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RACING *DOBBS*

KATHERINE FRANKE* & RIA TABACCO MAR**

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court reversed *Roe v. Wade*'s limits on a state's ability to restrict, and indeed completely outlaw, abortion. The case raises fundamentally important questions about rights to reproductive autonomy, bodily integrity, sex equality, privacy, and health.

Upon closer examination, *Dobbs* is also about race and the nation's racial history, as the two papers published here argue. In *Dreding Dobbs*, Professor Katherine Franke suggests that *Dobbs* should be read alongside the Supreme Court's 1857 decision in *Dred Scott v. Sandford*, in which the Court held that Black people—even free or freed Black people—were not U.S. citizens. Franke reasons that *Dred Scott* did for white supremacy—defining the United States as a white nation—what *Dobbs* does for patriarchy— masculinizing the Constitution as a compact among men. In fact, Franke argues, *Dred Scott* and *Dobbs* are both cases about reproductive justice in the shadow of slavery.

In *What "Every One Knows" About Dobbs—and Plessy*, Ria Tabacco Mar draws important connections between *Dobbs* and the Supreme Court's 1896 decision in *Plessy v. Ferguson*, the case in which the Court found that racial segregation of Black Americans did not violate the Fourteenth Amendment's Equal Protection Clause. In both *Plessy* and *Dobbs*, Tabacco Mar argues, the Court responds to constitutional injuries with trivializing and patronizing rejoinders that deny our lived experience.

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* Katherine Franke is the James L. Dohr Professor of Law at Columbia University, and Director of the Center for Gender & Sexuality Law.

** Director, ACLU Women's Rights Project. I am grateful to Naomi Mezey for inviting me to participate in the *After Dobbs* conference; to Liel Sterling for help transcribing the talk on which this essay is based; and to my ACLU colleagues for their steadfast support. I am lucky to work alongside such incredible advocates every day.

We publish these two papers here because, when read together, they offer new and fundamentally important insights about the meaning of *Dobbs* and how the legacies of slavery and the power of white supremacy haunt constitutional litigation even in cases that do not seem to be "about race."

In September 2022, Georgetown Law School's Gender + Justice Initiative held a conference titled *After Dobbs: the Assault on Reproductive Justice and Equality*. The conference brought together some of the leading academics and advocates working on reproductive justice to reflect on the meaning of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* and on the future of reproductive rights and justice in a world in which *Roe v. Wade* has been reversed.

Katherine Franke, the James L. Dohr Professor of Law and the director of the Center for Gender and Sexuality Law at Columbia Law School, and Ria Tabacco Mar, Director of the ACLU's Women's Rights Project, were among the speakers at the *After Dobbs* conference. The essays below are edited versions of the talks they gave at that conference.

DREDING *DOBBS*

KATHERINE FRANKE

As I was reading the Supreme Court's decision in *Dobbs v. Jackson Women's Health*,[1] both in draft and in final form, I had the distinct feeling that the opinion's structure and meaning were familiar. It then dawned on me: this case shares a number of similarities with *Dred Scott v. Sandford*, the 1857 Supreme Court case that found that the drafters of the U.S. Constitution never intended Black people to be U.S. citizens.[2] Having spent some time reading both cases side-by-side, I have concluded that in important ways, *Dred Scott* did for white supremacy, defining the United States as a white nation, what *Dobbs* does for patriarchy, masculinizing the Constitution as a compact among men. What I would like to do in this essay is read *Dred Scott* and *Dobbs* in relationship to one another, as cases about reproductive justice in the shadow of slavery.

First, the similarities between *Dred Scott* and *Dobbs* are reflected in their rhetorical structure. Both cases begin with text, and then move to history and tradition. In *Dred Scott*, Justice Taney begins his consideration of whether Black people could possibly hold the status of citizen within the meaning of Article 3 of the Constitution, by looking to the Constitution's text.[3] Of course, there are three references to slavery in the Constitution, but he mentions only two—the limit on the importation of enslaved people in Article 1, and the right of enslavers to seize enslaved people who escaped to free states in Article 4[4] (Taney makes no mention of the Three-Fifths clause). Taney's reliance on the textual presence of Black people in the Constitution as enslaved beings, and thus not citizens, is to be contrasted with Justice Alito's conclusion in *Dobbs* that both women and reproductive freedom are completely absent from the Constitution's text, thus justifying the finding that *Roe* was egregiously and wrongly decided in 1973. In both cases, the text of the Constitution definitively answers the question of rights and political belonging at stake in the case.

Both opinions then turn from text to history and tradition, declaring that the viability

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1 Dobbs v. Jackson Women's Health (*Dobbs)*, 597 U.S. 215 (2022).

2 Dred Scott v. Sandford (*Dredd Scott*), 60 U.S. 393 (1857).

3 "There are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed." *Dred Scott*, 60 U.S. at 411.

4 *Id.*

of the rights asserted must be answered by imaginatively reconstructing and then ventriloquizing constitutional meaning understood by the framers at the time the relevant language of the Constitution was written. Taney, like Alito, cherry picks colonial history to conclude, in terms too offensive to repeat once again here, that Black citizenship was unthinkable to the "great men—high in literary acquirements,"[5] who wrote the Declaration of Independence and the Constitution. Alito similarly ignores significant evidence supporting bodily autonomy in colonial history to conclude that history and tradition supported the denial of reproduction autonomy to pregnant people. Both cases evidence a disdain for the claim of rights alleged, relying on text, history, and tradition to ridicule the very idea of full citizenship for Black people or women. Interestingly, Taney does so in *Dred Scott* by reference to explicit constitutional text that must be read to relegate the "unfortunate" race to an inferior civil status, while in *Dobbs*, Alito does this work by erasing women from the story entirely. The debased *presence* of Black people in *Dred Scott* is mirrored by the insulting *absence* of women in *Dobbs*.

Pushing the comparison between the two cases a step further, it is not unreasonable to understand *Dred Scott* as a case that uses reproductive injustice to exonerate the institution of slavery. Taney turns to the history and traditions of eighteenth century colonial and state regulation of Black people to make the point that the term "We the people" meant white people only and assigned to Black people "the degraded condition" as an "unhappy race."[6]

Interestingly, to make the point, Taney singles out laws that prohibited interracial marriage and regulated interracial sex, defining the civil status of any children born to parents of different races as slaves. Sexual and reproductive injustice served as the predicate for and evidence of the notion that in the eighteenth century, Black people were understood by white lawmakers to be essentially inferior to white people. Recognizing Black people as holding any claim to U.S. citizenship was unthinkable, if not ludicrous. In this sense, *Dred Scott* shows us how the use of white supremacist values to underwrite the regulation of sex and sexuality can serve to legitimize the classification of Black people as an inferior caste under the Constitution. As such, *Dred Scott* is as much about the use of reproductive injustice to dehumanize Black people as it is about the constitutionality of the Missouri Compromise or federalism.

The *Dobbs* Court can also be understood to consider the constitutionality of reproductive rights in the shadow of slavery. Justice Alito justifies the outcome of the case, at least in

5 *Dred Scott*, 60 U.S. at 410.

6 *Dred Scott*, 60 U.S. at 409.

part, by reference to state laws that regulated abortion at the time of the ratification of the 14th Amendment, including an 1848 Virginia law that distinguished between free and enslaved people with respect to criminal penalties that could attach to the performance of an abortion—they applied only to abortions performed by free persons, acknowledging that the criminal laws of the time did not reach enslaved people, given that any discipline for their conduct lay exclusively in the jurisdiction of the people who enslaved them.[7]

Perhaps the most telling aspect of the holding in *Dobbs* that links it undeniably to *Dred Scott* is the notion that whatever rights people seeking access to abortion might have, they are to be found in state law and state citizenship, not the federal Constitution or federal citizenship. In this sense, both in *Dobbs* and *Dred Scott*, the federal Constitution was not implicated in, nor concerned with, the rights asserted by the plaintiffs. Rather, any rights they may have are secured as a matter of state citizenship.

Indeed, both cases declare a kind of neutrality with respect to the rights claimed by the parties. Remember, Justice Kavanaugh carried the water most muscularly, for the notion that judicial neutrality was required when it came to the question of whether abortion had any constitutional relevance. No, he argued, it did not. But unlike his colleague Clarence Thomas who specifically mentioned *Dred Scott* in his opinion for the Court, Kavanaugh could have borrowed the following language from Taney's opinion in *Dred Scott*: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power."[8]

In the end, Justice Breyer came closest to connecting the dots between *Dred Scott* and *Dobbs* in his dissent in *Dobbs* when he wrote, "Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[9] Justice Breyer and his fellow dissenters recognized that what was at stake in *Dobbs* was not merely an abstract right to reproductive autonomy, but the core of women's status as citizens.

7 "Any free person who shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, or more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child." 1848 Va. Acts p. 96, citing *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), slip op. at 85, Appendix A.

8 *Dred Scott*, 60 U.S. at 405.

9 *Dobbs*, 597 U.S. at 362 (Breyer, J., Dissenting).

The enduring jurisprudential legacy of *Dred Scott*, including the way it wove reproductive injustice into a larger story of Black inferiority, continues to haunt the Court, most recently in *Dobbs*. As Justice Thomas notes in *Dobbs*, the *Dred Scott* case was overturned "on the battlefields of the Civil War," not by the Supreme Court itself.[10] The white supremacist reasoning that infused every paragraph of Justice Taney's opinion has never been repudiated by the Court in the way that *Plessy*'s reasoning was disclaimed in *Brown v. Board of Education*.

The enduring afterlife of slavery, mixed with the values of heteropatriarchy, form the backdrop against which restrictions on the reproductive health of people who are pregnant in Mississippi have been degraded, and were fought out in the *Dobbs* case. It is well known that Black women are the most directly and negatively impacted by the Mississippi law at issue in *Dobbs*. Of course, Black men also bear the ongoing burden of the afterlife of slavery in this country, but when *Dobbs* is read against the enduring legacy of *Dred Scott*, it is abundantly clear how those legacies are uniquely written on and through Black women's bodies.

10 *Id.* at 336 (Thomas, J., Concurring).

WHAT "EVERY ONE KNOWS" ABOUT *DOBBS*—AND *PLESSY*

RIA TABACCO MAR

I appreciated the invitation to consider the *Dobbs* opinion together because I saw it as an opportunity to speak with you about something that has been bothering me since the day the case was argued. I think it has been bothering many of us. And that is the way the opinion invokes both the *Plessy* decision and the *Brown* decision.[11] I recall listening to the audio of the argument and hearing several Justices compare *Roe* to *Plessy*, laying the groundwork for the argument that overturning *Roe* was comparable to overturning *Plessy* in *Brown*. It instinctively struck me as wrong. It instinctively struck many as wrong. Since that day, I have read many interesting think pieces about what, precisely, was wrong with that comparison. Yet I still have the unsettling feeling that I have not quite fully wrapped my mind around it. I wanted to take today's prompt as an opportunity to name a few things that I have been grappling with and to hear from others how you have been thinking about it, too.

Shortly after *Dobbs* was argued, we saw a terrific statement from Sherrilyn Ifill, who was then President and Director-Counsel of the NAACP Legal Defense & Educational Fund. She made the point that *Roe* was fundamentally about recognizing the equality and dignity of all people.[12] So was *Brown*. *Plessy*, of course, was the inverse, in the sense that if you consider what the outcome means in terms of people's dignity and autonomy, the outcome of *Dobbs* is the antithesis of what *Brown* stood for. Then, there is also the idea that time (and the Court) march forward with an expansion of rights and that, in fact, *Dobbs* is more aptly characterized as a return to *Plessy*, rather than the reverse.[13]

I was rereading the work of Professor Richard Delgado on the practical reality of

11 Plessy v. Ferguson (*Plessy*), 163 U.S. 537 (1896); Brown v. Board of Education (*Brown*), 349 U.S. 294 (1955).

12 *LDF Issues Statement on Misleading References to Brown v. Board of Education by Supreme Court Justices*, NAACP LEGAL DEFENSE FUND: NEWS (Dec. 2, 2021), https://www.naacpldf.org/wp-content/uploads/Statement-on-SCOTUS-Comparison-of-Roe-and-Plessy.pdf [https://perma.cc/AFU2-TBDS].

13 David Cole, *Opinion: The Alito Opinion Would Be Like Plessy Overturning Brown v. Board of Education*, WASH.POST (May 5, 2022), https://www.washingtonpost.com/opinions/2022/05/05/reversals-usually-expand-rights-alitos-ruling-would-deny-them/ [https://perma.cc/S48S-4H33].

Brown[14] and began to see that it is not only that the outcomes of *Plessy* and *Dobbs* impact real people's lives in a similar way; it is that the reasoning of the *Dobbs* opinions bears striking similarity to the reasoning of the *Plessy* decision. Rereading *Plessy* after reading *Dobbs*, it is quite striking. I find that every time I reread *Plessy*, I find contemporary relevance, and I invite everyone to reread the decision often, but reading it through the lens of *Dobbs* was particularly disturbing.

The first similarity can best be summarized as: *I'm sorry you feel that way.* I am referring, of course, to the most famous (or infamous) quote from *Plessy*, in which the Court says, essentially, *Folks, if you think separate but equal is discriminatory, that's your own damn fault.* Here is how the Court put it:

> We consider the underlying fallacy of the plaintiff's argument [recall that the argument is that separate but equal is inherently discriminatory] to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[15]

Again, here is the Supreme Court saying, *I'm sorry you feel that way.* And we see that in *Dobbs*, particularly where the Court attempts to rebut the idea that restrictions on abortion are a form of sex discrimination. This "unrealistic refusal to see discrimination" where it exists—Professor Delgado calls it "crabbed neutrality"—we see here, too. The Court says, *Well, some people think restrictions on abortion are sex discrimination. The Solicitor General of the United States, and a long list of constitutional law scholars, say it's discrimination. But if you think that, it's because you don't understand.* Again, the familiar refrain. *I'm sorry you feel that way.*

I'm sorry you feel that way represents a stubborn refusal to see how discrimination operates or what discrimination means. Anybody who looks beyond the words of either the *Plessy* or *Dobbs* opinions understands what is happening, as Justice Harlan called out in his dissent from *Plessy*. Justice Harlan put it best when he wrote, "Every one knows."[16] "Every one knows," he says, that what this is really about is white supremacy. "Every one knows"

14 Richard Delgado & Jean Stefanic. *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

15 *Plessy*, 163 U.S. at 551.

