although the specifics of this rule vary from jurisdiction to jurisdiction, the direct connection test generally requires more than just mere conjecture of a possible third-party culprit.[30] Under this test, third-party culpability evidence must specifically link a particular third party to the commission of the offense at issue in a trial.[31] North Carolina follows a similar test, first defined in its present form in the 1987 case of *State v. Cotton*.[32] But unique to North Carolina's rule is the requirement that the third-party culpability evidence functionally exonerate the defendant.[33] How exactly this rule operates, namely the latter requirement, was at the center of the North Carolina Supreme Court case *State v. Abbitt*.[34]

A. *Factual Background*

On May 24, 2016, Lacynda Feimster was murdered during an attempted robbery.[35] Two perpetrators, a Black woman and Hispanic

27. FED. R. EVID. 401; FED. R. EVID. 402.

28. *See* Schwartz & Metcalf, *supra* note 18, app. at 403–09 (categorizing and listing different jurisdictions' approaches to third-party culpability evidence).

29. *Id.*

30. *See* Imwinkelried, *supra* note 19, at 97.

31. *Id.* at 98; *see* Schwartz & Metcalf, *supra* note 18, at 347 (quoting Rogers v. State, 280 P.3d 582, 586 (Alaska Ct. App. 2012)).

32. *See* State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279–80 (1987).

33. *Id.*, 351 S.E.2d at 279–80.

34. State v. Abbitt, 385 N.C. 28, 891 S.E.2d 249 (2023).

35. *Id.* at 30, 891 S.E.2d at 251–52.

man, followed Feimster into her apartment where the victim's mother, Mary Gregory, and three-year-old son also lived.[36] While in the apartment, the two perpetrators were searching for something, presumably money based on witness testimony.[37] After failing to find what she and her coconspirator were looking for, the female perpetrator fatally shot Feimster.[38] Gregory, who survived the attack, got a good enough look at the perpetrators to provide descriptions.[39] She recalled that the male perpetrator was "tall, with wavy black hair that was combed or slicked back."[40] Gregory did not make note of any facial hair or tattoos, and the man was wearing dirty latex gloves.[41] The female perpetrator was described as "short, stocky, and dark-skinned, having shoulder-length hair and wearing red tennis shoes."[42]

Three days after the offenses took place, Gregory identified Sindy Lina Abbitt and Daniel Albarran as the perpetrators through the use of a photographic lineup.[43] Subsequently, Abbitt and Albarran were indicted for the murder of Feimster.[44] Gregory affirmed her identification during the investigation and at trial.[45] During the cross-examination of Gregory at trial, defense counsel asked Gregory if she had ever been presented with a picture of a woman named Ashley Phillips.[46] Gregory answered that she had.[47] As a result of defense counsel's line of inquiry, the State filed a motion in limine to exclude discussion of the possible guilt of another person.[48]

In response to this motion, the defense presented a theory that identified two other individuals, Ashley Phillips and Tim McCain, as the perpetrators.[49] As the defense explained, the police identified Phillips as a possible suspect during their investigation.[50] Phillips is a Black woman that Feimster's family identified as a possible

36. *Id.* at 29, 891 S.E.2d at 251.
37. *Id.* at 30, 891 S.E.2d at 251.
38. *Id.*, 891 S.E.2d at 252.
39. *Id.*, 891 S.E.2d at 251–52.
40. State v. Abbitt, 385 N.C. 28, 29, 891 S.E.2d 249, 251 (2023).
41. *Id.*, 891 S.E.2d at 251.
42. *Id.* at 30, 891 S.E.2d at 251.
43. *Id.* at 31, 891 S.E.2d at 252.
44. *Id.* at 29, 891 S.E.2d at 251.
45. *Id.* at 31, 891 S.E.2d at 252.
46. State v. Abbitt, 385 N.C. 28, 31, 891 S.E.2d 249, 252 (2023).
47. *Id.*, 891 S.E.2d at 252.
48. *Id.*, 891 S.E.2d at 252.
49. *Id.* at 31–32, 891 S.E.2d at 252–53.
50. *Id.* at 31, 891 S.E.2d at 252.

perpetrator.[51] Phillips arrived at the police station for questioning in a vehicle which matched the description of a vehicle seen at the scene of the murder on the day of the murder.[52] Inside this car, investigators found a .25 caliber gun.[53] This gun matched the caliber of the bullet shell casing from the murder.[54] Police also found latex gloves similar to the ones worn by the male perpetrator.[55] DNA swabs were taken from both the gloves and shell casing, but the police failed to have these swabs analyzed.[56] Although Gregory was not shown a picture of Phillips in any photographic lineup, when later shown a picture of Phillips she said "[w]ell, she does look like [the female perpetrator]."[57]

The defense team also presented evidence suggesting that the second perpetrator of the murder was Tim McCain.[58] McCain and Phillips were allegedly associated with one another.[59] McCain was observed near the crime scene around the time the offense was committed.[60] McCain was allegedly "carrying a pistol and trying to conceal his face."[61] At this same time, McCain was with a woman who resembled Phillips.[62] Thus, the defense's argument identified Phillips and McCain, not Abbitt and Albarran, as the actual perpetrators.[63]

The trial court ruled that third-party culpability evidence must be relevant under N.C. Rule of Evidence 401 *and* satisfy the direct connection test.[64] In taking the evidence in the light most favorable to the State,[65] the trial court ruled in favor of the State.[66] The trial court reasoned that the proffered evidence failed to meet the second prong of the direct connection test, which requires the third-party culpability

51. *Id.*, 891 S.E.2d at 252.
52. State v. Abbitt, 385 N.C. 28, 31–32, 891 S.E.2d 249, 252 (2023).
53. *Id.* at 32, 891 S.E.2d at 252.
54. *Id.*, 891 S.E.2d at 252.
55. *Id.*, 891 S.E.2d at 252.
56. *Id.* at 46, 891 S.E.2d at 262 (Earls, J., dissenting).
57. *Id.* at 32, 891 S.E.2d at 252–53 (majority opinion).
58. State v. Abbitt, 385 N.C. 28, 32, 891 S.E.2d 249, 253 (2023).
59. *Id.*, 891 S.E.2d at 253.
60. *Id.*, 891 S.E.2d at 253.
61. *Id.* at 47, 891 S.E.2d at 262 (Earls, J., dissenting).
62. *Id.*, 891 S.E.2d at 262.
63. *Id.*, 891 S.E.2d at 262.
64. State v. Abbitt, 385 N.C. 28, 32–33, 891 S.E.2d 249, 253 (2023) (majority opinion).
65. Although this issue is not clearly discussed in the *Abbitt* majority, see *infra* note 82, Justice Earls points out that the trial court applied the wrong standard in this analysis, *Abbitt*, 385 N.C. at 47, 891 S.E.2d at 262 (Earls, J., dissenting).
66. *Id.* at 33, 891 S.E.2d at 253 (majority opinion).

evidence be "inconsistent" with the defendants' guilt.[67] Ultimately, the jury returned guilty verdicts against Abbitt and Albarran on first-degree murder and felony murder, respectively.[68]

B. *North Carolina's Direct Connection Approach*

The North Carolina Supreme Court heard the question of whether the trial court erred in refusing to admit the defendants' third-party culpability evidence.[69] In their briefing and oral arguments, the defendants specifically challenged the constitutionality of North Carolina's direct connection test for third-party culpability evidence.[70] The North Carolina Supreme Court began by recognizing that the United States Constitution "prohibits the exclusion of defense evidence under [evidentiary] rules that serve no legitimate purpose" or are "disproportionate to the ends that they . . . promote."[71] The evidentiary rules at issue in this case were Rule 401 and Rule 402.[72] These rules pertain to the *relevance* of evidence—Rule 402 limits admissible evidence to relevant evidence and Rule 401 defines relevant evidence as evidence which makes a fact of consequence to the issues more or less probable.[73]

Proceeding under this understanding, the North Carolina Supreme Court defined the limitations placed upon defendants under the direct connection test.[74] Third-party culpability evidence "must do more than create mere conjecture of another's guilt in order to be relevant."[75]

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67. *Id.*, 891 S.E.2d at 253.

68. *Id.* at 36, 891 S.E.2d at 255.

69. *Id.* at 36, 891 S.E.2d at 255.

70. State v. Abbitt, 385 N.C. 28, 39, 891 S.E.2d 249, 257 (2023) ("In their arguments before this Court, defendants assert error by the trial court, under both the Rules of Evidence with regard to the admissibility of relevant evidence in criminal trials and under the United State and North Carolina Constitutions in the context of a criminal defendant's right to present a defense under each instrument's Due Process Clause.").

71. *Id.* at 40, 891 S.E.2d at 257 (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)).

72. *Id.*, 891 S.E.2d at 257.

73. *See* N.C.G.S. § 8C-1, Rule 401 (2025) ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); *id.*, Rule 402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.").

74. *Abbitt*, 385 N.C. at 40–41, 891 S.E.2d at 258.

75. *Id.* at 40, 891 S.E.2d at 258 (quoting State v. McNeil, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990)).

The evidence must both implicate a third-party as the true culprit of an offense *and "*be inconsistent with the defendant's guilt."[76] The court reasoned that, without more than mere conjecture, third-party culpability evidence is "too remote to be relevant and should be excluded."[77]

Without any analysis of the constitutionality of the direct connection test, the North Carolina Supreme Court proceeded by applying the direct connection test to the facts of Abbitt and Albarran's case.[78] The court concluded there was no dispute on the first prong of the direct connection test and held in favor of the defendants on this front.[79] Thus, the real issue was whether the evidence was inconsistent with the defendants' guilt.[80] On this point, the North Carolina Supreme Court held that "while defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants."[81] Even when the court took the evidence in a light most favorable to the defendants and assumed, *arguendo*, that the evidence does prove that Phillips and McCain were present at the scene,[82] the court nonetheless reasoned that it didn't prove the defendants' innocence—if anything, it would merely indict co-conspirators.[83] For this reason, the third-party culpability evidence presented by the defendants was not "inconsistent" with the defendants' guilt and, accordingly, was not relevant evidence.[84]

Justice Earls was the sole dissenter in *Abbitt*.[85] She opened her dissent with a focus on the constitutional guarantees for a criminal

76. State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 258 (2023).

77. *Id.* at 41, 891 S.E.2d at 258 (quoting State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989)).

78. *Id.* at 41–43, 891 S.E.2d at 258–259.

79. *Id.* at 41, 891 S.E.2d at 258.

80. *Id.*, 891 S.E.2d at 258.

81. *Id.* at 43, 891 S.E.2d at 259.

82. Despite the trial court's erroneous weighing of evidence in granting the State's motion in limine, see *supra* n. 65, this is this majority's only discussion of the how a court should consider evidence when weighing the State's motion in limine, State v. Abbitt, 385 N.C. 28, 43, 891 S.E.2d 249, 259 (2023). The majority fails to consider the trial court's erroneous weighing of evidence in favor of the State.

83. *See Abbitt*, 385 N.C. at 43, 891 S.E.2d at 259 ("[W]hile defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants.").

84. *Id.*, 891 S.E.2d at 259–60.

85. *Id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting).

defendant.[86] Justice Earls's dissent placed a great emphasis on these constitutional protections and highlighted that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[87] Like the majority, the dissent gave credence to the constitutional rule that evidentiary rules should not be arbitrary or disproportionate to their purposes.[88] Justice Earls concluded that the direct connection test upheld and applied by the majority infringed upon a criminal defendant's right to have a meaningful opportunity to present a complete defense and, in turn, the right to a fair trial.[89]

The dissent focused on the nature of "relevance" regarding the admissibility of evidence. Justice Earls highlighted precedent explicitly holding that the standard for relevance is a "relatively lax" standard.[90] To support this assertion, Justice Earls pointed to precedent which held that any evidence speaking to the crime charged should be admitted by the trial court.[91] Regardless, as Justice Earls continued, the direct connection test applied by the majority is a misapplication of the relevancy standard.[92] The plain text of N.C. Rule of Evidence 401 merely requires evidence to make a fact at issue more or less likely in order to be relevant.[93] Justice Earls concluded that the majority improperly interpreted how to apply the direct connection test in light of the minimal standards required by Rule 401.[94] Although she agreed with the idea that third-party culpability evidence needs to be more than mere conjecture, Justice Earls argued that the direct connection test is not a two-part conjunctive test.[95] Instead, as she reasons, the relevancy test for third-party culpability evidence must tend to show that the defendant

86. *Id.*, 891 S.E.2d at 260.

87. *Id.*, 891 S.E.2d at 260 (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)).

88. State v. Abbitt, 385 N.C. 28, 44–45, 891 S.E.2d 249, 260 (2023) (Earls, J., dissenting).

89. *Id.* at 44, 891 S.E.2d at 260.

90. *Id.* at 45, 891 S.E.2d at 260 (first quoting State v. McElrath, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988); and then quoting State v. Israel, 353 N.C. 211, 219, 539 S.E.2d 633, 638 (2000))).

91. *Id.* at 45, 891 S.E.2d at 260 (quoting *Israel*, 353 N.C. at 219, 539 S.E.2d at 648).

92. *Id.*, 891 S.E.2d at 261.

93. *Id.*, 891 S.E.2d at 260.

94. *See* State v. Abbitt, 385 N.C. 28, 45, 891 S.E.2d 249, 261 (2023) (Earls, J., dissenting) (explaining an analysis distinct from the majority's analysis).

95. *Id.*, 891 S.E.2d at 261.

did not commit the crime *because* someone else was the likely perpetrator.[96]

Justice Earls concluded that the "rule of relevancy related to the admission of evidence of third-party guilt must be in line with" the constitutional right to present a meaningful defense.[97] Under her reading of Rule 401, Abbitt and Albarran were denied this right by having their third-party culpability evidence excluded.[98] She explained that evidentiary rules serve to protect against wrongful convictions, but when misapplied it can detract from this goal.[99] And the misapplication here and denial of the right to a fair trial have run the risk of incarcerating two possibly innocent people, and for these reasons she dissented.[100]

II. NORTH CAROLINA'S DIRECT CONNECTION APPROACH IS NOT DUE PROCESS

A central theme that reappeared in both the majority and dissent of *Abbitt* were the constitutional guarantees criminal defendants enjoy and how these rights interact with evidentiary rules.[101] The key case that both opinions relied on for this assertion is *Holmes v. South Carolina.*[102]

A. Holmes v. South Carolina *and The Right to Present a Defense*

Holmes v. South Carolina centers around a murder trial.[103] During the trial, Holmes, the defendant, sought to introduce evidence that another man, White, was the true perpetrator.[104] Holmes produced witnesses who spotted White in the neighborhood where the murder

96. *Id.*, 891 S.E.2d at 261.
97. *Id.* at 51, 891 S.E.2d at 264.
98. *Id.*, 891 S.E.2d at 264.
99. *Id.* at 50–51, 891 S.E.2d at 264.
100. State v. Abbitt, 385 N.C. 28, 50–51, 891 S.E.2d 249, 264–65 (2023) (Earls, J., dissenting).

101. *Id.* at 28, 891 S.E.2d at 257 (majority opinion) (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)); *id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting) (quoting *Holmes*, 547 U.S. at 324).
102. *Id.* at 28, 891 S.E.2d at 257 (majority opinion) (quoting *Holmes*, 547 U.S. at 326); *id.* at 44, 891 S.E.2d at 260 (Earls, J., dissenting) (quoting *Holmes*, 547 U.S. at 324).
103. *Holmes*, 547 U.S. at 319.
104. *Id.* at 323.

took place earlier that day.[105] Additionally, four witnesses provided testimony suggesting that White had confessed to the crime and admitted that Holmes was innocent.[106] Despite the relevancy of this evidence, the trial court excluded Holmes's third-party culpability evidence.[107] The South Carolina Supreme Court affirmed this exclusion, reasoning that third-party culpability evidence requires more than mere conjecture and, in the face of the State's forensic evidence, the claims of White's culpability could not raise a reasonable inference about Holmes's own innocence.[108]

The U.S. Supreme Court, however, vacated the decisions of the South Carolina courts and remanded the matter for a new trial.[109] The Court stated, in no uncertain terms, that States have the power to define evidentiary rules, but this authority has limits.[110] "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[111] This constitutional right to present a meaningful defense is violated when evidentiary rules are arbitrary or disproportionate to the purposes they serve.[112] For example, "arbitrary" rules include prohibitions on codefendants from testifying in support of their codefendants unless they are already acquitted,[113] bars on parties from impeaching their own witnesses,[114] and wholesale exclusions of testimony related to the unreliability of confessions.[115] However, the U.S. Supreme Court explicitly upheld evidentiary rules that exclude third-party culpability evidence that is "speculative or remote, or does

105. *Id.*
106. *Id.*
107. Holmes v. South Carolina, 547 U.S. 319, 323 (2006).
108. *Id.* at 324.
109. *Id.* at 331.
110. *Id.* at 324.
111. *Id.* (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); *see also* State v. Anderson, 350 N.C. 152, 176, 513 S.E.2d 296, 310 (1999) (quoting State v. Miller, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996)) ("The right of a defendant . . . to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution . . . .").
112. *Holmes*, 547 U.S. at 324–25 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)).
113. Holmes v. South Carolina, 547 U.S. 319, 325 (2006) (citing Washington v. Texas, 388 U.S. 14, 22–23 (1967)).
114. *Id.* at 325–26 (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).
115. *Id.* at 326 (citing *Crane*, 476 U.S. at 691).

not tend to prove or disprove a material fact in issue at the defendant's trial."[116] The Court did not explicitly endorse anything further than this.