16 *Id.* at 557 (Harlan, J., dissenting).

is a useful rubric for understanding the *Dobbs* opinion. So, too, "every one knows" that it is impossible to separate pregnancy, reproduction, parenting from patriarchy, from misogyny, from restrictions on our bodily autonomy. Everyone knows—and yet the Court tells us that if we *think* we know, well, we are wrong. *I'm sorry you feel that way.*

The second point can be summed up as: *Haven't we done enough for you people?* This closely mirrors an idea that slightly predates *Plessy* that we see in the Civil Rights Cases. There, the Supreme Court said, *Well, we emancipated you from slavery, and now we've done enough. You certainly can't expect to receive equal treatment in places of public accommodation*. That, the Court suggests, would be akin to "special rights":

> When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state [recall the year is 1883], there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws [ah, that old special favorite, the recently enslaved Black person in America], and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.[17]

That is to say, *Haven't we done enough for you people?*

I heard this refrain during oral argument in *Dobbs*, when Justice Barrett suggested that abortion was no longer necessary for women's economic security and freedom. We saw Justice Alito pick up on that theme and embrace it in the opinion, wherein he lists what he calls "modern developments" that he claims wash away the financial and physical implications of being pregnant.[18] So, he says, now "federal and state laws ban discrimination on the basis of pregnancy." (No thanks to the Supreme Court, which has repeatedly said that federal sex discrimination law does *not* ban discrimination based on pregnancy, forcing Congress to legislatively overrule the Court where it can.) "Leave for pregnancy and childbirth are now guaranteed by law in many cases," he says. "Costs of medical care associated with pregnancy are covered by insurance or government assistance."[19] He does

17 Civil Rights Cases, 109 U.S. 3, 25 (1883).

18 Ria Tabacco Mar, *Justice Alito's Rosy View of Pregnancy in America is Fantasy*, WASH.POST: OUTLOOK (May 6, 2022), https://www.washingtonpost.com/outlook/2022/05/06/alito-pregnancy-abortion-paid-leave/ [https://perma.cc/92Z3-3BCJ].

19 *Dobbs*, 597 U.S. at 258.

not need to say the last part out loud for us to hear it: *Haven't we done enough for you people?*

The last parallel I wanted to highlight today is the notion of returning the abortion question to the states. This aspect of the decision has gotten attention in the public discourse, and it is perhaps the most troubling if you stop to consider what comes next. *Plessy* spent a great deal of time emphasizing that its decision was only about Louisiana's choice to consign Homer Plessy to a separate, colored-only railroad car. This is not a railroad that travels across the country, the Court says. No, the train that Mr. Plessy was riding on had both of its termini within the state of Louisiana—and so, the Court says, this is Louisiana's business. What they want to do in their great state is up to them. If they want to say that Homer Plessy cannot ride alongside white people, *No harm, no foul.*

The premise of *Dobbs* is essentially the same: the notion that it is acceptable, and in fact preferable, to leave individual autonomy and dignity up to the states—as though the choice to recognize one's full humanity, and to *not* recognize one's full humanity, are entitled to equal dignity under our Constitution. That those choices are morally, constitutionally, and legally equivalent. The Constitution simply has nothing to say about which choice a state makes.

That, I think, is troubling, because when we look at Professor Delgado's work, writing in the context of the Court's race discrimination jurisprudence and the retreat from *Brown* reflected by the Court's affirmative action and minority contracting decisions, Professor Delgado posits that where the Court is going with race discrimination law is not only back to *Plessy*. We are in fact headed all the way back to *Dred Scott*. We have seen that timeline accelerate stunningly quickly in the context of abortion and reproductive freedom. Immediately after *Dobbs*, we have seen dozens of states act to ban abortion outright. We have now seen the introduction of a bill that would be a national ban on abortion. But national ban is a bit of a misnomer, because it is really only a ban in those states that are exercising what Justice Alito just said was their constitutional choice to protect the right to abortion.

That is the nature of the thing. Every advancement is met by, oftentimes, a more intense retraction and entrenchment of the forces of white supremacy and patriarchy. We are seeing that today happen at a disturbing pace as we awaken each day.

STATE SHOPPING FOR A BABY: A CALL FOR FEDERAL SURROGACY LEGISLATION

WENXIAO (KALEY) MI*

INTRODUCTION

The incredible strides made in the field of assisted reproductive technology (ART)[1] over the past several decades have helped countless individuals throughout the world actualize their dreams of starting a family using surrogacy. Social acceptance of surrogacy has also increased,[2] with many societies even welcoming the practice. Technological advancements and changing social norms have helped facilitate a growing need for surrogacy.

In response to the growing demand for and acceptance of surrogacy, American law has evolved to grapple with complex issues arising from this relatively new means of assisted procreation. The practice of surrogacy has always been controversial as it implicates substantial issues like parenthood, reproductive freedom, bodily autonomy, and commodification of reproductive capacity. The controversies surrounding surrogacy have shaped the legal framework's development, leaving surrogacy law in a confused state.

As of December 2023, the United States Congress has not enacted federal surrogacy laws. Instead, myriad state statutes and court decisions govern surrogacy in the United States. This fragmented legal system has fueled rampant forum shopping behavior: parents wanting a baby through surrogacy compare different states' laws and select the state that

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1 Although variations in the definition of ART exist, the Centers for Disease Control and Prevention (CDC) defined ART as "all fertility treatments in which either eggs or embryos are handled." DIV. REPROD. HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT 3 (2017).

2 *See* Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Geo. L.J. 2249, 2250 (2012).

provides the most favorable terms concerning contract enforceability, parental rights, and other substantive requirements. Forum shopping by intended parents has generated significant problems, such as legal uncertainties that fail to protect intended parents' expectation interests and inadequate procedural safeguards for surrogates' numerous rights.

This Note will focus on the problems generated by the current patchwork state system that governs the practice of surrogacy in the United States and demonstrate the need for uniform legislation at the federal level. Part I provides background information about surrogacy and explains the existing legal landscape. Part II identifies the major problems arising from this legal landscape and analyzes the detrimental effects of forum shopping in the surrogacy context. Part III discusses two model acts that seek to achieve uniformity and explores the surrogacy regimes in the United Kingdom and Ukraine as representative examples. Finally, drawing lessons from these examples, this Note argues that the solution to the problems articulated in Part II is uniform legislation at the federal level and offers some detailed drafting recommendations.

I. Background of Surrogacy in the United States

A. Understanding Surrogacy Arrangements: Traditional and Gestational Surrogacy

"Traditional surrogacy" refers to the procedures used for surrogacy before the public had ready access to vitro fertilization (IVF). In traditional surrogacy arrangements, a woman volunteers to be the surrogate, donates her own egg, becomes impregnated through artificial insemination, and carries the baby through pregnancy to full term on behalf of the intended parents.[3] Because the surrogate mother uses her own egg, this arrangement requires a surrogate mother to relinquish her parental rights over her biological baby, and, should the surrogate mother change her mind about the surrogacy arrangement, legal disputes may arise. The landmark surrogacy case, *In re Baby M*,[4] in which a surrogate mother found it emotionally impossible to relinquish custody of her child to the intended parents, exemplifies the potential custody disputes stemming from these arrangements.

In the *Baby M* case, William Stern and Mary Beth Whitehead signed a traditional

3 Alexus Williams, Comment, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 208 (2018).

4 *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

surrogacy contract.[5] The contract terms stated that Mrs. Whitehead would become pregnant using her own egg and Mr. Stern's sperm through artificial insemination.[6] Once Mrs. Whitehead delivered the baby, she would then renounce her parental rights, allowing Elizabeth Stern (Mr. Stern's wife) to adopt the child.[7] However, after Mrs. Whitehead gave birth and relinquished the child to the Sterns, she "became deeply disturbed, disconsolate, stricken with unbearable sadness," and threatened to commit suicide.[8] She asked the Sterns to return the baby to her, "even if only for one week," and promised that she would thereafter surrender the child back to the Sterns.[9] The Sterns, frightened by the depth of Mrs. Whitehead's despair, agreed to Mrs. Whiteman's request and turned the baby over to her with the understanding that she would return the baby after one week.[10] Instead, Mrs. Whitehead refused to return the baby to the Sterns.[11] Four months later, the baby was forcibly removed from Mrs. Whitehead and finally returned to the Sterns.[12] Mr. Stern filed an action to enforce the contract, but the Supreme Court of New Jersey deemed the contract as contrary to public policy and invalidated it.[13] The court first held that Mrs. Whitehead, the surrogate, was the natural mother of the child.[14] However, upon remand, after evaluating the baby's best interests, the trial court awarded the Sterns custody rights and awarded visitation rights to Mrs. Whitehead.[15]

The legal uncertainties surrounding a surrogate's parental and custody rights in traditional surrogacy, illustrated by the *Baby M* case, complicate the enforcement of traditional surrogacy arrangements. A traditional surrogate is both the genetic and the gestational parent, strengthening the argument that the surrogate also has parental rights to

5 *Id.* at 1235.

6 *Id.*

7 *Id.*

8 *Id.* at 1236–37

9 *Id.*

10 Baby M, 537 A.2d at 1237.

11 *Id.*

12 *Id.*

13 *Id.* at 1234.

14 *Id.*

15 *In Re* Baby M, 542 A.2d 52, 53 (Ch. Div. 1988).

the child.[16] Under these agreements, before the intended parents can establish their official status as the child's legal parents, the surrogate must agree to terminate her parental rights and the intended parents must complete an adoption process.[17] As the number of procedural requirements increase, the risk of potential legal complications increases, too.

Today, for multiple reasons, gestational surrogacy, wherein a pre-embryo is implanted in the surrogate's womb, has largely replaced traditional surrogacy.[18] Unlike traditional surrogacy, gestational surrogates do not use their egg for fertilization and thus retain no genetic ties to the babies they carry.[19] This feature also fulfills many families' wish that the baby carry a genetic link to both intended parents. Finally, gestational surrogacy provides more legal certainty about the parental status of all parties to the agreement, as many states are willing to honor the parties' intentions as expressed in the surrogacy contract when determining parental and custody rights.[20] As a result, gestational surrogacy has gradually become the prevailing practice.[21] This paper will exclusively focus on gestational surrogacy for this reason.

B. Contracting Parties in Surrogacy Arrangements

1. Surrogates' Motivations for Engaging in Surrogacy

Surrogacy may be altruistic or commercial, depending upon whether the surrogate receives monetary compensation for her services. Most women report altruistic intentions as at least one of the reasons behind their decision to become surrogates, including "wanting

16 Williams, *supra* note 3, at 211.

17 *Id.*

18 Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 527 (2011).

19 *Gestational Surrogacy Fact Sheet*, N.Y. STATE DEP'T OF HEALTH (2021), https://health.ny.gov/community/pregnancy/surrogacy/gestational_surrogacy_fact_sheet.htm [https://perma.cc/RG9B-PKHN].

20 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.").

21 Hisano, *supra* note 18, at 527.

to help a childless couple," "enjoyment of pregnancy," and "self-fulfillment."[22] However, it is difficult to accurately document the motivations of surrogates, particularly given how social norms dictating acceptable behavior may distort participants' self-reporting of subjective motivations.[23]

Regardless of their stated motivations, it is probably fair to say that compensation remains a motivating factor for many surrogates.[24] The average base compensation for a first-time surrogate ranges from $35,000 to $55,000, with additional allowances and reimbursements for other possible expenses, such as airfare, lodging, meals, and further costs.[25] Compensation is thus a substantial consideration which is likely factored into the surrogates' decision-making process. Since the emergence of surrogacy arrangements, concerns about coercion and commodification of women's bodies have continually stirred up debate on whether commercial surrogacy should be legally permissible.[26] This Note will not focus on the moral and philosophical controversies of surrogacy; rather, it will accept surrogacy as an increasingly popular social practice and discuss ways to protect surrogates' interests in surrogacy arrangements, despite the lack of consensus on the ethical issues related to surrogacy.

2. Intended Parents' Rationale for Pursuing Surrogacy

Individuals turn to the practice of surrogacy for a variety of reasons. For same-sex male

22 Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2199 (2003) ("The most common motivation reported by 31 (91%) women was 'wanting to help a childless couple.'"). *See also* HEATHER JACOBSON, LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES 38 (2016) (reporting "all the surrogates in [the author's] study spoke of their enjoyment of pregnancy and the joy they derived from giving [intended parents] their much desired children").

23 Jadva et al., *supra* note 22, at 2203.

24 *See* Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCH. 117, 118 (1983) (reporting that most surrogates would not have participated without receiving financial compensation).

25 *Surrogate Compensation,* CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/about-surrogacy/surrogate-compensation/ [https://perma.cc/P88A-S7XP]. Compensation for surrogate mothers varies between different surrogacy agencies, but most are within a similar range. *See, e.g.*, *Compensation*, FAM. CHOICE SURROGACY, https://familychoicesurrogacy.com/compensation/ [https://perma.cc/68TX-ATLU] (base compensation of $40,000 to $50,000); *Surrogate Compensation*, CTR. FOR SURROGATE PARENTING, https://www.creatingfamilies.com/surrogates/compensation/ [https://perma.cc/43Z4-AV9K] (base compensation of up to $50,000).

26 *See, e.g.*, Williams, *supra* note 3, at 217–18.

couples or single men, surrogacy provides a family-building option otherwise unattainable: a baby with a genetic link to them.[27] As perceptions of alternative family compositions have become more inclusive and diverse, surrogacy has gained more popularity among the LGBTQ+ community as a method by which to start a family.[28]

An increasing number of married couples and single women have turned to surrogacy as a form of family building as well.[29] Infertility is one of the major reasons intended parents opt for surrogacy, but it is not the only one.[30] For women who can conceive but cannot carry a fetus to full-term due to age or health issues, surrogacy gives them access to parenthood without physical risk and emotional distress.[31] And, of course, people can turn to surrogacy as a matter of pure personal preference,[32] choosing not to carry their own child despite having the physical ability to do so.

3. Surrogacy Arrangements: Agencies and Contracts

In the United States, many intended parents work with a surrogacy agency.[33] These agencies often provide a wide range of services to help clients navigate their surrogacy process, such as finding a suitable surrogate and acting as intermediaries between intended parents and surrogates.[34] With the assistance of surrogacy agencies, surrogacy parties usually find a surrogacy attorney to help them complete the proper legal process and safeguard their rights. With a surrogacy attorney's assistance, intended parents and a surrogate typically enter into a contract clearly outlining their respective rights and obligations. This legal

27 Shir Dar et al., *Assisted Reproduction Involving Gestational Surrogacy: An Analysis of the Medical, Psychosocial and Legal Issues: Experience From a Large Surrogacy Program*, 30 HUM. REPROD. 345, 351 (2015).

28 Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1640 (2020).

29 Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 660: Family Building Through Gestational Surrogacy, 127 OBSTETRICS & GYNECOLOGY e97, e97 (2016).

30 *10 Reasons People Use a Surrogate Mother*, FAM. TREE SURROGACY CTR., https://familytreesurrogacy.com/blog/people-use-surrogate-mother/ [https://perma.cc/JX8Z-4W5W].