In considering the South Carolina rule, the Supreme Court found it to be "arbitrary" and impermissible.[117] The Court reasoned that the South Carolina rule did not focus on the probative value of the proposed third-party culpability evidence or the evidence's potentially adverse effects; the application of the rule centered entirely on if the State's case was strong enough to independently debunk the third-party guilt argument.[118] This hostility towards third-party culpability evidence divorced the rule from its purpose of avoiding baseless and distracting accusations towards third parties.[119] Accordingly, the South Carolina rule violated the defendant's due process right to have a meaningful opportunity to present a complete defense.[120]

B. Abbitt *Cannot Survive* Holmes

Although *Holmes* was present in *Abbitt*, the majority ignored the lasting premise of *Holmes*. The *Holmes* decision is about under what circumstances a state's evidentiary rules which exclude third-party evidence violate the constitution.[121] The *Abbitt* court did not meaningfully engage in a *Holmes* analysis.[122] *Abbitt* did not thoroughly elaborate on nor persuasively justify the policy objectives of the direct connection test.[123] *Abbitt* did not even address the defendants' claim regarding the constitutionality of the direct connection test in North Carolina.[124] The *Abbitt* majority's failure to engage in the *Holmes* analysis for North Carolina's direct connection rule is particularly

116. *Id.* at 327.
117. *Id.* at 331.
118. *Id.* at 329.
119. Holmes v. South Carolina, 547 U.S. 319, 330 (2006).
120. *Id.* at 331 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).
121. *See id.* at 321 ("This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the *defendant may not introduce proof of third-party guilt* . . . ." (emphasis added)).
122. *See* State v. Abbitt, 385 N.C. 28, 40–42, 891 S.E.2d 249, 257–58 (2023) (discussing North Carolina's third-party culpability evidence admissibility standard, including a quote from and citation to *Holmes*, but failing to consider disproportionality of the standard).
123. *See id.* at 41, 891 S.E.2d at 258.
124. *See id.* at 39, 891 S.E.2d at 257.

salient given how the authorities the court relies on all predate *Holmes*.[125]

The only occasion where North Carolina courts considered North Carolina's direct connection test in relation to *Holmes* came in *State v. Loftis*,[126] a Court of Appeals decision. The *Loftis* court ultimately upheld North Carolina's direct connection test by distinguishing North Carolina's rule from the rule in *Holmes*.[127] The *Loftis* court explained that the rule in *Holmes* was premised on the strength of prosecution's evidence.[128] Comparatively, North Carolina's direct connection test does not hinge on anything external to the inherent qualities of the evidence presented.[129] In fact, the *Loftis* court cited the U.S. Supreme Court's explicit endorsement of third-party culpability relevance rules which limit speculative or remote evidence.[130] Thus, the *Loftis* court concluded that the more stringent demands of the direct connection test fall within constitutional limits because it is a reasonable limitation to preserve the governmental interest in reliable and relevant evidence.[131]

However, the *Loftis* court used this snippet of *Holmes* to fully distinguish *both prongs* of North Carolina's direct connection test and uphold its constitutionality.[132] The *Loftis* court failed to diligently consider the second prong of North Carolina's direct connection test.[133] *Abbitt* also suffered from the same unjustifiable oversight.[134] As stated in *Abbitt*, the proffered third-party culpability evidence must serve to exculpate the defendant.[135] This requirement functionally demands the accused to prove that they are not guilty.[136] *Abbitt*'s demand for more

125. *See id.* at 41, 891 S.E.2d at 258 (citing only cases from before 2006 in supporting rule for admissibility of third-party culpability evidence.).

126. State v. Loftis, 185 N.C. App. 190, 649 S.E.2d 1 (2007).

127. *Id.* at 201–02, 649 S.E.2d at 9–10.

128. *Id.*, 649 S.E.2d at 9–10.

129. *Id.*, 649 S.E.2d at 9–10.

130. *Id.* at 202, 649 S.E.2d at 10 (quoting Holmes v. South Carolina, 547 U.S. 319, 327 (2023)).

131. *See id.*, 649 S.E.2d at 10; *Holmes*, 547 U.S. at 326–27; Griffin, *supra* note 24, at 156.

132. *See* State v. Loftis, 185 N.C. App. 190, 202, 649 S.E.2d 1, 9–10 (2007).

133. *See id.*, 649 S.E.2d at 9.

134. *See* State v. Abbitt, 385 N.C. 28, 40–41, 891 S.E.2d 249, 257–58 (2023).

135. *Id.* at 41, 891 S.E.2d at 258 (quoting State v. Miles, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012)).

136. *See id.*, 891 S.E.2d at 258; *see also Exculpate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

than just colorable evidence of third-party culpability divorces the analysis from the plain text of the evidentiary rule to something that is more searching.[137]

In practice, the second prong of the *Abbitt* test operates more like a sufficiency test.[138] In the criminal context, the evidence must be strong enough for a reasonable jury to convict the defendant beyond a reasonable doubt.[139] The prosecution bears the burden of producing sufficient evidence as to all elements of a crime.[140] Identity is one such element the prosecution has the burden of proving.[141] Criminal defendants may also carry a burden of production if they are presenting affirmative defenses.[142]

But presenting evidence countering an essential element that the prosecution must prove, such as identity, is not an affirmative defense.[143] A criminal defendant cannot be required to meet a burden of production with evidence challenging the essential elements of the crime charged.[144] This remains true even when they proffer evidence of a third-party culprit.[145] As Professor David Schwartz and Chelsey Metcalf note, the alleged goal of placing a burden of production on the defendant for third-party culpability evidence is to prevent "speculative acquittals."[146] The two are critical of this interest because it favors giving the jury no evidence over some evidence; "exclud[ing] all evidence of third-party guilt" to avoid "speculative acquittals" but "allowing a jury to make a finding of not guilty—which necessarily implies that some unknown third person committed the crime—means that a jury can make a decision based on a possibility of third-party guilt with no evidence of third-party guilt."[147] Further, the direct connection test is irreconcilable with the principle that it is the prosecution's duty to

137. *See Abbitt*, 385 N.C. at 45, 891 S.E.2d at 261 (Earls, J., dissenting).

138. *See* Schwartz & Metcalf, *supra* note 18, at 382.

139. Jackson v. Virginia, 443 U.S. 307, 318 (1979); *see also* Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431, 462 (2023).

140. Everhart, *supra* note 24, at 287.

141. *Id.* at 292–93.

142. *Id.* at 288.

143. *Id.* at 290.

144. Schwartz & Metcalf, *supra* note 18, at 397.

145. *Id.*

146. *See id.* at 398–99.