31 *Id.*

32 *Id.*

33 Jordan Stirling Davis, *Regulating Surrogacy Agencies Through Value-Based Compliance*, 43 J. CORP. L. 663, 665–66 (2018).

34 *Id.* at 666.

document ensures both parties have adequate legal protection should any disputes arise in the course of the surrogacy process.

There is not a universal template for surrogacy contracts. Based on local state law and their individual situations, surrogacy parties draft a contract together that reflects their mutual understanding. A standard surrogacy contract should address certain key issues, including the specific rights and obligations of each party, any financial compensation and reimbursements, the surrogate's health-related conduct during the pregnancy, the potential risks associated with surrogacy, and agreements regarding "what-if" scenarios that implicate the health or general welfare of the surrogate or fetus.[35]

Surrogacy is currently governed by state law in the United States.[36] In states where courts hold surrogacy agreements enforceable, such contracts establish the baseline rights and obligations of each party. In states where courts are hostile to surrogacy contracts and hold them void, surrogacy parties sometimes still draft letters of understanding reflecting the terms of their agreement even though such letters are technically unenforceable.[37]

C. The Current Legal Landscape of Surrogacy in the United States

Despite the growing practice of commercial surrogacy in the United States, no federal legislation guiding the contracting process or regulating the agencies that facilitate surrogacy for either domestic or international surrogacy arrangements exists. Unlike other interstate activity, which is generally regulated by some uniform federal legislation implemented under the Commerce Power, Congress has thus far failed to pass any type of law regulating the practice of surrogacy.[38] The lack of federal law has left the regulation of surrogacy in the United States in a state of confusion, or "jurisdictional chaos," as aptly described by one author examining state legislative discrepancies in respect to commercial surrogacy.[39]

35 *Intended Parents: Understanding Surrogacy Contracts*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/ [https://perma.cc/3Q67-2URY].

36 *See* Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 301 (2007).

37 *Gestational Surrogacy Law Arizona*, SURROGATE.COM, https://surrogatefirst.com/pages/gestational-surrogacy-law-arizona/ [https://perma.cc/R2P7-D6RP].

38 Drabiak et al., *supra* note 36, at 302.

39 *Id.*

In the United States, surrogacy is currently governed by diverging state statutes and guided by court opinions. There are some states with statutes that expressly authorize surrogacy, some that enforce surrogacy contracts under certain circumstances, and some that declare surrogacy contracts unenforceable and void as against public policy.[40] The legal limbo in many states with the discrepancies in regulations between jurisdictions has given rise to abundant forum shopping.[41] This "patchwork surrogacy law regime" produces complex challenges regarding legal and logistical barriers, resulting in significant hurdles to safeguarding the rights and interests of surrogates and intended parents throughout the country. [42]

States view surrogacy agreements with varying degrees of friendliness. On one end of the spectrum, the states considered the most "surrogate-friendly" either have statutes permitting and recognizing gestational surrogacy or have a longstanding history of favorable rulings in surrogacy disputes.[43] These states typically allow compensated surrogacy agreements and "grant pre-birth orders regardless of intended parents' marital status, sexual orientation, and in some cases, genetic relationship to the baby."[44] These states include California,[45] Colorado,[46] Connecticut,[47] Delaware,[48] District of Columbia,[49]

40 *See* discussion *infra* p. 6-10 and accompanying notes 45-83.

41 *See* Sangeeta Udgaonkar, *The Regulation of Oocyte Donation and Surrogate Motherhood in India*, *in* Making Babies: Birth Markets and Assisted Reproductive Technologies in India 74, 89 (Sandhya Srinivasan ed., 2010) (discussing surrogacy laws in the United States).

42 Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 479 (2011).

43 *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/ [https://perma.cc/QV2F-5H8C].

44 *Id.* A pre-birth order is a legal document that establishes the parental rights of the intended parents to the baby to be born pursuant to the surrogacy agreement.

45 CAL. FAM. CODE §§ 7960–7962 (West 2020).

46 COLO. REV. STAT. §§ 19-4.5-101 to -114 (2021).

47 CONN. GEN. STAT § 7-48a (2022).

48 DEL. CODE ANN. tit. 13, §§ 8-801 to -810 (2022).

49 D.C. CODE §§ 16-401 to -412 (2023).

Idaho,[50] Maine,[51] New Hampshire,[52] New Jersey,[53] Nevada,[54] Vermont,[55] and Washington.[56] California in particular is considered one of the most "surrogate-friendly" states due to comprehensive statutory law[57] and longstanding case law that supports the practice of gestational surrogacy.[58]

At the other end of the spectrum, the three states considered least friendly towards surrogacy are Louisiana, Michigan, and Nebraska.[59] In Nebraska, all commercial surrogacy contracts are void and unenforceable.[60] The practical result is that Nebraska courts only permit altruistic (uncompensated) surrogacy, but any underlying surrogacy contract is still void and thus unenforceable.

Even more hostile to surrogacy are Michigan and Louisiana. Michigan wholly prohibits all surrogacy contracts, agreements, or arrangements.[61] Moreover, parties who enter into compensated surrogacy contracts are subject to criminal penalties.[62] Like Nebraska, Michigan does not criminalize altruistic surrogacy agreements, but any contracts drawn up for the process are unenforceable.

50 IDAHO CODE §§ 7-1601 to -1612 (2023).

51 ME. STAT. tit. 19-A, §§ 1931–1939 (2015).

52 N.H. REV. STAT. ANN. §§ 168-B:1–22 (2023).

53 N.J. REV. STAT. §§ 9:17-61–:17-71 (West 2018).

54 NEV. REV. STAT. §§ 126.500–.810 (2021).

55 VT. STAT. ANN. tit. 15C, §§ 801–809 (2021).

56 WASH. REV. CODE §§ 26.26A.700–.785 (2023).

57 *See* Surrogacy and Donor Facilitators, Assisted Reproduction Agreements for Gestational Carriers, and Oocyte Donation, CAL. FAM. CODE §§ 7960–7962 (West 2020); Establishing Parent and Child Relationship, CAL. FAM. CODE § 7613 (West 2020); Independent Adoptions, CAL. FAM. CODE §§ 8800–8823 (West 2020); Stepparent Adoptions, CAL. FAM. CODE §§ 9000–9007 (West 2020).

58 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

59 *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/983V-KKFB].

60 NEB. REV. STAT. ANN. § 25-21,200 (2023).

61 MICH. COMP. LAWS § 722.855 (2023).

62 *Id.* § 722.859.

Louisiana has the most restrictive laws, limiting gestational surrogacy to married heterosexual couples who use their own gametes and thus are both genetically related to the child.[63] Couples who satisfy this requirement must also comply with onerous contractual and procedural requirements, including a bar on financial compensation for the surrogate and a court's advanced approval of the agreement.[64] All other individuals—such as unmarried persons, same-sex couples, and heterosexual couples who need a donor gamete—cannot legally complete a gestational surrogacy in Louisiana. Surrogacy agreements not in compliance with the statutory requirements "shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy."[65] Furthermore, any person who enters into or assists with an unlawful surrogacy agreement in any way is subject to criminal penalties.[66] The onerous requirements in these three states either eliminate gestational surrogacy as an option, or, at minimum, create substantial hurdles for intended parents seeking to build their family with the help of a surrogate.

Most states fall somewhere between the two extremes described above. These states have favorable statutory or case law regarding surrogacy, but, for various reasons, provide less legal certainty to intended parents than the states in the first category. The different statutory schemes among these states give rise to varying degrees of "surrogacy-friendliness" with respect to the legal status of gestational surrogacy and the procedural requirements entailed by the practice, creating confusion for intended parents trying to choose a state to commence the surrogacy process.

For example, gestational surrogacy is considered legal in South Dakota because no state statute or published case law prohibits it.[67] Due to the lack of express authorization for the practice, many questions remain unanswered, such as whether a hearing is required to obtain pre-birth orders or whether pre-birth orders are obtainable if no party lives in South Dakota.[68]

Virginia permits gestational surrogacy by statute but imposes a significant number

63 LA. STAT. ANN. § 9:2720 (2023).

64 *See* LA. STAT. ANN. §§ 9:2720–2720.13 (2023).

65 LA. STAT. ANN. § 9:2720(C) (2023).

66 LA. STAT. ANN. § 14:286(C) (2023).

67 *Gestational Surrogacy in South Dakota*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/south-dakota/ [https://perma.cc/D8NJ-4C3H].

68 *Id.*

of restrictions on eligibility, procedure, and compensation.[69] In North Dakota, gestational surrogacy is permitted by statute, but only when "the embryo is conceived by using the egg and sperm of the intended parents."[70] Moreover, the statute simply states, "A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any."[71] Although North Dakota's statute establishes the general legality of gestational surrogacy, it fails to clarify many issues that are important to intended parents and surrogates, such as whether both intended parents can be named as legal parents in a pre-birth order in the case that neither of the intended parents are genetically related to the child.[72]

In Massachusetts, the legal status of gestational surrogacy is confirmed through case law.[73] Therefore, many requirements, such as the requirement of a hearing for obtaining pre-birth orders, are left to local judges' discretion. Similarly, gestational surrogacy in Ohio is also governed by published case law, which holds gestational surrogacy agreements generally enforceable.[74]

Several states fall on the more restrictive end on the "surrogacy-friendliness" spectrum; they are not considered surrogacy-friendly because the legal status of surrogacy is murky, but they also do not legally prohibit surrogacy. In these states, there is often considerable mismatch between the law and actual practice. This gray area, combined with inconsistent case law, has produced considerable uncertainties concerning the procedural requirements and legal status of intended parents and surrogates.

In Idaho, Tennessee, and Wyoming, gestational surrogacy is routinely practiced and considered permitted because no state statute or published case law expressly prohibits it.[75] However, intended parents in these states confront many legal hurdles and onerous

69 VA. CODE ANN. § 20-158.

70 N.D. CENT. CODE ANN. §14-18-01(2) (2023). Traditional surrogacy agreements are void in North Dakota. *See id*. § 14-18-05.

71 N.D. CENT. CODE ANN. §14-18-08 (West 2021).

72 *Gestational Surrogacy in North Dakota*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/north-dakota/ [https://perma.cc/DZB2-SYZM].

73 *See, e.g.*, Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004).

74 J.F. v. D.B., 879 N.E.2d 740, 741 (2007).

75 TENN. CODE ANN. §36-1-102 (48).

restrictions, which may add undue stress and legal risks to the family building process. For example, under Tennessee and Idaho case law, the surrogate will be established as the legal mother on the birth certificate unless both intended parents use their own egg and sperm.[76] This requirement makes it more difficult for same-sex couples and intended parents who cannot use their own egg or sperm to establish their legal status as the child's parent. In Wyoming, statutes prohibit issuance of pre-birth parentage orders until after the child's birth, adding to the intended parents' burden of completing post-birth procedures.[77]

In more "surrogacy-restrictive" states like Arizona and Indiana, courts are hostile to surrogacy contracts.[78] Arizona and Indiana's state legislatures have enacted statutes declaring gestational surrogacy contracts void and unenforceable, deeming such contracts to be against public policy.[79] Consequently, some surrogacy parties do not draft surrogacy agreements, leaving them without recourse or a legal record of their understanding of respective rights and obligations if any disputes arise. Some parties still prepare letters of understanding to reflect the terms upon which they agree.[80] In other surrogacy-restrictive states like Virginia, surrogacy contracts may be enforced depending on certain circumstances, but the availability of pre-birth orders may depend on the intended parents' marital status and other factors.[81] Despite these restrictions on surrogacy agreements' legal enforceability, surrogacy is still practiced in these states, and some courts have started to grant pre-birth parentage orders establishing the legal parental rights of intended parents.[82]

In summary, the fifty states and the District of Columbia vary widely in terms of their surrogacy-friendliness and surrogacy-restrictiveness. While a few states expressly authorize

76 *See In re* Adoption of Male Child A.F.C., 491 S.W.3d 316 (Tenn. Ct. App. 2014*); In re* Doe, 372 P.3d 1106 (Idaho 2016).

77 WYO. STAT. ANN. § 14-2-811 (West 2023).

78 *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/983V-KKFB].

79 ARIZ. REV. STAT. ANN. § 25-218 (West 2023); IND. CODE ANN. §31-20-1-1 (West 2023).

80 *Gestational Surrogacy in Arizona*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/arizona/ [https://perma.cc/M4VC-UWFJ].

81 *Gestational Surrogacy in Virginia*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/virginia/ [https://perma.cc/5X73-VYW8].

82 *Gestational Surrogacy in Arizona*, *supra* note 80; *Gestational Surrogacy in Indiana*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/indiana/ [https://perma.cc/5NWX-QDEG].

the practice of gestational surrogacy, most states have not comprehensively addressed the enforceability and legal requirements of gestational surrogacy contracts, leaving inadequate guidance for intended parents. Because surrogacy laws are not federalized, "[s]tate regulation of surrogacy contracts has left intended couples battling a hydra with fifty heads, leaving in its wake an omnipresent sense of uncertainty and unprecedented inconsistencies and inequities."[83]

II. Problems with Forum Shopping in the Surrogacy Context

In the absence of a uniform federal surrogacy law, it has become increasingly common for intended parents to engage in a kind of "forum shopping." "Forum shopping has been defined as a litigant's attempt 'to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'"[84] In the context of surrogacy, forum shopping refers to the tendency of intended parents to "shop" for the friendliest laws under which to make and enforce surrogacy arrangements. Forum shopping can be motivated by a variety of factors, including the availability of pre-birth parentage orders, treatment of same-sex couples, legality of compensation, procedural requirements, and costs.

Many surrogacy agencies catalyze and proliferate forum shopping behaviors, made possible by patchwork surrogacy laws.[85] Surrogacy agencies tend to cluster in states with favorable laws and take advantage of state regulatory disparities for commercial advantage.[86] These agencies explicitly encourage forum shopping to attract clients from all over the United States. Surrogacy agencies bridge physical distance between themselves and their clients by advertising their services on the internet and providing virtual or phone consultations. Surrogacy agencies provide intended parents with information on different states' surrogacy laws and advise them to embark upon their surrogacy journeys in "the best states."[87] Nonetheless, the lack of uniform surrogacy laws regarding the surrogacy

83 Brett Thomaston, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155, 1167 (2016).

84 Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting *Forum shopping*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

85 Thomaston, *supra* note 83, at 1179.

86 Drabiak et al., *supra* note 36, at 308.

87 *Surrogacy by State*, SURROGATE.COM, https://surrogate.com/surrogacy-by-state/ [https://perma.cc/UW48-QS9G] (providing articles on surrogacy laws and processes for each state).

procedure and surrogacy parties' rights causes many problems for the individuals involved in surrogacy agreements.