147. *See id.* at 399.

prove guilt beyond a reasonable doubt because the direct connection test prevents the injection of reasonable doubt.[148]

Higher burdens for third-party culpability evidence serve general governmental interest in ensuring that evidence is reliable.[149] On that note, the *Holmes* court explained that relevancy rules exist "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."[150] These interests can all be fairly satisfied by a requirement for third-party culpability evidence to go beyond mere conjecture and hypothesizing.[151] And once the governmental interest of credibility has been satisfied, the interest for a greater showing is even lower.[152]

The "exculpatory" prong of North Carolina's direct connection test does not serve to further these interests in any meaningful way beyond what is already established. The "exculpatory" element is redundant; the demand for more than mere conjecture is already satisfied by the first prong of the direct connection test. By excluding "testimony which was relevant to the central question presented to the jury" with relevancy rules that exceed their purpose, the *Abbitt* court unconstitutionally and "impermissibly constrain[s] defendants' ability to mount their defense."[153]

III. RETURNING THE RIGHT TO A DEFENSE TO DEFENDANTS

If *Abbitt*'s approach to relevancy for third-party culpability evidence cannot be squared with *Holmes* and Due Process, how can it be? That question can be answered in several ways. One such approach would be to abandon the direct connection test entirely.[154] The direct connection test—not just in North Carolina, but across the nation—is inconsistent with the plain text of the evidentiary rules for relevance.[155] The federal rule (which is mirrored across the nation) plainly states that evidence is relevant if it has a tendency to make a fact of consequence

148. *Id.* at 401.
149. Griffin, *supra* note 24, at 156.
150. Holmes v. South Carolina, 547 U.S. 319, 330 (2006).
151. *See* State v. Abbitt, 385 N.C. 28, 41, 891 S.E.2d 249, 258 (2023).
152. Griffin, *supra* note 24, at 156.
153. State v. Corbett, 376 N.C. 799, 832, 855 S.E.2d 228, 252 (2021); *see Holmes*, 547 U.S. at 324.
154. Schwartz & Metcalf, *supra* note 18, at 402.
155. *Id.*

more or less probable.[156] And the issue of identity is always a fact of consequence, no matter what the trial is about.[157]

Another possibility is reframing the purpose of third-party culpability evidence. Instead of understanding the evidence as the accusation of a third party as the culprit, it should be understood as illustrating the investigatory shortcomings of the police.[158] This approach avoids some of the problems that may arise with less-than-stellar third-party culpability evidence, such as hearsay, character evidence, and "direct connection" issues.[159] As one author described this approach, "using the same evidence to focus on the government's incompetence, including its failure to consider the guilt of third parties, renders the evidence admissible" despite some direct evidence of third-party guilt.[160] However, this particular approach may still permit some portions of the defense to be inhibited, as evidenced by trial court's approach in *Abbitt*.[161]

Despite these ideas, the most practical approach would be the one proposed in Justice Earls's dissent. Unlike the *Abbitt* majority, Justice Earls is cognizant of the principles set forth in *Holmes*.[162] And her approach to the constitutional problem is as simple as reinterpreting the basic text of North Carolina's direct connection approach. The rule "simply means that the proffered evidence must tend to show the defendant did not commit the crime because someone other than the defendant was the perpetrator."[163] This tracks with the historical precedent on third-party culpability evidence prior to *State v. Cotton*, where the requirement that the evidence be inconsistent with the defendant's guilt first appeared without any support for the "inconsistent" prong.[164] Justice Earls's understanding of third-party culpability evidence would place North Carolina in line with almost

156. FED. R. EVID. 401.

157. State v. Abbitt, 385 N.C. 28, 40, 891 S.E.2d 249, 257 (2023) (quoting State v. Jeter, 326 N.C. 457, 458, 389 S.E.2d 805 (1990).

158. Imwinkelried*, supra* note 19, at 105; Cicchini, *supra* note 19, at 26.

159. Imwinkelried, *supra* note 19, at 113–18; *see* Cicchini, *supra* note 19, at 31–33.

160. Cicchini, *supra* note 19, at 31.

161. *See Abbitt*, 385 N.C. at 33–35, 891 S.E.2d at 253–54.

162. *Id.* at 44–45, 891 S.E.2d at 260–61 (Earls, J., dissenting).

163. State v. Abbitt, 385 N.C. 28, 45, 891 S.E.2d 249, 261 (2023) (Earls, J., dissenting) (internal citation omitted).

164. *See* State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279–80 (1987); *cf.* State v. Hamlet, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981); State v. Allen, 80 N.C. App. 549, 550, 342 S.E.2d 571, 572 (1986).

every other jurisdiction that follows some form of the direct connection test.[165]

CONCLUSION

The *Holmes* precedent prohibits the application of evidentiary rules that are arbitrary or disproportionate to the purposes they serve. North Carolina's direct connection test, as stated and deployed in *Abbitt*, demands the defendant to produce exculpatory evidence. This is an incredibly stringent bar that is arbitrary to the purposes of relevancy requirement that underlies the direct connection test. The *Abbitt* rule runs the risk of preventing defendants from presenting a true and persuasive narrative that can prevent a wrongful conviction. However, there are constitutional ways to analyze third-party culpability evidence. The simplest and most practical way to achieve this is by removing the disproportionate requirement for evidence to be exculpatory and only require some colorable link between the crime alleged and a third-party culprit. This change would not only go towards bringing the evidentiary rule into constitutional compliance, but it also realigns the direct connection test with the meaning of relevant evidence. Without a change to North Carolina's direct connection test, criminal defendants will lose an invaluable tool to protect their innocence. Otherwise, we risk reducing a defendant's innocence to an arbitrary technicality.

165. *See* Schwartz & Metcalf, *supra* note 18, app. at 403–08.

OLD GILLS BREATHE NEW LIFE: A RECENT FISH PROTECTION CASE CONSTITUTIONALIZED NORTH CAROLINA CITIZENS' ENVIRONMENTAL RIGHTS*

JULIA RHINE**

INTRODUCTION

The piers used to be filled with fishers standing shoulder to shoulder, but now they are barren. One used to hear the chatter of fishers discussing their luck that day, but now the only thing that speaks is the wind whistling over the sounds of a depleted ocean. The fish are gone. The River Herring population may never recover. Many other fish species are following in its footsteps. Several of North Carolina's once bustling fisheries are desolate now that 84 to 98 percent of certain fish species have disappeared because of overfishing. These are the claims of plaintiffs in *Coastal Conservation Association v. North Carolina*, who blamed the State for mismanaging the coastal fisheries resource.[1] As part of the resolution of this case, the State just became constitutionally liable for the empty piers and dead fish. And surprisingly, it was done through a fifty-year-old environmental policy-focused Amendment to the North Carolina Constitution that just became exponentially more powerful.

This recent development has four parts. First, it will explain what happened in *Coastal*. Second, it will give a legal history of the

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1. Complaint at 6, Coastal Conservation Association v. State, 2022-NCCOA-589, 285 N.C. App. 267, 878 S.E.2d 288 (No. 20-CVS-12925).

Conservation Clause, other Green Amendments, and case law applying policy in the Conservation Clause. Third, this piece will explain how *Coastal* shifted the direction of the law from a policy consideration to an enforceable right. And finally, the piece will conclude by explaining how this is akin to fundamental rights and how it can be used to enhance environmental protections in the future.

I. HOW THE TIDE ROLLED IN: LEGAL HISTORY

Legal history illustrates the uniqueness of *Coastal*—the courts had never considered the Conservation Clause more than a policy declaration. In the early 1970s, fourteen states amended their state constitutions to protect the environment.[2] North Carolina was one of the states that joined in this trend, enacting the Conservation of Natural Resources Clause (the "Conservation Clause").[3] However, North Carolina's amendment was far weaker than that of other states.[4] Eight states and territories used the term "right" to explain citizens' interests in the environment while North Carolina only used the word "policy."[5] The word choice constituted a stark difference practically. At least initially, these eight states hoped for self-executing rights—which is a constitutional right that can be enforced without passing other laws—and two states guaranteed a private right of action in the Constitution.[6] These are called Green Amendments.[7]

Meanwhile, North Carolina did not provide for any affirmative rights—meaning, it did not require the government to act instead of merely refraining from acting (a negative right).[8] The Conservation Clause only said, "[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry."[9] The "policy" phrasing was mostly aspirational, and at the time, legal scholars excluded North Carolina from discussions of state environmental

2. § 7:3. Sources of state environmental law—State constitutional provisions, 1 L. of Envtl. Prot. § 7:3.

3. N.C. CONST. art. XIV, § 5.

4. *See id.*

5. Quinn Yeargain, *Decarbonizing Constitutions,* 41 YALE L. & POL'Y REV., no 2, 2023, at 1, 33–34.

6. *Id.* at 33.

7. Mary van Rossum & Kacy Manahan, *Constitutional Green Amendments*, 35 NAT. RESOURCES & ENV'T, 27 (2021).

8. *See* Yeargain, *supra* note 5, at 35.

9. N.C. CONST. art. XIV, § 5.

amendments because it was inconsequential constitutionally.[10] Originally, the Conservation Clause did not feature a private right of action, much less any language indicating the existence of a right.[11] Instead, states like North Carolina that used policy declarations encouraged their legislature to implement the policy through statutes, such as environmental protection bills, or appropriations of funds to address environmental issues.[12] Because of this difference, the Conservation Clause was not considered a Green Amendment like the other states' amendments that prescribed rights.[13]

North Carolina case law reinforced that the Conservation Clause was only a policy statute for nearly fifty years. The few cases that cite the Conservation Clause only had two uses for the clause. First, the government would validate their actions concerning the environment by referring to the Conservation Clause.[14] For example, in 2005, the Court of Appeals heard a case where the plaintiff contested the constitutional validity of a special assessment on his property.[15] The court used the Conservation Clause to show certain statutes' consistency with the constitution, such as a statute that proclaimed that the coast has a high recreational and aesthetic value.[16] Instead of having a cause of action directly under the Conservation Clause, Plaintiffs were required to sue through laws that utilize the Conservation Clause's policy declaration.[17]

Second, individuals used the Conservation Clause to reinforce the validity of the public trust doctrine.[18] The court in *North Carolina Coastal Fisheries Reform Group v. Captain Gaston LLC* cited the

10. Yeargain, *supra* note 5, at 34.

11. *See id.* at 33; N.C. Const. art. XIV, § 5 ("It shall be the policy of this State . . . ").

12. Johanna Adashek, *Do It for the Kids: Protecting Future Generations from Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment*, 45 PUB. LAND & RESOURCES L. REV. 113, 131 (2022).

13. *Id.*

14. *See* Parker v. New Hanover Cnty., 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005) (citing the Conservation Clause to show endorsement of the government action); Smith Chapel Baptist Church v. City of Durham, 348 N.C. 632, 502 S.E.2d 364 (1998), *opinion superseded on reh'g,* 350 N.C. 805, 517 S.E.2d 874 (1999) (citing the Conservation Clause to show endorsement of the government action); Cooper v. United States, 779 F. Supp. 833 (E.D.N.C. 1991) (citing the Conservation Clause to show endorsement of the government action); BSK Enterprises, Inc. v. Beroth Oil Co., 246 N.C. App. 1, 783 S.E.2d 236 (2016) (citing the Conservation Clause to show endorsement of the government action).

15. *See generally Parker*, 173 N.C. App. at 653, 619 S.E.2d at 875.

16. *Id.* at 653, 619 S.E.2d at 875.

17. *Id.*

18. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 1008 (E.D.N.C. 2021), *aff'd,* 76 F.4th 291 (4th Cir. 2023).

Conservation Clause (along with supporting statutes) to explain that it "empowers" the State to use the doctrine to protect the public trust rights of North Carolina citizens.[19] North Carolina courts have used similar language in other cases. For example, in *Cooper*, the court used the word "authorize" to describe the Conservation Clause's effect on the State government.[20] These words grant power to the State, but they do not create an obligation.[21] While one case in 1988, *Rohrer v. Credle*, used the term "mandated," the North Carolina courts followed *Cooper* instead.[22] This distinction is crucial. It is the difference between the Conservation Clause directly guaranteeing a right versus giving the state government the discretion to enact new statutes or create common law precedent.

Similarly, *Nags Head* was originally winding down the normal public-trust-path of interpreting the Conservation Clause before the court took a different direction. The case began when the Town of Nags Head took an easement out of a private, ocean-front property to replenish the beach.[23] The landowner argued that the town needed to pay compensation according to the eminent domain statute.[24] The town countered by saying that they could avoid paying compensation because the easement was already implied under the policy that the town could protect and preserve public trust rights.[25] In its holding, the court explained the public trust doctrine—public trust rights that include the right to enjoy all recreational activities offered by public trust lands, as well as the right to use the beaches.[26] They then connected this doctrine to the Conservation Clause and later environmental statutes. At this point in the legal analysis, courts usually employ the words "authorizes" or "empowers." But the *Nags Head* court pivoted. Instead, it said the "State is *tasked* with protecting these rights pursuant to the North Carolina Constitution," and then it quoted the Conservation Clause.[27] There was no other analysis pertaining to the Conservation Clause, nor were there any mentions that the Conservation Clause could possibly present a private right of action.

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19. *Id.* (citing N.C. CONST. art. XIV and N.C. GEN. STAT. § 113-131).

20. Cooper v. United States, 779 F. Supp. 833, 835 (E.D.N.C. 1991).

21. *See id.*

22. State ex rel. Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 830 (1988).

23. Town of Nags Head v. Richardson, 260 N.C. App. 325, 326, 817 S.E.2d 874, 878 (2018), *aff'd,* 372 N.C. 349, 828 S.E.2d 154 (2019).

24. *Id.*

25. *Id.*

26. *Id.* at 334–35, 817 S.E.2d at 883.

27. *Id*. at 334, 817 S.E.2d at 833 (emphasis added).

However, "tasked" presented a stronger connotation—it framed the Conservation Clause as more of an *obligation* for the States, rather than a lofty goal. Perhaps the courts meant to assign more weight to the Conservation Clause, or perhaps this one word was an accident. Regardless, this word presented the *Coastal* court with an opportunity—and it took it.

II. ABOUT *COASTAL*

The plaintiffs in *Coastal* were citizens of North Carolina who sued the State for allowing overexploitation and waste in fish populations, "which in turn threaten the right of current and future generations of the public to use such public waters to fish."[28] Specifically, they alleged that North Carolina, acting through the North Carolina Division of Marine Fisheries and the North Carolina Marine Fisheries Commission permitted, and even facilitated, destructive fishing practices, such as trawling in estuarine waters with many juvenile finfish and using "unattended" gillnets.[29] Trawling is when commercial shrimp boats plow the bottom of waters, a technique otherwise known as "bulldozing the oceans."[30] This practice is detrimental to fish populations when done in areas vital for spawning and nursery grounds.[31] Meanwhile, gillnets are essentially a curtain net that indiscriminately trap fish regardless of the intended catch.[32] When gillnets are unattended, there is massive waste—unwanted fish die alongside the target fish.[33]

The plaintiffs alleged that while North Carolina encouraged these practices, all other southeastern states "either banned or severely curtailed" them.[34] The plaintiffs claimed this decades-long mismanagement caused multiple fish species to "decline[] precipitously—84 to 98 percent—since the last major fisheries management reform legislation was enacted in North Carolina in 1997."[35]

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28. Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 269, 878 S.E.2d 288, 292 (2022).

29. *Id.* at 280, 878 S.E.2d. at 298.

30. Complaint at 85, 92, Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 878 S.E.2d 288 (2022) (No. COA21-654).

31. *Id.* at 88.

32. *Id.* at 148.

33. *Id.* at 149.

34. *Id.* at 13.

35. *Coastal Conservation Ass'n*, 285 N.C. App. at 270, 878 S.E.2d at 292.

As a result, plaintiffs alleged, only four out of sixteen coastal fish stocks were listed as viable while all others were considered "depleted, recovering, of concern" or of unknown status.[36]

Plaintiffs claimed these adverse effects impeded both their constitutional and public trust doctrine rights.[37] They alleged breaches of obligation: under the public trust doctrine; under the Right to Hunt, Fish, and Harvest Wildlife Clause in the North Carolina Constitution; and under the Conservation of Natural Resources Clause.[38] Plaintiffs hoped to enjoin the State from committing further breaches.[39]

The State moved to dismiss all claims.[40] For the Conservation Clause breach claim, the State argued that there was no valid legal claim even possible because that clause "does not articulate any enforceable individual right but instead clarifies state policies."[41] The trial court disagreed with this argument and denied the motion to dismiss.[42] The State appealed to the Court of Appeals of North Carolina.[43]

In the holding of *Coastal*, the court explained North Carolina's three-part test for establishing a claim under the State Constitution: (1) the State must have violated an individual's constitutional rights; (2) the claim must present facts sufficient to support the allegation; and (3) there cannot be an adequate state remedy.[44] Because the case was in the motion to dismiss stage, all facts the Plaintiffs alleged were taken as true for the sole purpose of determining if there was a potentially viable case as a matter of law.[45]

To begin, the court recognized that there is an implied individual constitutional right to harvest fish under the Conservation Clause.[46] The court established the right by combining interpretations from two public trust doctrine cases—*Town of Nags Head v. Richardson* and *Rohrer v.*

36. Complaint at 66, Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 878 S.E.2d 288 (No. COA21-654).

37. *Coastal Conservation Ass'n* 285 N.C. App. at 270, 878 S.E.2d at 292.