A. Legal Uncertainties and Expectation Interests

There is currently no clear and consistent regulatory framework when it comes to surrogacy in the United States. The inconsistencies across state laws create confusion for intended parents hoping to build a family via surrogacy, making surrogacy a "riskier endeavor than it need be."[88] Each state has a different approach to surrogacy, which means that intended parents and surrogates need to expend considerable time and energy understanding the legal status of surrogacy and relevant procedural requirements. In addition, while some states have enacted statutes expressly authorizing surrogacy (provided certain requirements are met), other states do not have statutes enumerating requirements in detail and simply leave any disputes to a judge's discretion. As a result, even in "surrogacy-friendly" states, it is possible for surrogacy parties to encounter legal uncertainties as to whether a particular surrogacy contract will be declared enforceable and how custody of the child will be adjudicated. Hence, surrogacy parties are often forced to gamble with one of the most important decisions of their lives, hoping that their contract will be held enforceable.

The harms of forum shopping are well-documented, with the key objection being that "it instinctively, 'leads to disparate treatment' of the litigants."[89] As such, "forum shopping undermines the foundational underpinnings of the court system itself, and leaves in its wake inequity, inconsistency, and confusion."[90] This reality of surrogacy in the United States contradicts the quintessential goal of contract law: to protect contracting parties' expectation interests.[91] As stated in the Restatement (Second) of Contracts, "judicial remedies . . .serve to protect one or more of the following interests of a promisee . . . [the party's] . . . 'expectation interest' . . . 'reliance interest' . . . [and] 'restitution interest.'"[92]

88 Makenzie B. Russo, The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States 49 (2016) (B.A. thesis, Trinity College) (on file with the Trinity College Digital Repository).

89 Thomaston, *supra* note 83, at 1178 (quoting Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 197 (2013)).

90 *Id.*

91 *Cf.* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 118(A) (5th ed. 2011) (observing that "the purpose of contract law is often stated as the fulfillment of those expectations that have been induced by the making of a promise").

92 RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981).

In the context of surrogacy contracts, the expectation interests of intended parents may involve biological parenthood, legal rights to the baby, legal compliance throughout the process, and enforcement of their financial agreements. As surrogacy agreements are contracts, they should be afforded the same protections to which other types of contracts are entitled.[93] The goals of ensuring equitable results and protecting parties' expectation interests thus necessitate a uniform legal framework regarding surrogacy that can be applied in a consistent and equitable manner.

B. Inadequate Protection for Surrogacy Parties

Due to the lack of federalized, uniform surrogacy legislation, contracting parties do not have a standard against which to measure the "terms" of their surrogacy arrangement. The legal and medical complexities of surrogacy highlight the problems with the lack of such a standard. Moreover, as surrogacy pregnancy is often divorced from the legally protected status of motherhood, surrogacy contracts sometimes raise concerns about commodification and exploitation of surrogates' bodies.[94] In states with fewer requirements for the surrogacy process, surrogates may also be vulnerable to undue influence by intended parents due to economic and power disparities.[95] The lack of legal safeguards can potentially threaten surrogates' rights to informed consent and bodily integrity.

Stiver v. Parker illustrates the lack of legal safeguards for surrogates.[96] In this case, Judy Stiver signed a contract to bear a baby as the surrogate for Alexander Malahoff.[97] At the time that the agreement was signed, the Michigan legislature had yet to criminalize commercial surrogacy contracts.[98] Stiver was artificially inseminated with Malahoff's un-

93 *See* Thomaston, *supra* note 83, at 1175 (contending that contract law should protect expectation interests in surrogacy contracts); *see also* Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 510–12 (2010) (discussing the use of contracts in defining surrogacy arrangements).

94 *See* Caitlin Conklin, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 88–89 (2013).

95 Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. Int'l L. 96, 105 (2018).

96 *See* Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992).

97 *Id.* at 263.

98 *Id.* at 269.

tested semen and gave birth to a baby.[99] The baby was diagnosed with severe birth defects, and Stiver alleged that Malahoff's semen was the source of the disease-causing virus.[100] Stiver sued the surrogacy broker, the doctors, and a lawyer who participated in the surrogacy program for negligence since Malahoff's failure to be tested for the virus caused their serious emotional and financial losses.[101] At the time, there was little legislative guidance on the subject of surrogacy.[102] Hence, since the contracting parties failed to properly stipulate the legal duties and rights of each party, the court had to decide whether the defendants owed a duty of care to the surrogate.[103] Although the court eventually entered a judgment in favor of the surrogate,[104] had there been a thorough legal framework guiding the contracting process for parties involved in surrogacy, the surrogate's rights would have been more easily vindicated.

Additionally, surrogates' economic interests are inadequately protected against the backdrop of the existing legal framework. In states where commercial surrogacy contracts are unenforceable, surrogates lack legal mechanisms to ensure any promised compensation for their time and effort when a dispute arises.[105] This is especially concerning given that most surrogates are lower-middle class and are thus more vulnerable to economic exploitation.[106] Combined with social stigma around demanding financial recompense for surrogacy, unenforceability of commercial surrogacy contracts in certain states leaves surrogates in a disadvantaged position when negotiating adequate compensation for the valuable service they provide.

Even in surrogacy-friendly states, a lack of guidelines on fair compensation renders surrogates vulnerable to economic exploitation. Commercial surrogacy agencies exacerbate the problem, prioritizing their own financial gain over surrogates' economic interests. Disparate state treatment of surrogacy has caused commercial surrogacy agencies to cluster

99 *Id.* at 263.

100 *Id.* at 264–66.

101 *Id.* at 264.

102 Stiver v. Parker, *supra* note 96, at 269.

103 *Id.* at 268.

104 *Id.*

105 *See* Drabiak et al., *supra* note 36, at 303.

106 *Id.* at 304.

in the surrogacy-permissive jurisdictions.[107] But just because surrogacy-friendly states' permissive laws impose fewer restrictions on surrogacy, that does not mean that these states' laws adequately protect surrogates. Surrogacy agencies often attempt to weaponize the rhetoric of "surrogacy as an altruistic act" in order to reduce surrogates' economic bargaining power.[108] Hence, surrogates are vulnerable to exploitation and are often at the mercy of these agencies in negotiating surrogacy contracts.

Just as the current legal framework fails to protect surrogates' interests, it also fails to protect intended parents' interests in the surrogacy process. For example, the outcome of the custody battle in the *Baby M*[109] case failed to align with the expectations of the intended parents, the Sterns, largely due to the surrogate's breach of contract, marked by her impulsive and unpredictable actions. While there was no consensus on whether Mrs. Whitehead was actually an "unfit or incompetent mother,"[110] a rigorous screening process that thoroughly evaluated Mrs. Whitehead's mental and emotional fitness to be a surrogate could have forewarned the Sterns about the risks involved and helped prevent the deviation from their expectations. Thus, the Sterns also could have avoided the tremendous emotional distress and litigation costs in the legal battle that ensued. However, as of today, only a few states explicitly require medical evaluations and mental fitness consultations for surrogates.[111] Most states lack a comprehensive legal framework that addresses the risks with respect to the surrogate's mental and emotional fitness. As a result, they fail to ensure the fulfillment of contractual obligations to safeguard the expectation interests of the intended parents.

Moreover, the lack of regulation of the growing number of surrogacy agencies jeopardizes the rights of both intended parents and surrogates. Operating without licensing requirements, commercial surrogacy agencies focus on "producing children for money."[112] In fact, "this lack of law and regulation has permitted ART agencies to take advantage of their clients to the extent of delayed or lost reproductive cycles, and, in some of the

107 *Id.* at 308.

108 *Id.* at 304.

109 *See* Baby M, 537 A.2d.

110 *Id.*

111 *See, e.g.*, COLO. REV. STAT. § 19-4.5-104 (2021).

112 Davis, *supra* note 33, at 676.

most egregious cases where fraud is involved, theft of millions of dollars."[113] These market failures need to be addressed urgently.

C. Surrogacy as a Federal Constitutional Right

Forum shopping can lead to the inconsistent application of constitutional rights and undermine equal protection under the law.[114] While some states' courts recognize the validity of surrogacy contracts in general,[115] others refuse to provide the intended parents with a legal cause of action, reasoning that such contracts are against public policy and thus unenforceable.[116] The inconsistency and unpredictability of the makeshift state regulatory scheme do not align with the significance of the constitutional rights at stake for the expectant parents.

From a constitutional law perspective, there are strong arguments for treating surrogacy as a fundamental right. In a series of landmark decisions, the Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to afford substantive protections against undue government intrusion in private matters related to procreation, marriage, and parentage.[117] The Court has also invoked the Equal Protection Clause of the Fourteenth Amendment to supplement these substantive due process guarantees in cases in which a state attempts to restrict certain groups' exercise of protected fundamental rights.[118]

113 REPORT ACCOMPANYING A RESOLUTION TO ADOPT THE ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. AGENCIES 112A 4-5 (AM. BAR. ASS'N 2016) (reporting on ART and ART regulation to the ABA House of Delegates).

114 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938) (finding that the *Swift* doctrine that enabled forum shopping "had prevented uniformity in the administration of the law of the state" and "rendered impossible equal protection of the law").

115 *E.g.*, Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (opining that "the agreement is not, on its face, inconsistent with public policy").

116 *E.g.*, Baby M, 537 A.2d at 1246. *But see* New Jersey Gestational Carrier Agreement Act, N.J. REV. STAT. § 9:17-65 (2018).

117 *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

118 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down miscegenation statutes that criminalized interracial marriage on the ground that the racial classification violated the Fourteenth Amendment's Equal Protection and Due Process Clauses).

In *Carey v. Population Servs. Int'l.*, the Court held that prohibitions on the distribution of nonprescription contraceptives violated the Due Process Clause of the Fourteenth Amendment and recognized that "decisions whether to accomplish or to prevent conception are among the most private and sensitive."[119] Then, in *Eisenstadt v. Baird*, another case regarding the right to contraception, the Supreme Court stated, "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[120]

Surrogacy is, by definition, a means to achieve parenthood. Following the Court's line of reasoning in *Carey* and *Eisenstadt*, the Constitution should similarly afford protection to personal decisions relating to surrogacy, as it also concerns the fundamental right of procreation. In fact, many state courts deciding surrogacy cases have recognized a constitutional right to procreate along these lines.[121]

State statutes invalidating surrogacy agreements restrict individuals' exercise of their fundamental rights involving procreation and family relationships. Under the Fourteenth Amendment, when a fundamental right is at stake, the government must demonstrate a "compelling state interest" to justify infringement upon the right, and any regulation must be "narrowly tailored" to serve the compelling state interest.[122] However, some states have arguably unconstitutionally deprived surrogacy parties of their fundamental right of procreation. The outright criminalization of commercial surrogacy in Michigan,[123] for example, hardly seems "narrowly tailored" to support any purported state interest in regulating surrogacy as a means of procreation.

Under the Fourteenth Amendment's Equal Protection Clause, laws that implicate rights embodied in family relationships and procreation cannot treat one class of persons differently from others.[124] For same-sex couples and individuals who struggle with infertility, gestational surrogacy represents their only chance to bear or beget a child who

119 *Carey*, 431 U.S. at 685.

120 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

121 *E.g.*, J.R. v. Utah, 261 F. Supp. 2d 1268, 1277 (D. Utah 2002).

122 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

123 MICH. COMP. LAWS § 722.859 (2014).

124 *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (holding that the forced sterilization of habitual criminals violates the Fourteenth Amendment's Equal Protection Clause).

is genetically linked to them. Denying "[t]heir singular opportunity to procreate through gestational surrogacy necessarily implicates their fundamental right to bear children, thereby invoking the protections of the United States Constitution."[125]

This interpretation of the fundamental right to bear children as including surrogacy can be seen in the state context. In *J.R. v. Utah,* plaintiffs brought a facial challenge to Utah Code Ann. § 76-7-204 (which prohibited surrogacy agreements and declared the surrogate to be the child's mother for all legal purposes), arguing that the statute was unconstitutional on equal protection grounds because it deprived the infertile of their only opportunity for genetic parenthood.[126] Plaintiffs also challenged the surrogate's designation as the legal mother on equal protection grounds because, according to Utah law and administrative practice, genetic fathers could be listed on the birth certificate as the legal father, while the genetic mothers could not be listed as the legal mother.[127] The plaintiffs argued that this disparity "operate[d] to deny the genetic/biological mother the equal protection of the laws guaranteed by the Fourteenth Amendment."[128] The court agreed.[129] Again, surrogacy laws should be federalized to realize equal protection in this way.

Abortion jurisprudence can also provide insight into the current legal state of privacy and family planning. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court revisited the question of whether abortion is a fundamental right constitutionally protected under substantive due process.[130] In *Dobbs*, the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which previously recognized[131] and affirmed[132] a constitutional right to abortion. In *Dobbs*, the Court reasoned that the Constitution does not expressly guarantee abortion rights.[133]

125 J.R., 261 F. Supp. 2d at 1274.

126 *Id.* at 1272.

127 *Id*.

128 *Id.* at 1274.

129 *Id.* at 1294.

130 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

131 *See generally* Roe v. Wade, 410 U.S. 113 (1973).

132 *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

133 Dobbs, 142 S. Ct. at 2242.

As the first decision in recent history in which the Court overruled precedents establishing a fundamental right,[134] the *Dobbs* ruling marks a seismic shift in substantive due process jurisprudence, and in particular, reproductive rights, forecasting a highly precarious legal future for surrogacy. While the *Dobbs* majority explicitly states that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[135] this uncommon revocation of a constitutional right still raises widespread concerns about the longevity of constitutional protections for other fundamental rights concerning privacy and family, such as the rights to contraception, same-sex intimacy, and same-sex marriage. Although the Supreme Court has yet to address surrogacy or the use of ART, the *Dobbs* decision portends a murky legal outlook for surrogacy as a fundamental right. The likelihood that the Court would recognize surrogacy as constitutionally protected under the fundamental right of procreation is considerably weaker after *Dobbs*.

The existing piecemeal approach to addressing surrogacy fuels rampant forum shopping and renders some states' efforts to safeguard individuals' constitutional rights ultimately inadequate. While issues touching upon family relations are generally reserved to the states, surrogacy involves federal constitutional issues of parentage, procreation, and privacy that can be properly addressed by Congress,[136] potentially under the Commerce Clause, the Spending Clause, or the Enforcement Clause of the Fourteenth Amendment. Although the ramifications of *Dobbs* are not completely clear, it is undeniable that substantive due process rights and equal protection guarantees related to procreation are imperiled in the post-*Dobbs* era. Hence, it is more imperative than ever that Congress exercise its legislative authority to enact laws to protect or otherwise regulate surrogacy practices.