38. *Id.*

39. *Id*., 878 S.E.2d at 292.

40. *Id.*, 878 S.E.2d at 292.

41. *Id* at 271, 878 S.E.2d at 293.

42. *Id.* at 269, 878 S.E.2d at 291.

43. *Id.*, 878 S.E.2d at 291.

44. *Id.* at 279, 878 S.E.2d at 298.

45. *Id.* at 269, 878 S.E.2d at 291–92.

46. *Id.* at 280, 878 S.E.2d at 298–299.

Credle.[47] In *Nags Head*, one piece of dicta mentioned that the Conversation Clause supported public trust rights, a common law doctrine. But one word mentioned in the case gave the *Coastal* court an avenue for new interpretation: "The State is *tasked* with protecting [public trust] rights pursuant to the North Carolina Constitution."[48] In *Credle*, a nearly 40-year-old case, the court mentioned that the Conservation Clause "mandates" allowed the *Coastal* court to expand its meaning.[49] The court combined these two cases to determine that the State has a constitutional duty to protect both public trust rights and public lands.[50] These constitutional rights include State protection of harvestable fish "for the benefit of all its citizenry."[51] Element one of establishing a constitutional claim—the state violating an individual's constitutional rights—was met.[52]

The Court found that Plaintiffs also met the second element: alleging sufficient facts that the State violated this right.[53] Such violations can include both action and inaction: permitting and protecting questionable fishing methods, refusal to address overfishing, and tolerating inadequate harvest reporting.[54] This conduct presents a viable claim that the government curtailed the public's right to fish.[55] The court further held that since this claim was pled in the alternative to the public trust doctrine claim, the Plaintiffs met the third element.[56] Thus, the Court denied the State's motion to dismiss.[57] The State did not seek review by the North Carolina Supreme Court.[58]

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47. *See id.* at 280, 878 S.E.2d at 298 (combining case law from *Nags Head* and *Credle* for their opinion).

48. *See id.*, 878 S.E.2d at 298 (citing Town of Nags Head v. Richardson, 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2018)).

49. *See id.* at 280, 878 S.E.2d at 298 (citing Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988)).

50. *Id.* at 280, 878 S.E.2d at 298.

51. *Id.* at 280, 878 S.E.2d at 298-99.

52. *Id.*, 878 S.E.2d at 298–99.

53. *Id.* at 280, 878 S.E.2d at 298.

54. *Id.*, 878 S.E.2d at 298.

55. *Id.*, 878 S.E.2d at 298.

56. *Id.* at 280, 878 S.E.2d at 299.

57. *Id.* at 284, 878 S.E.2d at 301.

58. The Coastal Review, *State declines to appeal fisheries case to NC Supreme Court*, ISLAND FREE PRESS (Oct. 13, 2022), https://islandfreepress.org/fishing-report/state-declines-to-appeal-fisheries-case-to-nc-supreme-court/.

III. CHANGING THE TIDES: COASTAL IMPLICATIONS

The *Coastal* court established that, for the first time in fifty years, the Conservation Clause provides a private right of action under the constitution for North Carolina citizens dissatisfied with the State's protection of the environment. Under this new precedent, the State has a "constitutional duty to not only protect the public lands, but also the public trust rights attached thereto."[59] The Conservation Clause provides an avenue for declaratory and injunctive relief to citizens whose rights are violated by the state.[60] Simply put, North Carolinians just gained a new constitutional right.

Notably, this opinion was at the motion to dismiss stage—an early stage of litigation.[61] It is certain that a private right of action exists, but the exact contours of the law are still emerging. Therefore, *Coastal* presents us with a piece of clay that litigators and judges can mold into a beautiful, solid sculpture. This recent development illustrates how litigators and judges can and should shape the law. While this piece imagines grand sculptures, it is important to remember that this law is still an untouched lump of clay.

Returning to the analysis of the right itself, the right extends to protecting the harvestable fish population for the benefit of all North Carolina citizens.[62] Potential violations certainly extend to positive acts, since the court explained that there were sufficient facts to show that the State could have "mismanaged" the fisheries.[63] The potential violation included many positive actions like "permitting, sanctioning, and even protecting" methods of fishing.[64]

Even more significantly, this right of action probably extends to the State's inaction. For example, the allegations also include many negative actions, such as "refusing to address" overfishing and "tolerating a lack of reporting."[65] It is notable that the court said, "the alleged facts here support Plaintiffs' contention the State *did not protect* the

59. *Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298.

60. *Id.* at 280, 878 S.E.2d at 299.

61. *Id.* at 284, 878 S.E.2d at 301.

62. *Id.* at 280, 878 S.E.2d at 208–299 ("[T]he alleged facts here support plaintiff's contention the State did not protect the harvestable fish population . . . Plaintiffs have alleged a colorable constitutional claim.").

63. *Id.* at 280, 878 S.E.2d at 298.

64. *Id.*, 878 S.E.2d at 298.

65. *Id.*, 878 S.E.2d at 298.

harvestable fish population."[66] Non-protection is inaction. This tracks the language of the Conservation Clause which indicates State policy is to "conserve and protect."[67] It is also consistent with *Nags Head* and *Credle* which used affirmative words like "tasked" and "mandated."[68] A brand new Court of Appeals of North Carolina case reinforces this interpretation, saying "[w]e held that [the Conservation Clause] was created to protect the right to fish against encroachment, and that the State had an *affirmative duty* pursuant to the amendment."[69] Therefore, the court established an affirmative duty to take action to protect fisheries, in which State inaction can constitute a violation of the constitution.

Based on the facts of this case, this constitutional duty applies, at the very least, to protecting the harvestable fish population for the benefit of all citizens.[70] This case plainly protects fishing on the coast.[71] However, the court's language has an even broader application. First, the court says the State must protect the harvestable fish population for the "benefits to all citizens" that the fish could have.[72] This point implies that there are other possible benefits the fish could have besides food.[73] The court did not expand further, so its exact scope is unknown.[74] However, based on typical practices concerning fish, protected uses could include recreational fishing, fishing for industrial products, or tourism attractions.

Second, the court said the State has a duty "not only to protect public lands, but also the public rights attached thereto."[75] Three inferences may be drawn from this statement. First, the court intends for this statement to apply not only to waters, but also to lands. While this could be inferred from the language of the Conservation Clause, this statement reinforces it. Second, the court separates the State's duty to protect the public lands and the public's rights to the land. This means that the land *itself* has the right to be protected, apart from the public's rights to use it. Notably, this provision is entirely separate from the

66. *Id.*, 878 S.E.2d at 298.

67. N.C. CONST. art. XIV, § 5.

68. Town of Nags Head v. Richardson, 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2018); *See Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298 (citing Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988)).

69. Oates v. Berger, 2025 WL 1118741, at *5 (N.C. Ct. App. Apr. 16, 2025).

70. *Coastal Conservation Ass'n*, 285 N.C. App at 280, 878 S.E.2d at 298–99.

71. *Id.* at 282, 878 S.E.2d at 300; *Oates*, 2025 WL 1118741, at *5.

72. *Coastal Conservation Ass'n,* at 280, 878 S.E.2d at 299.

73. *Id.*, 878 S.E.2d at 299.

74. *Id.*, 878 S.E.2d at 299.

75. *Id.* at 280, 878 S.E.2d at 298.

citizen's rights to use the land. And finally, the "public rights attached thereto" means that the public trust doctrine is now a constitutional guarantee. This is the best indication for the Conservation Clause's scope based on citizen's rights attached to the public trust doctrine. At a minimum, this language that the land itself has a right to be protected shows that this Conservation Clause encompasses the public trust doctrine and then some.