III. A Federal Legislative Solution to Safeguard the Rights of the Surrogacy Parties

A. Past Attempts at Uniformity: The Model Acts

While Congress has yet to enact a uniform law regulating commercial surrogacy, a few law commissions have proposed model acts that would align the law with the growing social acceptance of surrogacy and address conflicts and inconsistencies in state surrogacy laws. While none of these proposals have successfully led to the implementation of a

134 Kelsey Y. Santamaria, CONG. RSCH. SERV., LSB10820, *Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity* (Sep. 14, 2022).

135 Dobbs, 142 S. Ct. at 2239.

136 Caster, *supra* note 42, at 505.

national legal framework, they mark an important starting point for establishing more consistent legal standards governing surrogacy contracts and shed light on the need for federal legislation.

1. The Uniform Parentage Act

As the second half of the twentieth century saw society gradually become more open-minded towards non-marital children, the law also became more egalitarian in its treatment of marital and non-marital children.[137] In an attempt to fill the statutory void in family law, the National Conference of Commissioners of Uniform State Laws promulgated the Uniform Parentage Act ("UPA") in 1973 in order to provide equal protection for all children.[138]

The UPA was amended in 2002 to include a provision on surrogacy agreements and to establish the parentage of children born out of surrogacy contracts.[139] Further revisions to the UPA in 2017 modernized some of the rules governing gestational surrogacy in order to keep the UPA in line with the developing law.[140] For example, by applying its surrogacy provisions to same-sex couples, the 2017 UPA cures the constitutional infirmity in some state laws and upholds same-sex couples' equal protection rights.[141]

The UPA, as revised in 2002 and 2017, sets forth a set of rules governing surrogacy agreements. The UPA requires the surrogate to have attained twenty-one years of age, given birth to at least one child, gone through medical and mental health evaluations, and have independent legal representation throughout the surrogacy period.[142] There are also similar requirements for intended parents regarding their ages, medical and mental evaluations, and independent representation.[143] The UPA enumerates procedural requirements to ensure

137 Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q., 1 (1974).

138 UNIFORM PARENTAGE ACT, Prefatory Note (UNIF. L. COMM'N 2017). ("A core principle of UPA (1973) was to ensure that 'all children and all parents have equal rights with respect to each other,' regardless of the marital status of their parents.") (internal citation omitted).

139 *Id.* Art. 8.

140 *Id.*

141 *Id.* Prefatory Note.

142 *Id.* § 802.

143 *Id.*

the validity and enforceability of surrogacy contracts, such as mandating that both parties receive independent legal counsel and that the agreement be executed before any medical procedure occurs.[144] The UPA also regulates surrogacy agreements' content by, for example, explicitly providing for the intended parents' parental rights, allocating surrogacy-related medical expenses, and preserving the surrogate's right to terminate pregnancy.[145] For example, the UPA states that each intended parent is a legal parent of the child, while the surrogate or her spouse is not.[146]

Though the UPA seeks to establish the uniform regulation of surrogacy, a minority of states have adopted it.[147] Since the UPA is designed to be adopted on a voluntary basis and is open to modifications, there is no effective mechanism to enforce this uniform legal framework across all jurisdictions.[148] Because the goal of nationwide uniformity cannot be achieved, the UPA's good-faith attempt at unvaried regulation of surrogacy law only has only a limited impact.

2. The ABA Model Act

> *We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.*[149]

In recognition of problems arising from modern developments of ART, the American

144 UNIF. PARENTAGE ACT § 803.

145 It is worth noting that as *Dobbs* removed federal protection for abortion rights, the decision concerning termination of pregnancy or selective reproduction has become more complex in states where abortion is limited, banned, or criminalized. *See generally* Dobbs, 142 S. Ct 2228; HUMAN RIGHTS WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER DOBBS (2023) https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/4Q27-M3YS].

146 UNIF. PARENTAGE ACT § 803.

147 *Id.* § 803 cmt.

148 Thomaston, *supra* note 83, at 1183.

149 *American Bar Association Model Act Governing Assisted Reproductive Technology February 2008*, 42 FAM. L.Q. 171, 172 (2008) (quoting *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

Bar Association ("ABA") identified the need to provide a guiding framework to ". . . give assisted reproductive technology (ART) patients, participants, parents, providers, and the resulting children and their siblings clear legal rights, obligations, and protections."[150] Additionally, the ABA noticed the rapid growth of surrogacy agencies and the corresponding lack of oversight:

> Such [surrogacy] agencies can be owned and operated by anyone without professional training or affiliation. There have been documented cases in which the owners of such agencies have misappropriated and absconded with client funds and otherwise inadequately or negligently administered their programs to the detriment of their clients and their donors/surrogates. Regarding such agencies there is a significant gap in the licensing and regulation that governs most other aspects of the ART process[.][151]

In response to these issues, the ABA Model Act Governing Assisted Reproductive Technologies ("ABA Model Act") was born in 2008.[152] The ABA Model Act offers two models for states: Alternative A, a judicial preauthorization model,[153] and Alternative B, an administrative model.[154] Alternative A allows a prospective surrogate and intended parents who meet certain procedural and substantive requirements to commence a judicial proceeding to validate their gestational agreement in advance.[155] The court has the discretion to reject the contract regardless of whether it fulfills all of the statutory requirements.[156] This is a major drawback to Alternative A, as judicial discretion could lead to inequitable results among similarly situated parties without reasonable justification.[157]

150 *Id.* at 171.

151 MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES, Prefatory Note (AM. BAR ASS'N, DRAFT OCT. 2013).

152 *See generally American Bar Association Model Act*, 42 FAM. L.Q. 171.

153 The requirements in Alternative A are substantially similar to those established by the 2002 version of the UPA, which provides that gestational agreements are only enforceable if submitted to a court for approval in advance. The 2017 amendment to the UPA removed this requirement. *American Bar Association Model Act*, 42 FAM. L.Q.at 188–89.

154 *Id.* at 188.

155 *Id.* at 189.

156 *See* Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 817 (2012).

157 *Id.* at 818.

In contrast, Alternative B allows for self-executing agreements without prior judicial approval.[158] In other words, a surrogacy agreement is enforceable so long as it meets the eligibility and contractual requirements set forth in Alternative B.[159] This model reduces the administrative burden of obtaining court approval and eliminates the possibility of judicial arbitrariness that exists under Alternative A.

The surrogate's eligibility requirements imposed by Alternative B are similar to those set forth by the UPA, including the surrogate's minimum age, prior childbirth requirement, medical and mental health evaluations, and consultation with independent legal counsel, among others.[160] The ABA Model Act also mandates that the surrogate ". . . has, or obtains prior to the embryo transfer, a health insurance policy that covers major medical treatments . . ." and that ". . . the policy may be procured by the intended parents on behalf of the gestational carrier . . .," which serves to protect the surrogate's interests.[161] Under Alternative B, the intended parents are required to contribute at least one of the gametes, demonstrate a medical need for the surrogacy arrangement, complete a mental health evaluation, and secure independent legal consultation.[162]

Like the UPA, the ABA Model Act explicitly provides for the parental rights of the intended parents and the surrender of custody by the surrogate and her legal spouse (if applicable).[163] In addition to the contractual requirements, the ABA Model Act allows provisions that require the surrogate to undergo medical exams and treatments recommended by the physician and to abstain from activities that are reasonably believed to be harmful to the pregnancy.[164] The ABA Model Act also requires the intended parents to pay reasonable compensation and reimburse the surrogate for reasonable expenses relating to the surrogacy.[165] By setting forth substantive and procedural requirements, the ABA Model Act clearly establishes the recommended practices for the safety and interests of all parties and establishes much-needed predictability.

158 *See American Bar Association Model Act*, 42 FAM. L.Q. at 194.

159 *Id.*

160 *Id.* at 193.

161 *Id.*

162 *Id.*

163 *Id.* at 195.

164 *American Bar Association Model Act*, *supra* note 158, at 194.

165 *Id.*

The ABA Model Act is an exciting stepping stone towards better protection of surrogate parties' interests. However, since the ABA lacks the legislative authority to promulgate a set of uniform standards that apply nationwide, the ABA Model Act provides only a basis by which legislators can craft laws governing surrogacy. Hence, in light of the adoption and enforcement challenges encountered by the UPA and the ABA Model Act, the best solution to eliminate forum shopping and achieve uniformity is clear: federal legislation.

B. International Examples of Uniform Regulation

In considering the promulgation of surrogacy regulations at the federal level, it is helpful for the United States to look to international examples of uniform surrogacy regulation. Surrogacy laws in the United Kingdom and Ukraine shed light on the potential benefits of and considerations for a federal solution in the United States.

1. The United Kingdom

Surrogacy in the United Kingdom is governed by the Surrogacy Arrangements Act 1985 ("SAA")[166] and the Human Fertilisation and Embryology Acts 1990 (as amended)[167] and 2008 ("HFE").[168] The SAA, enacted almost four decades ago, outlaws commercial surrogacy while leaving altruistic surrogacy lawful.[169] It prohibits surrogacy advertisement by individuals or for-profit companies, but permits an exception for non-profit organizations who can lawfully provide assistance to intended parents and surrogates.[170] In essence, the Act criminalizes third parties financially benefitting from surrogacy.[171] While commercial surrogacy is forbidden, it is nevertheless legal for intended parents to reimburse the surrogate for reasonable expenses incurred by reason of pregnancy.[172]

166 Surrogacy Arrangements Act 1985, c. 49, §§ 1, 2 (UK) https://www.legislation.gov.uk/ukpga/1985/49 [https://perma.cc/2XHW-WT96].

167 Human Fertilisation and Embryology Act 1990, c. 37 (UK) https://www.legislation.gov.uk/ukpga/1990/37/contents [https://perma.cc/VHL9-Z63R].

168 Human Fertilisation and Embryology Act 2008, c. 22 (UK) https://www.legislation.gov.uk/ukpga/2008/22/section/22 [https://perma.cc/46UW-4XG8].

169 Surrogacy Arrangements Act, *supra* note 166.

170 *Id.*

171 *Id.*

172 *Id.*

Pursuant to the SAA, surrogacy contracts are not legally enforceable in the United Kingdom.[173] Although not legally binding, it is still common practice for intended parents and surrogates to sign a written agreement as a statement of intention documenting the details of the arrangement.[174] In cases where disputes arise between the intended parents and the surrogate, the agreement is non-binding and the court would solely consider the child's best interests in adjudicating the disputed issues.[175] According to British law, the surrogate is the legal parent of the child at birth.[176] In order to gain legal parenthood, the intended parents need to obtain the surrogate's (and the surrogate's legal partner's, if applicable) consent and apply to a court for a parental order.[177]

In tandem, the HFE is focused on providing rights to intended parents in surrogacy arrangements.[178] The HFE introduced parental orders as an avenue for intended parents to gain legal parenthood to children that carry a genetic link to at least one of the intended parents without having to go through the adoption process.[179] The law allows married couples (including same-sex couples), couples in an enduring relationship or civil partnership, and single individuals to apply for a parental order and be treated as legal parents.[180] By clearly prescribing the legal requirements for parental order applications, these HFE provisions make the parentage question more predictable and thus can more effectively protect the expectation interests of intended parents and surrogates.

The SAA and the HFE have many strengths that could inform surrogacy legislation in the United States. Although the United Kingdom's laws are more restrictive compared to those in most "surrogacy-friendly" states in the United States, as the SAA prohibits commercial surrogacy and does not legally recognize surrogacy contracts, adopting such a uniform legal regime in the United States would block forum shopping behavior by ensuring consistent and equitable results across the nation. The HFE also reflects legislative efforts to develop the existing legal framework to accommodate modern societal norms

173 *Id.*

174 Bianca Olaye-Felix et al., *Surrogacy and the law in the UK*, 99 POSTGRADUATE MED. J. 358, 359 (2023).

175 *Id.*

176 *Id.*

177 *Id.* at 360.

178 *Id.* at 359.

179 Human Fertilisation and Embryology Act, *supra* note 168, § 54.

180 *Id.*

and technological advances. In particular, the HFE casts light on the potential benefit of parental orders as a mechanism to prevent unnecessary litigation concerning parental rights and protect surrogate parties' expectation interests.

2. Ukraine

Ukraine is another country with nationwide regulations on surrogacy. Ukraine is one of the most popular international surrogacy destinations, second only to the United States.[181] Ukraine's surrogacy law plays a prominent role in its popularity as a surrogacy destination. Ukraine's law alleviates any concern for uncertainties regarding parental rights and eliminates the need for burdensome court proceedings.

Ukraine's surrogacy law is highly permissive and sets forth enumerated rights and interests of intended parents. Gestational surrogacy is completely legal in Ukraine, provided that a few eligibility requirements are satisfied.[182] The law mandates that the parties sign a Written Informed Consent for participation in surrogacy.[183] The contracts between surrogates and intended parents are enforceable as long as they are executed in written form before a notary.[184] The law also states that the intended parents are recognized as the legal parents from the moment an embryo is created in the surrogate's body.[185] After the surrogate has given her informed consent to the arrangement, she cannot rescind on the agreement, and her name never appears on the child's birth certificate.[186] The surrogate must be within the age range of eighteen to thirty-six years old, have previously given

181 *Surrogacy During the War in Ukraine*, SURROGACY360 (Sept. 6, 2022), https://surrogacy360.org/resources/surrogacy-during-the-war-in-ukraine/#:~:text=Now%20Ukraine%20is%20one%20of,only%20to%20the%20United%20States [https://perma.cc/SJ7W-39G6].

182 For example, the prospective surrogate has to be healthy, of full age, free of medical contra-indications, and must have given birth to a healthy child before. *Legislation of Ukraine*, INT'L REPROD. TECH. SUPPORT AGENCY (IRTSA) (2023), http://www.irtsa.com.ua/en/legislation/ukraine.html [https://perma.cc/4L8B-ZRE4].

183 *See* Conklin, *supra* note 94, at 92.

184 Ukrainian Ministry of Justice Act on "Alterations to Civil Registration Regulations in Ukraine" No. 1154/5 from 22.11.2007, paragraph 10, article 3 (Ukr.).

185 Family Code of Ukraine, Article 123, Part 3, https://zakon.rada.gov.ua/laws/show/en/2947-14#Text [https://perma.cc/2X67-6SAH].

186 *See* Conklin, *supra* note 94, at 92.

birth to a healthy child, and must be free of hereditary diseases or harmful habits, such as alcoholism or drug addiction.[187]

Despite the benefits of Ukraine's surrogacy law for intended parents, the law has some glaring drawbacks. One such limitation is the law's stipulation that only married heterosexual couples can participate in the surrogacy process.[188] The limited eligibility denies surrogacy as an available family-building option for single individuals, same-sex couples, and unmarried heterosexual couples. In addition, advocates for women's rights decry the lack of safeguards for the health and interests of surrogates in Ukraine.[189] Ukrainian legislation does not explicitly provide for the surrogate's right to make decisions regarding medical procedures related to the pregnancy, does not require mental evaluation of any surrogate parties, and does not require that each party obtain an independent legal consultation prior to commencement of the surrogacy arrangement.[190] These gaps in Ukraine's law highlight the competing interests that inherently exist in surrogacy agreements. The interests of both the intended parents and the surrogate must be carefully weighed in crafting any equitable surrogacy legislations. Such key considerations of the surrogate include the surrogate's right to bodily and reproductive autonomy, the intended parents' expectation interests and right to procreate, and the state interest in preventing commodification and exploitation of women's reproductive capacity.

Despite these clear drawbacks, Ukraine's legal regime affords certainty to the surrogate parties and contains provisions that are friendly to intended parents. The United States could look to Ukrainian surrogacy legislation as an example, albeit one-sided, as it clearly delineates parental rights and has nationwide application.

C. Recommendations for U.S. Federal Surrogacy Legislation

It is imperative for Congress to adopt a uniform federal law to address the "jurisdictional

187 *Legislation of Ukraine*, *supra* note 182.

188 *Id.*

189 Kate Baklitskaya & Magdalena Chodownik, *Lack of Regulation and COVID-19 Leaves Ukrainian Surrogate Mothers and Babies in Limbo*, NEW E. EUR. (Dec. 24, 2020) https://neweasterneurope.eu/2020/12/24/lack-of-regulation-and-covid-19-leaves-ukrainian-surrogate-mothers-and-babies-in-limbo/ [https://perma.cc/UVL5-T99A].

190 *Legislation of Ukraine*, *supra* note 182.

chaos"[191] in the sphere of surrogacy regulation and provide adequate protections for parties engaging in surrogacy arrangements. While none of the model acts and foreign surrogacy laws discussed above are paragons, they serve as valuable base models for federal legislation governing surrogacy practices in the United States.

The ABA Model Act outlines some eligibility and procedural requirements governing the surrogacy process that should be adopted in the federal legislation. For example, the provisions regarding the surrogate's age, prior childbirth experience, physical and mental evaluations, and independent legal counsel are good baseline requirements.[192] Additionally, Congress should follow Alternative B as proposed by the ABA Model Act, which makes surrogacy contracts self-executing (given that all of the requirements are fulfilled).[193] Compared to the judicial preauthorization model in Alternative A, Alternative B eliminates the burden of judicial oversight; adopting Alternative B both promotes judicial economy and diminishes the potential of inconsistent outcomes for similarly situated individuals. While prior approval from the courts in Alternative A theoretically decreases ex-post legal disputes, all the substantive and procedural requirements, if duly fulfilled, should constitute adequate protection for all parties and minimize litigation risk.

The United States should consider the strengths and shortcomings of the laws in the United Kingdom and Ukraine in its own approach to federal surrogacy legislation. The United Kingdom holds a rather conservative stance towards surrogacy, banning all commercial surrogacy and declaring surrogacy agreements legally unenforceable.[194] The unenforceability of surrogacy contracts leaves both the surrogates and intended parents in an uncertain situation and at risk of exploitation. One party has no avenue of remediation if the other party reneges on their agreement or otherwise fails to meet the conditions upon which they agreed, just as what happened in the United States in *Baby M*.[195] Despite these shortcomings of the United Kingdom's surrogacy legislation, the United States can use the HFE as a model to protect intended parents' expectation interest regarding their parental rights. Enacting a law inspired by the HFE, which enables intended parents to be listed on

191 Drabiak, *supra* note 36, at 302.

192 *See* UNIFORM PARENTAGE ACT § 802 (UNIF. L. COMM'N 2017); *see American Bar Association Model Act*, 42 FAM. L.Q.

193 *See American Bar Association Model Act*, 42 FAM. L.Q. at 192–197.

194 Surrogacy Arrangements Act 1985, c. 49, § 2 (UK) https://www.legislation.gov.uk/ukpga/1985/49 [https://perma.cc/2XHW-WT96].

195 *See generally* Baby M, 537 A.2d 1227.

their genetic child's birth certificates,[196] would prevent situations in which intended parents have to legally adopt their child.

By comparison to the United Kingdom's surrogacy laws, Ukraine's law reflects a more permissive attitude towards surrogacy, even if it is unbalanced in its considerations for intended parents and surrogates. Congress should nevertheless follow Ukraine's example with respect to establishing a clear delineation of the rights of surrogate parties. Drawing lessons from Ukraine's approach, which favors intended parents over surrogates, Congress should seek to strike a balance between advancing intended parents' expectation interests and protecting surrogates' reproductive autonomy. This can be achieved by, for example, mandating independent legal counsel for potential surrogates before any procedure is done to ensure they are adequately educated on what surrogacy entails, have equal bargaining power in negotiating any surrogacy agreement, and are able to give true informed consent.

Establishing uniform federal legislation in the United States would eliminate forum shopping in the surrogacy context. Predictable, uniform surrogacy regulation would diminish the need for intended parents to track down surrogacy-friendly states, ensure consistent treatment across jurisdictions, and elevate the standards of protection afforded to surrogacy parties across the nation. For example, a comprehensive legal framework could address questions like access to surrogacy for same-sex couples and unmarried individuals, guidelines for fair compensation, requirements for obtaining legal parenthood, surrogates' medical decision-making rights, etc. Moreover, federal legislation could address the market failures in the surrogacy industry by imposing licensing requirements and operating standards on surrogacy agencies to ensure the rights of the other stakeholders are protected.

In discussing potential federal surrogacy legislation, it is important to acknowledge that surrogacy remains a highly contentious topic in the United States, both in stances toward how it should be regulated and in its public perception. The current discordant state laws suggest that any proposed bills outlining expansive surrogacy rights and protections for both intended parents and surrogates is unlikely to gain the congressional support it needs to become federal law. A possible alternative path would be for the Supreme Court to recognize surrogacy as a fundamental constitutional right as part of privacy rights and/or parental rights, which makes it subject to regulation by the federal government, not the states.

The lack of uniformity among states' approaches to surrogacy regulation reflects

196 *See* Conklin, *supra* note 94, at 91.

diverging public opinions over ethical and legal issues relating to surrogacy. Critics of surrogacy often express concerns over commodification of women and children, exploitation of the economically vulnerable, or moral objections to ART as a whole.[197] While some of these concerns are persuasive, they should not hinder the creation of a uniform surrogacy regulatory regime. In fact, some of these criticisms could be addressed by a uniform surrogacy regulatory regime. Establishing detailed, equitable federal surrogacy laws would ensure fairness to all parties and would promote judicial economy. As exemplified by the United Kingdom's and Ukraine's nationwide surrogacy laws, a uniform regulatory framework does not necessarily have to lie on either extreme end of the permissiveness-restrictiveness spectrum. The primary objective of federal surrogacy legislation should be to define the parameters of surrogacy contracts and protect the parties involved from exploitation and coercion.

CONCLUSION

The surrogacy industry's unbridled growth in the United States has outpaced Congress's ability to regulate it. This dearth of federal legislative guidance has resulted in a state-by-state piecemeal approach to regulating surrogacy in the United States. As courts struggle to maintain consistency in their rulings, confusion surrounding parties' rights and obligations grows. In response, surrogacy parties and agencies attempt to circumvent surrogacy-restrictive jurisdictions. This widespread forum shopping has produced inconsistent and inequitable treatments across the nation. Ultimately, the current system is unable to keep up with changing family planning practices, provide predictability for those involved in the surrogacy process, or safeguard the rights of surrogates and intended parents. As the law stands, surrogates are often vulnerable to exploitation and are left without remedy if the intended parents fail to fulfill any agreed-upon obligations. On the other hand, states that deem surrogacy contracts unenforceable or that lack clear provisions on parental rights force the intended parents to gamble with their expectation of sole parental rights to their genetic child.

The solution is clear: the implementation of uniform surrogacy legislation at the federal level. A nationwide law would provide legal clarity to surrogate parties as to their rights, fortify the right to equal protection across state lines, and eradicate forum shopping to ensure that contracting parties are not left to the mercy of courts' differing interpretations. The United States can learn from the examples of the United Kingdom and Ukraine's legal

197 Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 249–53 (2010).

regimes concerning surrogacy, adopting their strengths and avoiding their downfalls in order to minimize legal confusion, protect surrogacy parties' rights, and reflect growing societal acceptance of surrogacy. In considering these examples and looking to models like the UPA and the ABA Model Act, federal surrogacy legislation could finally curb forum shopping in the surrogacy context, strengthen protections for surrogates, and safeguard the interests of intended parents as they navigate the path to building a family.

Now is the time to focus on comprehensive, federal surrogacy legislation. In *Dobbs*, the Supreme Court chipped away at substantive due process jurisprudence. Arguably, *Dobbs* left many fundamental rights concerning parentage, procreation, and bodily autonomy in a precarious position. As such, it is more urgent than ever that Congress takes legislative action to protect the right to procreation and parental rights for all individuals seeking to pursue parenthood through surrogacy, ensuring their right to equal protection.

Surrogacy will likely always be an area replete with ethical issues, ranging from imbalanced power dynamics to reproductive autonomy. This reality should not be an excuse for Congress to turn a blind eye to the inadequacy of market forces and the need for legislative cohesion at the federal level. The legal clarity provided by a uniform surrogacy law would safeguard intended parents' and surrogates' expectation interests, clarify the parties' rights and obligations, and facilitate judicial efficiency.

1/20,000TH OF A PERSON?: DEMOCRACY AND PROTECTING EQUAL RIGHTS IN NOTICE AND COMMENT RULEMAKING

NANCY CHI CANTALUPO*

Abstract

Notice-and-comment rulemaking is a key function of the U.S. administrative state, thought to give members of the public access to the process of government decision-making. However, notice-and-comment rulemaking fails to accomplish that goal, and its deficiencies have critical implications for U.S. democracy and for the role of women and other traditionally underrepresented groups in that democracy.

This Article examines the many ways in which notice-and-comment rulemaking has fallen short of its central purpose through a case study of a 2018–19 rulemaking dealing with enforcement of Title IX's prohibition on sexual harassment. Members of the public, mobilized by activists, filed a historic 124,000+ comments in that rulemaking. This author created and led a "crowd-research" innovation to catalog ninety-four percent of those comments.

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Analysis of that rulemaking and its comments exposes rulemaking's oligarchic tendency to value technocratic practices above democratic ones, a tendency that is particularly problematic in the case of rulemakings that implicate civil rights and discrimination. This Article proposes a path for agencies to avoid notice-and-comment rulemaking's failings by supplementing traditional processes with a modified form of negotiated rulemaking.

INTRODUCTION

The years that the 45th President of the United States[1] was in office witnessed several developments that come together in this Article. First, the administration that came into power on January 20, 2017, launched a broad-based attack on the infrastructure of the federal government, what we generally refer to as "the administrative state." Second, and linked to this attack, was a concerted effort to undermine democratic institutions and values, culminating in 45's attempted coup on January 6, 2021.[2] Third, and perhaps most obvious, in light of much evidence of 45's racism, sexism, and xenophobia, including dozens of instances—both proven and highly credible—in which 45 reportedly sexually harassed and assaulted women, 45's administration attacked the civil and human rights of immigrants, non-white populations, women, and LGTBQ+ people, especially gender minorities.

Fourth, a "Resistance" to 45's administration launched, led primarily by women of color and mobilizing millions of primarily cisgender women who became visibly politically active in a way that the United States has not seen since the first and second "waves" of the women's movement.[3] This Resistance began with the Women's March the day after 45's inauguration, and within weeks and months it transitioned into widespread protests of 45's so-called Muslim travel ban, the #MeToo movement, and an unprecedented wave of women running for political office.[4] This Resistance also drew from other major movements that pre-date but achieved national visibility during 45's administration, including the student-

1 In solidarity with efforts to keep references to the name of 45th President of the United States to a minimum after he stopped being President but continued (and continues) to perpetuate "The Big Lie" regarding the election of President Biden, this Article will refer to the 45th President as "45" or through other terms and descriptions that do not use his name.

2 *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (Aug. 2, 2023), https://www.bbc.com/news/world-us-canada-56004916 [https://perma.cc/A6LL-F7M5].

3 *See generally* Susan Chira, *Donald Trump's Gift to Feminism: The Resistance*, 149 DAEDALUS 72 (2020).

4 Sandro Galea, *Social Movements in the Trump Era*, BOS.UNIV. SCH. OF PUB. HEALTH (June 29, 2018), https://www.bu.edu/sph/news/articles/2018/social-movements-in-the-trump-era/ [https://perma.cc/NRQ6-8XKC].

led gun control movement, the DREAMer-led immigration reform movement, and, of course, Black Lives Matter.[5]

One series of actions launched by that Resistance—and those at the center of this Article—sought to counter all three of 45's attacks together. These actions responded to a specific move by 45's administration regarding Title IX of the Education Amendments of 1972 ("Title IX"), the civil rights law prohibiting federally-funded educational programs (including almost all of the United States' schools, from pre-kindergarten through graduate education) from engaging in gender-based discrimination. When 45's administration came into power, a robust civil rights movement of college campus sexual violence survivors and their allies had raised the profile of Title IX significantly, and the U.S. Department of Education ("ED") Office for Civil Rights ("OCR") under President Obama had responded with the most powerful enforcement measures against sexual harassment and gender-based violence in its history.[6]

However, as we have seen repeatedly since the 2016 election, the second time this century that a Presidential candidate won the national popular vote but lost the Electoral College (an institution created by slavery and the constitutional Three-Fifths Compromise),[7] the Resistance had to fight against some hurricane-force headwinds. These opposing forces would have been present had the Resistance chosen to counter any one of the three attacks being led by 45 by itself, so fighting all three together was that much more challenging. Like with the Electoral College, moreover, these headwinds are fed by undemocratic institutions—this time the undemocratic institutions of the administrative state—that were crafted to exclude all but a very few from equal, or indeed *any*, participation in the American state. These institutions then bolstered the attacks on equality, civil rights, and democracy itself during 45's years in power.[8]

5 *Id.*

6 The status of these activist efforts as a national "movement" is confirmed by much evidence, including a symposium at Yale Law that included many articles by activists in the movement, on which I commented. *See* Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281 (2016) [hereinafter *For the Title IX Civil Rights Movement*].

7 *See* Maya Francis, *How the Electoral College is Tied to Slavery and the Three-Fifths Compromise*, TEEN VOGUE (July 14, 2020), https://www.teenvogue.com/story/electoral-college-slavery-three-fifths-compromise-history [https://perma.cc/LAF3-YPJC].