The notion that the Conservation Clause's new constitutional duties extend beyond the public's right to fish is further exemplified by the other cause of action in the suit—the Right to Hunt, Fish, and Harvest Wildlife Clause. This is a different clause in the constitution, which the court interpreted to impose "an affirmative duty on the State to preserve the people's right to fish and harvest fish" among other activities like hunting.[76] Applying it to the facts of *Coastal*, the court determined that there were adequate facts that, if proven, could show the State violated its right to preserve fisheries for the benefit of the public. This wording is particularly similar to the cause of action under the Conservation Clause.[77] It indicates that the Conservation Clause is broader than just fishing and hunting. Instead, the Conservation Clause is more focused on the conservation of natural resources, as its name suggests, which encompasses protecting the land, waters, *and* the citizen's rights that are attached to them. This protects natural resources, and can connect to citizens' rights if the destruction of those resources then injures their use of the resources. Meanwhile, the Right to Hunt, Fish, and Harvest Wildlife relies on citizen's activities, but can connect to natural resources when it hinders those activities.

Because the Attorney General did not seek review from the North Carolina Supreme Court, this ruling comes from the highest possible court and is binding on all lower courts in North Carolina.[78] *Coastal* is good law. The North Carolina Constitution now has an affirmative duty under the Conservation Clause to protect public lands and waters, or it can face suit directly under the Clause from private citizens.

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76. *Id*. at 282, 878 S.E.2d at 300.

77. *Id.* at 280, 878 S.E.2d at 298 (ruling that the state has a "constitutional duty not only to protect the public lands, but also the public rights attached thereto.").

78. The Coastal Review, *supra* note 58.

IV. POTENTIAL FOR A TSUNAMI: WHY THIS CHANGE COULD BE MONUMENTAL

The Conservation Clause's revitalization was essential because before *Coastal*, the policy-driven amendment did not provide citizens enough environmental protection. It had no real substantive effect. In fact, the Conservation Clause was so insignificant that it was regularly omitted from discussions of environmental constitutional policies.[79] While legal scholars analyze the contours of other state environmental rights, they dismissed the Conservation Clause as "aspirational"[80] or for "aesthetic" value.[81] Prior to *Coastal*, the Conservation Clause was weak and omitted from environmental rights conversations for good reason. Now, it acts like a Green Amendment.

While the state relies exclusively on legislative actions, North Carolina faces escalating environmental devastation. In addition to fishing crises, the coasts are experiencing unprecedented rates of erosion. Sea-levels typically rose 0.14 inches per year from the 1990s and early 2000s, but over the last decade the rates have been 3.5 times that figure—0.5 inches per year.[82] For example, Wilmington's high tides could be 2.26 feet higher by 2050.[83]

All the while, North Carolina's Division of Public Health warns that "increasing frequency and intensity of precipitation and extreme weather events . . . has caused extensive and widespread flooding along the coast."[84] Hurricanes are getting stronger, wetter, and deadlier.[85] Hurricane Florence in 2018 exemplified how climate change has boosted

79. Yeargain, *supra* note 5, at 35.

80. *Id.*

81. Milton S. Heath, Jr. & Alex L. Hess, III, *The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation*, 29 CAMPBELL L. REV. 535, 539 (2007).

82. Gareth McGrath, *New studies show 'unprecedented' sea-level rise along the North Carolina coast*, WILMINGTON STAR-NEWS (Apr. 25, 2023, 5:00 AM), https://www.starnewsonline.com/story/news/local/2023/04/25/studies-show-sea-level-rise-is-accelerating-off-north-carolina/70101145007/.

83. *Id.*

84. *Epidemiology: Occupational and Environmental*, N.C. DIV. OF PUB. HEALTH, https://epi.dph.ncdhhs.gov/oee/programs/climate.html.

85. Jeff Berardelli, *How Climate Change is Making Hurricanes More Dangerous*, YALE CLIMATE CONNECTIONS (July 8, 2019), https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/.

storms—they move slowly, dump unthinkable amounts of water, and devastate communities.[86]

Expanding beyond the coast, most parts of North Carolina are experiencing extreme heat more and more frequently.[87] On average, 4000 people visit North Carolina emergency rooms because of heat-related illnesses during the warm seasons.[88] Emergency room visits also increased by 42 to 66 percent for cardiovascular and respiratory issues due to climate hazards like pollen, ozone, and moisture in homes from floods.[89] Climate change ravages North Carolina and will continue to do so absent a change. These trends also reveal that it is not enough to rely on the North Carolina legislature to combat environmental issues. As environmental activist Maya van Rossum wrote, "[l]egislative environmentalism has had its day, and the environment is still on the brink of catastrophe—we need a new way forward."[90]

Under *Coastal*, the revived Conservation Clause amendment frees environmental protection efforts from relying solely on legislative action. Citizens no longer need wait for a cumbersome process of bills becoming law through lobbying, fundraising, and advocacy.[91] The affirmative aspect of this new right ensures that the state must take steps to protect the environment even if it did not assign the duty unto itself.[92]

For example, Pennsylvanian plaintiffs used their Green Amendment to force their state to clean up a toxic site when government

86. Corey Davis, *Florence After Five: Redefining the Future*, N.C. STATE CLIMATE OFF.: CLIMATE BLOG (Sept. 14, 2023), https://climate.ncsu.edu/blog/2023/09/florence-after-five-redefining-the-future/#:~:text=%E2%80%9CThe%20storms%20are%20getting%20stronger,as%20heavy%20rainfall%20and%20freshwater.

87. N.C. DIV. OF PUB. HEALTH, *supra* note 84.

88. *Id.*

89. *Id.*

90. MAYA VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 15 (2017); Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go From Here?*, 49 ENV'T L. REP. 10362, 10371 (2019) (quoting *id.*).

91. *See* van Rossum & Manahan, *supra* note 7, at 30 ("If environmental rights are not self-executing, and instead are defined by the legislative or executive branch of government, they will once again become subservient to the political whimsies of the day with only election politics as the solution for protection and change.").

92. *See* Yeargain, *supra* note 5, at 44 (discussing rights imposing an affirmative duty of protection on the state government).

officials failed to do so.[93] They *made* the officials protect the environment. Avoiding politics also means avoiding inconsistency—laws change with whichever party is dominating at the time. A constitutional right will remain untampered. North Carolinians can remain holders of environmental rights no matter who is elected that November. Even if North Carolina were to pass a harmful law, regulation, or other form of state action, then under this new precedent, the plaintiff can sue for a violation of their rights, just like in *Coastal*.[94] Further, this avoids the single-mindedness of legislation, which typically covers one topic at a time such as hazardous pollution, endangered species, or clean air. Green Amendments like this one are much more versatile and, as will be explained further, have the potential to span various areas.[95] While legislation is available, North Carolinians now have another avenue for environmental protection.[96]

Green Amendments reframe environmental protection as a fundamental rights issue. As van Rossum said, "This authority is the inalienable, indefeasible, inherent rights we all possess as residents of the earth."[97] As a constitutional right, it is "on par with other protected rights such as speech, religion, and property."[98] The Conservation Clause has self-executing enforcement in its own right—no extrinsic legislation needed.[99] This enforcement right will prevent government actions that hurt the environment as well as compel government action to protect it where existing governmental protections are inadequate.[100] The court provided near "affirmative duty" language in *Coastal* when it provided liability for state inaction.[101] The duty placed on the state government forces officials to prioritize preventing a constitutional violation, which

93. Samuel L. Brown, Maya K. van Rossum, Antoinette Sedillo Lopez, Terry A. Sloan & Artemisio Romero y Carver, *Green Amendments: Vehicles for Environmental Justice*, 51 ENV'T L. REP. 10903, 10905 (2021).

94. *See* Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 280, 878 S.E.2d 288, 299 (2022) (allowing for a private right of action under the Conservation Clause).

95. Adashek, *supra* note 12, at 131.

96. There are also strong environmental protections stemming from executive orders, administrative law, international law, and beyond. However, for the sake of time, this paper focuses on Green Amendments and their relation to legislation.

97. VAN ROSSUM, *supra* note 90, at 43-44; Hill, *supra* note 90, at 10371 (quoting VAN ROSSUM, *supra* note 90).

98. van Rossum & Manahan, *supra* note 7, at 28. *See also* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10906.

99. van Rossum & Manahan, *supra* note 7, at 30.

100. *Id*. at 31.

101. *See supra* Part III.

in turn means preventing environmental harm. Decision-makers must *act* to prevent harm. They cannot accept degradation as a foregone conclusion, but instead, they must backtrack in their thought-process to avoid liability.[102] This alters both the legal scheme and the mindset of decision-makers in Raleigh, which cannot be understated in terms of effectiveness.[103] North Carolina decision-makers can no longer dismiss the environment as inconsequential, an issue for later, or low-priority without facing legal consequences.