8 John Cassidy, *Why It's Right to be Mad About Kavanaugh and the Supreme Court*, NEW YORKER (July 11, 2018), https://www.newyorker.com/news/our-columnists/why-its-right-to-be-mad-about-kavanaugh-and-the-supreme-court [https://perma.cc/G6LN-VFJY].

As a central example of such attacks, this Article considers the rulemaking dealing with Title IX's prohibition of sexual harassment and gender-based violence, conducted under the leadership of 45's ED Secretary Betsy DeVos ("DeVos rulemaking").[9] That rulemaking and the activism around it—including a new legal backstop of sorts that I created and led (named the "Big Comment Catalog" by some of the approximately 600 volunteers working on it)—exposed numerous problems and conflicts both within and surrounding the rulemaking process. These difficulties are both fundamental to rulemakings in general and disturbingly inequitable in the case of certain rulemakings, particularly those, like the DeVos rulemaking, which implicate discrimination and civil rights. These challenges mean that agencies—especially those regulating on issues involving equal protection of the law—should not solely follow traditional rulemaking processes. Agencies should instead, on appropriate and relatively discrete regulatory issues, opt to use a modified form of negotiated rulemaking that I propose and detail in this Article.

The DeVos rulemaking took place after approximately a half-decade of student survivor and ally organizing, especially at colleges and universities, against schools' indifference toward sexual harassment, gender-based violence, and their victims.[10] This "Title IX Movement" (or "Movement") accomplished and continues to prompt enormous changes in how we address sexual harassment and gender-based violence, inside and outside education. The DeVos rulemaking thus represents a distressingly efficient, multipronged form of backlash to the Title IX Movement's successes, since 45's administration collaborated with dark money-funded organizations and men's rights activists[11] to write regulations that violate Title IX itself. Unsurprisingly, therefore, the Notice of Proposed Rulemaking (the first step in the federal administrative law process generally referred to as "notice-and-

9 34 C.F.R. § 106 (2018).

10 Anna K. Danziger Halperin, *As Title IX Turns 50, Students Continue to Protest Sex Discrimination*, WASH. POST (June 10, 2022), https://www.washingtonpost.com/outlook/2022/06/10/title-ix-turns-50-students-continue-protest-sex-discrimination/ [https://perma.cc/4F2H-SVUY].

11 These collaborations have been documented by both myself and *The Nation*. *See* Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, THE NATION (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/ [https://perma.cc/R4SN-R4EL]; Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 343–47 (2019) [hereinafter *Dog Whistles and Beachheads*]. Others have reported on how many men's rights groups, including those that have appeared on the Southern Poverty Law Center's "hate map," use "extreme misogyny" as a "gateway drug" to lure cisgender men into white supremacy. *See*, *e.g.*, Aja Romeno, *How the Alt-Right's Sexism Lures Men into White Supremacy*, VOX (Apr. 26, 2018), https://www.vox.com/culture/2016/12/14/13576192/alt-right-sexism-recruitment [https://perma.cc/6M8J-GL5W].

comment rulemaking") that began the DeVos rulemaking ("DeVos NPRM") was met with massive hostility.

Fortunately for Movement activists and others in the Resistance that joined them, notice-and-comment rulemaking provides an outlet for such hostility, via the "comment" part of the process. That is, once an agency has proposed a rule via an NPRM, it is required to give the general public a certain amount of time to file comments with the agency on that proposal. The agency is then required to read, consider, and make any changes to the proposed rule that the agency judges the comments to warrant, before finalizing the rule with an explanation of what the comments said, how they did or did not lead the agency to change the rule, and why.

In response to the DeVos NPRM, over 124,000 comments were filed—a deluge that research conducted for this Article confirms overwhelmingly opposed not only virtually all of the DeVos NPRM's content, but the very existence of the DeVos rulemaking in the first place.[12] This public participation—remarkable both because of its massive size and the fact that most of the commenters were ordinary civilians—resulted from a determined national organizing effort led by Title IX Movement activists and joined by those protesting sexual harassment via #MeToo and the Women's March, as well as many other allies.[13] Nevertheless, DeVos's ED ignored what is now *documented evidence* of intense public antagonism to its proposals,[14] finalizing them in May 2020 with no major changes from the DeVos NPRM. In addition, DeVos's ED was completely uninfluenced by the fact that the bulk of the comments were filed by commenters who do not fit the typical commenter profile (here, such typical "insider commenters" would include education industry groups,

12 See discussion *infra* Part I.

13 Nancy Chi Cantalupo, Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment: Part II*, L. & POL. ECON. PROJECT (Aug. 2, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment-part-ii/ [https://perma.cc/G6SE-8D9H].

14 Thomas Dircks et al., Overwhelming Opposition: The American Public's Views on the Devos Title IX Rulemaking of 2018–2020 (July 2, 2022) (unpublished manuscript) (available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4152477 [https://perma.cc/AH5J-JGYA]). This Article reports on some of the data collected in the Big Comment Catalog. The data included in the "Overwhelming Opposition" report was selected by the co-authors of the report based on their determinations as to what data would be of most potential use to the public. However, the co-authors surmised that they would not anticipate all the data questions the public may have. As such, and in order to make the data available to other researchers, the full Big Comment Catalog database is included as an appendix to the "Overwhelming Opposition" report. Where this Article discusses data and analysis included in the "Overwhelming Opposition" report, it will cite to that report. Any such discussions herein can be further verified by going to Appendix B of the "Overwhelming Opposition" report, which contains the Big Comment Catalog data.

public interest organizations, and experts like individual faculty members who conduct relevant research),[15] commenters to whom agencies have at least given lip service in the past for wanting to be involved in rulemaking.

The DeVos rulemaking thus uncovered a fundamental contradiction between what rulemaking is supposed to be and do, at least in the eyes of "outsider commenters,"[16] and what it actually is—a contradiction best understood by returning to the oligarchic headwinds mentioned above, headwinds also present in the administrative state. Indeed, the administrative state has been plagued from its very inception by its lack of constitutional definition as a branch of government, preventing it from being subject to any constitutional check or balance.[17] As a result, through the Administrative Procedure Act ("APA"), Congress put in place various ways that all three constitutional branches can check administrative agencies, including one check held, according to one interpretation of the APA, directly by the American public, via what some call the "commenting power."[18]

The narrative surrounding the commenting power maintains that notice-and-comment rulemaking is structured to facilitate ordinary people's participation in national

15 Note that approximately 1,500 of the comments catalogued may fit into these categories, with a majority of these traditional comments also strongly opposing the DeVos NPRM. I base this estimate on the following analysis: Comments fitting the definition of traditional "insider comments" likely included an attachment. However, the Big Comment Catalog also tracked postcards which, because they were written by hand, were uploaded to regulations.gov as attachments. 18,640 comments were cataloged as having attachments, and 17,121 were cataloged as being postcard comments. The difference between the two numbers is 1,519. However, comments such as hand-written letters or short comments nevertheless filed as an attachment—i.e., comments that do not fit the definition of traditional "insider comments"—might be included in the 18,640 comments with attachments but not in the 17,121 postcard comments. In addition, the Big Comment Catalog was unable to access and/or catalog approximately 6,800 comments that ED indicated were filed.

16 Such outsiders include: (1) those not perceived as having technical expertise in the subject matter of the rulemaking; (2) those who use stories about their individual experiences to explain how proposed rules will affect their lives; and (3) those perceived as "clicktivists" who have been organized by "interest groups" to flood an agency with comments (often boilerplate) that mainly express a policy preference without explaining it using new and/or unique evidence, research, and analysis. *See Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers, and Subvert the Rulemaking Process*: *Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 116th Cong. 139–69 (2020) [hereinafter *Astroturfing Hearings*] (statement of Beth Simone Noveck, Professor and Director, The Governance Lab, N.Y. Univ.).

17 Mark V. Tushnet, *The Administrative State in the Twenty-First Century: Deconstruction and/or Reconstruction*, 150 DAEDALUS: J. AM. ACAD. ARTS & SCIS. 5 (2021).

18 Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601–02 (2018).

policymaking, as well as hold the administrative state accountable. This rulemaking narrative is arguably at the core of President Obama's well-known Open Government Executive Order, signed his first day in office.[19]

In practice, however, at least until very recently, ordinary people have almost never participated in rulemaking. Traditionally, rulemakings have been dominated by the "regulated industry," as well as other occasional rulemaking insiders, such as public interest organizations, which file, at most, a few hundred comments per rulemaking, almost always written by lawyers.[20] Furthermore, on the agency staff's side, the arguable main function of rulemaking is to funnel to the agency previously-unidentified technical expertise and new "sophisticated" ideas regarding the subject matter of the regulation. So, for most of its existence and to this day, for the vast majority of rulemakings, the process has achieved only technocratic purposes, whereby insider commenters convince the agency to regulate in certain ways based on their analyses (especially economic ones) of proposed rules, often relying on support from expensive research conducted by the commenter.[21] Unsurprisingly, this reality means that commenters such as corporations that anticipate their profits being affected by the rulemaking become the most inside of the insiders, often leading to objections that an agency has been "captured" by the industry that it is supposed to regulate.

More recent rulemakings on certain topics, with the assistance of e-technologies, have led to the phenomenon of "mass commenting," which can generate comments in the thousands to the millions,[22] often through "boilerplate" comments (comments that use the same or virtually the same language). Initially, such mass commenting may seem like a positive method for encouraging more use by the public of the commenting power; however, it has been countered by a well-known convention amongst agencies, which treats boilerplate comments, no matter how many people have filed the same or virtually the same comment, as a single comment.[23]

19 Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) ("Executive departments and agencies should offer Americans increased opportunities to participate in policymaking . . .").

20 Reeve T. Bull, *Democratizing and Technocratizing the Notice-and-Comment Process*, BROOKINGS (Oct. 12, 2021), https://www.brookings.edu/blog/up-front/2021/10/12/democratizing-and-technocratizing-the-notice-and-comment-process/ [https://perma.cc/GV42-NB3X].

21 Daniel P. Carpenter et al., *Inequality in Administrative Democracy: Methods and Evidence from Financial Rulemaking*, HARV. UNIV. (July 20, 2023).

22 *See Dog Whistles and Beachheads*, *supra* note 11.

23 *Id.*

As a practical matter, then, even though mass commenting—and its seeming facilitation of Americans' use of their commenting power—would appear to be a democratizing force in rulemaking, conventions such as the boilerplate comment convention reduce hundreds to millions of people's views into that of a single person. Such a dilution amounts to a basic and complete dismissal of those commenters in a manner not only reminiscent of the Electoral College's connections to the Three-Fifths Compromise,[24] but also of campuses' treatment of sexual assault reports, as detailed in an op-ed by Catharine MacKinnon at the height of #MeToo. In that op-ed, MacKinnon discusses how she calculated, over decades of tracking of campus sexual assault cases, that, on average, four victims must accuse a campus harasser before a school would find a sexual assault, essentially counting survivors as one-fourth of a person.[25] In the case of the DeVos rulemaking, the Big Comment Catalog tracked about 80,000 comments as using some version of four boilerplate comments, meaning that, under this convention, those 80,000 comments reduce down to four comments, counting these commenters as less than 1/20,000th of a commenter.[26]

Thus, the DeVos rulemaking reveals the fiction at the heart of the commenting power and shows that rulemaking's reality has not only been undemocratic in the sense of not including significant percentages of the American public, but it has also been defined by serious inequalities that are undemocratic. Notice-and-comment rulemaking instead appears to serve largely oligarchic and technocratic purposes, despite the claims of the commenting power narrative.

Moreover, case law enables the technocratic and oligarchic approach by requiring agencies to consider and address only "significant" comments in their published justifications for final rules—the only version of the rules subject to judicial review.[27] "Significance" is based on a comment's ability to alert an agency to new problems or solutions relevant to the issues on which the agency seeks to regulate.[28] In contrast, the fact that thousands, hundreds of thousands, or even millions of people agreed with one point or

24 *See* Francis, *supra* note 7.

25 *See* Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html [https://perma.cc/22KS-J2ED]; *see also* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

26 *See* Dircks et.al., *supra* note 14.

27 Hewitt v. Comm'r, 21 F.4th 1336, 1347 (11th Cir. 2021); *see also* Oakbrook Land Holdings, L.L.C. v. Comm'r, 28 F.4th 700 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 626 (2023).

28 Hewitt, 21 F.4th at 1347; *see also* Oakbrook Land Holdings, L.L.C, 28 F.4th at 713.

set of points regarding a rule—which is what boilerplate comments suggest when viewed in a democratic as opposed to technocratic light—has *not* been treated as "significant."

Most disturbingly, the boilerplate comment convention, as well as a general derision directed at mass commenting,[29] has the potential to particularly dilute the power of women.[30] On the most basic level, this is because women are not a minority population—women are a *subjugated majority*[31]—so if women mobilize as a group, their numbers potentially give them significant power. Women, especially women of color, also have a long history of leading successful mass protests,[32] even when that leadership is rendered invisible—with the Women's March and Black Lives Matter being two recent examples. Yet, the boilerplate comment convention virtually nullifies the power of such collective action.

This dismissal of mass commenting is moreover chillingly reminiscent of the United States' most undemocratic structures, which excluded women from voting—the baseline right of democratic participation—until only a little over 100 years ago and which still massively discriminate against people of color's ability to vote.[33] These systemic flaws enabled 45's presidency, despite his popular vote loss to Hillary Clinton in 2016 by a margin of nearly three million,[34] as well as providing 45 and confederates such as John Eastman and Rudy Guiliani with various structural vulnerabilities that they attempted to

29 There appears to be a much broader dismissal of comments from ordinary Americans, documented by administrative law researchers and scholars in the form of not only agency rulemakers' expressed annoyance with boilerplate comments, but also a much deeper and more systemic indifference to outsider comments. Muddying the picture—and potentially serving as an excuse for otherwise oligarchic attitudes—are the torrents of fake comments filed by bots and/or created via "astroturf" campaigns. *See Astroturfing Hearings*, *supra* note 16.

30 *Stepping up and Standing Out: Women's Political Participation in 2020*, GENDER ON THE BALLOT (2020), https://www.genderontheballot.org/women-voters-research/ [https://perma.cc/UMP9-SZWW].

31 REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER 116 (2018).

32 Keisha N. Blain, *The Black Women Who Paved the Way for This Movement*, ATL. (June 9, 2020), https://www.theatlantic.com/ideas/archive/2020/06/pioneering-black-women-who-paved-way-moment/612838/ [https://perma.cc/P87S-BTAH].

33 *The Impact of Voter Suppression in Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/2LDJ-Z5AK].