The Conservation Clause, now a true Green Amendment, advances the idea that resources belong to the people of North Carolina, not the state.[104] The state has responsibility to protect the resources for North Carolinians.[105] While Green Amendments give rights belonging to all people, there are two key demographics who experience dramatic growth in their rights: minority communities and future generations.

The first group who the new Conservation Clause immensely impacts are minority and underrepresented communities. The brunt of pollution issues and environmental degradation largely fall on minority communities through repeated siting and permitting, development practices, or technology decisions.[106] For example, coal-fired power plants, incinerators, and waste treatment facilities will usually be developed in areas highly populated by minorities.[107] This phenomenon is called environmental racism.[108]

In recent years, activists and politicians began calling for environmental justice, a plan to end the inequitable environmental treatment for minority communities.[109] Many believed that systemic injustices are so deeply-rooted in our legal system that the best cure are Green Amendments: "'Green Amendments' enshrine environmental rights so they can transcend a system of law and government that passively allows systemic environmental racism to fester in an endless

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102. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 92, at 10906.

103. *Id.*

104. *See id.* at 10907 (explaining that Green Amendments make a state's resources property of the citizens).

105. *See id.* (explaining that green amendments make state officials trustees for the citizen's natural resources).

106. van Rossum & Manahan, *supra* note 7, at 28.

107. *Id.*

108. *Id.*

109. *Id.*

backloop."[110] Green Amendments, like the revamped Conservation Clause, give equal protection to every citizen. Where non-minority communities have the benefit of more statutory weaponry when suing for environmental harms in court because they are more likely to be represented in the legislature, minority communities now have a right of action to sue for their harms too.[111]

One legal scholar argued that residents of Flint, Michigan—a predominately African-American city that suffers from unsafe drinking, washing, and bathing water because of state and local government decisions—could have had more success in their legal fight had there been a Green Amendment in Michigan.[112] In reality, the Environmental Protection Agency's (EPA) Office of Inspector General recommended that the EPA should more strictly oversee state drinking water programs, but the EPA "was, for the most part, absolved of any real responsibility to Flint Residents."[113] The legal scholar explained that in the fake Michigan-Green-Amendment-world, Flint residents would clearly have a strong case because there was cause-in-fact injury, and even more, state officials would have taken their complaints more seriously.[114] The Flint water crisis exemplifies the need for Green Amendments: water, the key to all life, needs to be protected, and if citizens cannot succeed in court for their state-poisoned water, what type of America are we living in? The new Conservation Clause helps protect North Carolinians from a legal fate like those in Flint. And, on a larger scale, it will help curb the systemic effects of environmental racism for minority communities.

The new interpretation of the Conservation Clause also immensely benefits future generations. One potential benefit is if the courts included future generations as beneficiaries of North Carolina's natural resources. Many legal scholars argue that this is a crucial part of any Green Amendment: "it's not about what we need now, but what is good for our children and grandchildren."[115] Future generations will be "extremely vulnerable" to climate change, so it is important to protect

110. *Id.*

111. *See id.* at 31 ("In the absence of legislation or regulation to prevent or address this contamination, communities benefiting from a Green Amendment could rely upon their constitutional right to clean water in a legal challenge seeking needed government protection.").

112. Hill, *supra* note 90, at 10382.

113. *Id.*

114. *Id.*

115. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907.

them before troubles arrive.[116] Green Amendments are more capable of creating these protections than legislation because constitutional amendments "cannot fall as easily to the whims of the legislature" with its broad language and lasting presence in the state constitution.[117]

For *Coastal*, there are two impacts for future generations. The first is indirect: the definite change in the State's behavior regarding fish harvesting will hopefully correct bad acts that negatively affect the future.[118] The second impact is that opinions could interpret *Coastal*'s demand that the state protect fish "for the benefit of all its citizenry" to include future generations who will grow up to harvest fish.[119] For this result, the courts would need to interpret the benefit broadly—it does not have to be immediate; the benefit can extend years into the future.[120] If the broader interpretation is upheld, then future cases could later interpret "all its citizenry" to include unborn generations—making the State protect the environment now to protect future North Carolinians. Including future generations as beneficiaries ensures a prospective mindset towards resource conservation—the idea that the environment is more than the now; it is the future.[121] In the context of *Coastal*, for example, future generations could have their own right to the fishing populations, ocean pollution, and water quality that the state would need to protect resources *long-term*. The Conservation Clause would address current overfishing while also enforcing preventative measures for potential future problems.[122] If the courts use this interpretation, this would be an avenue to force North Carolina to address one of the future generations' most pressing issues—climate change.[123]

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116. Adashek, *supra* note 12, at 137.

117. *Id. at* 138.

118. *See* Adashek, *supra* note 12, at 134 (arguing that a Green Amendment would help future generations); Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 280, 878 S.E.2d 288, 298-99 (calling for the State to protect the fisheries for the benefit of its citizenry).

119. *See Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298.

120. *See* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93. at 10907 (arguing that Green Amendments should not just provide benefits for problems now but also benefit future citizens).

121. Adashek, *supra* note 12, at 138.

122. *See id.* (arguing that including future generations in Green Amendments will enact proactive and precautionary environmental protection)*;* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907 (arguing that Green Amendments should not just provide benefits for problems now but also benefit future citizens).

123. Adashek, *supra* note 12, at 136–37 (explaining that future generations are more vulnerable to climate change and that preventative legislation from Green Amendments can protect them).

V. WHERE SHOULD LITIGATORS CAST THEIR NETS NEXT?

Litigators in North Carolina should explore the depth and contours of the Conservation Clause so citizens can learn about the extent of their rights. Foremost, further litigation is needed to see what standard will be applied to determine whether the state breached their duty to protect North Carolina's natural resources. How easy will it be to find the state liable? How beneficial do the resources need to be to citizens to be subject to protection? Or will they protect the resources themselves absent citizens' use of them, just as *Coastal* alluded to? Will there be a balancing test? Does this apply to citizens who are not yet born? As of April 2025, these issues have not yet been litigated in court. Litigation will be critical in determining the Conservation Clause's flexibility and efficacy as an environmental protector. Litigators could expand water protection to state sanctioning of offshore drilling, pollution, and forever chemicals which poison rivers. And while it is a natural reading of the Conservation Clause that the state has a duty to "conserve and protect its *lands* and waters," litigators should present a case involving land to create judicial precedent.[124] For example, potential land related litigation could involve pollution or deforestation. Litigators could also connect the Conservation Clause with emerging atmospheric trust litigation.[125]

Coastal also has practical effects outside North Carolina. The other states whose constitutions have amendments that are "mere policy declarations" could follow North Carolina's precedent and decide that policy-based amendments are meant to be substantive.[126] Moreover, more and more Green Amendments in the states advances the probability of a federal Green Amendment, since environmental activists are currently focusing on the state level and will eventually take it to the federal

124. N.C. CONST. art. XIV, § 5 (emphasis added).

125. A developing aspect of law that North Carolina can now be a part of is atmospheric trust litigation. This is the argument that the public trust doctrine applies not only to land and water, but also the atmosphere. Hill, *supra* note 90, at 10377. The atmospheric trust doctrine encapsulates issues from smog to climate change. *Id.* Climate change causes temperatures to rise, which leads to ice glaciers melting, sea level rise, and then inevitable beach erosion and land loss on North Carolina coasts. Adashek, *supra* note 12, at 114. The Conservation Clause constitutionalized the public trust doctrine, and if litigators can encapsulate the atmosphere in citizens' rights then plaintiffs will have more direct pathways to hold the state accountable for preventing climate change.

126. Adashek, *supra* note 12, at 131.

level.[127] While it is a small bit of progress nationally, it is one step closer to guaranteeing environmental rights for all Americans.

CONCLUSION

Coastal created a new cause of action under the North Carolina Constitution. North Carolina lawmakers now have a duty to protect the state's natural resources; they can be held liable for both inaction and action. This is a monumental step in the fight for environmental protection in North Carolina. With worsening environmental quality, this is a much-needed advancement in law that gives citizens a new avenue to protect their rights. The legal landscapes are changing, and the environment is becoming a force of nature in North Carolina constitutional law.

127. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907.