34 *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/elections/2016/results/president [https://perma.cc/W8B7-DJEU].

manipulate to overturn President Biden's Electoral College victory in 2020, despite Biden's seven million popular vote victory over 45.[35]

The DeVos rulemaking thus serves as a cautionary tale regarding how rulemaking structures can be used by an administration in its desire to attack and destroy the administrative state itself. Even more so, it shows how an obviously anti-civil rights administration can use structures like the boilerplate comment convention to undermine equal protection for already politically marginalized groups, even when—or perhaps especially when—the rulemaking deals with enforcement of a civil rights statute.

This cautionary tale urgently demands a better process than traditional notice-and-comment rulemaking currently provides. It also highlights the need to take advantage of the opportunity offered by the democratic engagement of more ordinary Americans in rulemaking via mass commenting (when not involving fake or abusive comments). Thus, in this Article, I propose a modified form of negotiated rulemaking that could be used by agencies on discrete regulatory questions to involve outsider commenters, including mass commenters, in a more meaningful way. This proposal would also facilitate agencies obtaining the kind of expertise that people develop living their everyday lives and that may not be illuminated by more technocratic experts. Such nontraditional expertise has the potential to be particularly useful in rulemakings involving discrimination and civil rights because marginalized groups that are most subject to discrimination are not only likely to be outsiders to the traditional rulemaking process, but are also less likely to have their experiences be visible to those in power. As I discuss when presenting my proposal, ED even has an opportunity to pilot the modified negotiated rulemaking process that I propose in a rulemaking that is in progress at this writing and seeks to correct the DeVos rulemaking ("2022 NPRM" or "2022 rulemaking").

Thus, this Article provides new perspectives on various scholarly and policy debates regarding notice-and-comment rulemaking's intertwined law, democracy, and equal protection failings through the lens of the DeVos rulemaking, then proposes a method to address those failings. It will first tell the story of the relevant events leading up to the DeVos NPRM as well as what happened during the DeVos rulemaking itself, including information on the comments collected by a crowd-research method detailed in this part. Part Two will then survey the various goals that have been advanced for the notice-and-comment process and explain both why the "commenting power" serves the most important

35 Burgess Everett, *At Least 12 GOP Senators to Challenge Biden's Win*, POLITICO (Jan. 2, 2021), https://www.politico.com/news/2021/01/02/ted-cruz-electoral-college-challenge-453430 [https://perma.cc/ZE53-5QYG].

purpose and why rulemaking should avoid serving technocratic and oligarchic purposes, especially for rulemakings involving equal protection of the law. Part Three focuses on boilerplate comments, mass commenting, and the undemocratic and unequal effects of the virtually total dismissals of these types of comments—not only by agencies but also by researchers and scholars who otherwise support the "commenting power" narrative. Finally, Part Four proposes a more equal and democratic alternative structure for large notice-and-comment rulemakings where mass comments are filed, modifying a pre-2000s technique: negotiated rulemaking.

I. What Happened During, Leading Up To, and After the DeVos Rulemaking

The 124,000+ comments filed in response to the DeVos NPRM were the result of a remarkable organizing effort (led primarily by student sexual harassment survivor activists but joined by many allies) to encourage commenting by people who rarely participate in such administrative lawmaking but who are profoundly affected by how ED enforces Title IX.[36] The number of comments this coalition facilitated during two months normally taken up by exams and holidays, and that ended up overlapping almost entirely with the longest federal government shutdown in United States history, led *Mother Jones* magazine to suggest, only a few weeks into the comment period, that "There's a Quiet #MeToo Movement Unfolding in the Government's Comments Section."[37]

This headline captures the perspective of most commenters' opposition to the proposed regulations. Indeed, the Big Comment Catalog gathered sufficient information from ninety-four percent of the comments to unequivocally show that the DeVos NPRM's proposals were overwhelmingly opposed by commenters. The project was able to catalog 117,358 of the 124,160 comments that regulation.gov says were filed in response to the NPRM (the project is unable to account for the missing 6,802), and, of those, nearly 115,000 opposed the proposed rules.[38] "Only 853 comments—less than one percent—of the cataloged-comments supported the DeVos NPRM's proposals."[39]

36 34 C.F.R. § 106 (2018).

37 Madison Pauly, *There's a Quiet #MeToo Movement Unfolding in the Government's Comments Section*, MOTHER JONES (Jan. 15, 2019), https://www.motherjones.com/politics/2019/01/betsy-devos-title-ix-sexual-assault-harassment-metoo/ [https://perma.cc/D2HN-6R5B].

38 *See infra* Section I.C.2. *See also* Dircks et al., *supra* note 14.

39 Dircks et al., *supra* note 14, at 5.

Despite this tremendous opposition, in May 2020 DeVos's ED issued final regulations ("Final Rules"), largely unchanged from the NPRM, which took effect in August 2020.[40] Within a week, the American Civil Liberties Union ("ACLU") filed a suit challenging the regulations on behalf of Know Your IX, Council of Parent Attorneys and Advocates, Inc., Girls for Gender Equity, and Stop Sexual Assault in Schools.[41] By July 1, 2020, three more lawsuits challenging the rules were filed, including lawsuits filed by Attorneys General in eighteen states and the District of Columbia in two separate challenges, and by a coalition including leading women's civil rights organizations, victims' rights legal services providers, and individual survivor plaintiffs ("Title IX Coalition").[42] The Title IX Coalition challengers filed a motion for a preliminary injunction in July that drew amici support from twenty-five civil rights organizations, twenty-five higher education organizations and associations (led by the American Council on Education, the association for college and university presidents), twenty-five survivors' rights organizations, the three main associations collectively representing thousands of K-12 public school districts, twelve men's organizations, twenty-seven administrative law and/or civil rights law professors, and over eighty members of Congress.[43] Nearly all these amici had also filed comments

40 34 C.F.R. § 106 (2018).

41 *ACLU Sues Betsy DeVos for Allowing Schools to Ignore Sexual Harassment and Assault,* ACLU (May 14, 2020), https://www.aclu.org/press-releases/aclu-sues-betsy-devos-allowing-schools-ignore-sexual-harassment-and-assault [https://perma.cc/GW3D-XTQ2]

42 *Id*. *See also NWLC Files Lawsuit Against Betsy DeVos, Trump Administration's Sexual Harassment Rules*, NAT'L WOMEN'S L. CTR. (June 10, 2020), https://nwlc.org/press-release/nwlc-files-lawsuit-against-betsy-devos-trump-administrations-sexual-harassment-rules/ [https://perma.cc/GZX6-Z6QW].

43 *See* Brief Amici Curiae of AASA, the School Superintendent's Association, The Council of the Great City Schools, and the National Association of Secondary School Principals in Support of Plaintiffs' Motion for Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief for the American Council on Education et al. as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction or 5 U.S.C. § 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief of the Civil Rights and Advocacy Amici as Amici Curiae in Support of Plaintiffs' Motion for Preliminary Injunction, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); [Proposed] Brief of Members of Congress as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief

opposing the new regulations during the NPRM's comment period.[44]

A. Evidence of Opposition Prior to the Rulemaking

However, even before the 124,000+ comments were filed and made clear their overwhelming opposition to the proposals in the NPRM, DeVos's ED had much evidence that its rulemaking—as well as the proposed and final versions of the rules that resulted—would not be supported by a wide swath of the American public. First, it was surely aware of the national Title IX Movement that had already been receiving significant public attention since 2013. There have been several written accounts of this movement coalescing around, primarily, college and university mishandling of sexual assault cases involving their students.[45] For instance, Karen Tani has postulated that the Title IX Movement is the latest iteration of a decades-long movement seeking to combat and end gender-based violence in

of Survivors of Sexual Violence as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction of Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Brief of California Women's Law Center, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Curiae Brief of Law Professors, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief of Promundo, American Men's Studies Association: Connect, Inc., Jana's Campaign, Inc., Men Stopping Violence, Men's Story Project, Men and Masculinities Knowledge Community of the Student Affairs Administrators in Higher Education, North American Men Engage Network, Ten Men – Rhode Island Coalition Against Domestic Violence, and Vera House, Inc. as Amici Curiae in Support of Plantiffs' Motion for Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Curiae Brief of Law Professors, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

44 Brief for the American Council on Education et al. as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction or 5 U.S.C. § 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

45 *See, e.g.*, Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847 (2017).

the United States, one that looks to administrative legal mechanisms for a new path after the closure of other roads such as the civil rights remedy of the Violence Against Women Act.[46] My own account overlaps somewhat with Tani's, with more of a focus on the Title IX Movement as an outgrowth of legal theories that recognize sexual harassment and gender-based violence as forms of sex discrimination that are both causes and consequences of gender inequality in society as a whole.[47] Because anti-sexual harassment law and education civil rights laws rely at least in part on administrative agencies to enforce and protect those civil rights, both accounts involve administrative law.

Both accounts also delved into certain facets of the Title IX Movement that are relevant to the DeVos NPRM and the public's reaction to it. That is, since 2013, the Movement has involved many thousands of activists, usually students enrolled in colleges and universities and often survivors of sexual harassment and gender-based violence. Well before the Final Rules were announced, the 124,000+ comments were filed, or 45's administration even entered into office, these thousands of activists collected nearly two hundred thousand signatures on an online petition,[48] organized direct action protests in front of ED's D.C. headquarters,[49] filed dozens of lawsuits,[50] and sextupled the number of complaints filed with ED against schools for mishandling students' sexual harassment reports.[51] The Movement

46 *Id.*

47 *See, e.g.*, Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Violence: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, *in* 2021 THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 240 (Deborah Brake, Martha Chamallas & Verna Williams eds., 2021) [hereinafter *Title IX Against Campus Sexual Violence*].

48 *See* Know Your IX, *Department of Education: Hold Colleges Accountable That Break the Law by Refusing to Protect Students from Sexual Assault*, CHANGE (2013), https://www.change.org/p/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault [https://perma.cc/HA6K-FKFT].

49 Alexandra Brodsky, *Title IX Enforcement is Getting Better, but the Education Department Needs to Do More*, FEMINISTING (Nov. 15, 2013), http://feministing.com/2013/11/15/title-ix-enforcement-is-getting-better-but-the-education-department-needs-to-do-more/ [https://perma.cc/T9SU-PVY4].

50 Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 2, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/95T2-8D6P].

51 *Compare* Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFPOST (June 16, 2016), https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment_n_575f4b0ee4b053d433061b3d [https://perma.cc/8237-2N2Y] (reporting 246 Office for Civil Rights sexual assault investigations of universities as of June 2016), *with* Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFPOST (May 1, 2014), https://www.huffpost.com/entry/college-sexual-assault_n_5247267

also started three national 501(c)(3) organizations,[52] inspired a high-profile documentary that aired on CNN after months in theaters with a significant impact inside and outside the United States,[53] and convinced the Obama administration that it was worth starting a cross-government task force focused on sexual harassment in education.[54]

As a scholar and national expert on Title IX and sexual harassment, I am constantly contacted by people concerned about the problem, and I can attest to the breadth of the Title IX Movement's ranks by 2017. In addition to the student survivor activists who started the movement, those ranks included: thousands of college/university student, faculty, and staff allies; teachers' and graduate student unions; civil rights organizations and attorneys inside and outside the government; a significant slice of law enforcement (not only the predictable police and prosecutors committed to responding more effectively to gender-based violence but also less expected groups such as campus police); and a wide range of (former, soon to be former, and still current) federal officials and employees. This last group was led in key ways during the Obama administration by then-Vice President Biden and members of his staff such as Lynn Rosenthal, the first White House Advisor on Violence Against Women.[55] Rosenthal also co-chaired the White House Task Force to Protect Students from Sexual Assault with Valerie Jarrett, senior adviser to President Obama.[56] These individuals continued a good deal of that work and activity as they entered the private sector after the Obama administration left.[57]

Moreover, the American public's vocal furor over sexual harassment had overflowed the bounds of education well before the NPRM was announced. As DeVos's ED proceeded

[https://perma.cc/22SU-3GAU].

52 These organizations include Know Your IX, SurvJustice, and End Rape on Campus.

53 *The Hunting Ground Australia Project*, HUNTING GROUND (2015), https://thehuntinggroundaustralia.com.au/about-thg-australia/ [https://perma.cc/Z7DQ-7MWZ].

54 WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), https://www.justice.gov/archives/ovw/page/file/905942/download [https://perma.cc/G8XB-559D].

55 *See* Lynn Rosenthal, *About Me*, LYNN ROSENTHAL WEBSITE (2017), https://www.lynnrosenthal.com/about-me [https://perma.cc/GMP9-8RKL].

56 *See* Randall Kennedy, *Valerie Jarrett's Winding Path to the Obama's Inner Circle*, WASH. POST (Apr. 11, 2019), https://www.washingtonpost.com/outlook/valerie-jarretts-winding-path-to-the-obamas-inner-circle/2019/04/11/acab2512-4595-11e9-8aab-95b8d80a1e4f_story.html [https://perma.cc/8SAJ-LFA2].

57 *See id.;* Rosenthal, *supra* note 55.

on the path to November 2018, 45 himself was named again and again as a sexual harasser and abuser, with over two dozen allegations of sexual assault publicly reported, and the Access Hollywood tape of then-private citizen, Donald Trump, bragging about grabbing women's genitalia without their consent playing at some frequency between "incessantly" and "regularly" over the airwaves.[58] The Women's March took its place in history as the world's largest single-day protest,[59] with sexual harassment and gender-based violence as clear themes—although hardly the only ones—among protesters. #MeToo exploded, with 19 million tweets (over 55,000 per day) using it in its first eleven-and-a-half months as a hashtag,[60] and 4,700,000 people discussing it twelve million times on Facebook in the hashtag's first twenty-four hours of life.[61] Beginning before #MeToo but fueled by #MeToo into a conflagration, long-time serial harassers began to lose their jobs and even end up in jail, including abusive doctors Larry Nassar and George Tyndall,[62] media figures such as Harvey Weinstein, Bill Cosby, Roger Ailes, Matt Lauer, and many other "Sh*tty Media Men,"[63] as well as politicians like Roy Moore and Al Franken.[64] Millions of dollars were raised in a couple of weeks for the TimesUp organization, including a Legal Defense Fund to help sexual harassment victims who do not have funds to hire lawyers and seek legal redress for harassment.[65] When the DeVos NPRM was published, the yells of the floods of

58 Meghan Keneally, *List of Trump's Accusers and their Allegations of Sexual Misconduct*, ABC NEWS (Sept. 18, 2020), https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story?id=51956410 [https://perma.cc/T62B-N5CX].

59 *See generally* WOMEN'S MARCH ORGANIZERS & CONDÉ NAST, TOGETHER WE RISE: BEHIND THE SCENES AT THE PROTEST HEARD AROUND THE WORLD (2018) [hereinafter WOMEN'S MARCH ORGANIZERS & CONDÉ NAST].

60 Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/4ZGN-9G9L].

61 Cassandra Santiago & Doug Criss, *#MeToo: An Activist, A Little Girl and the Heartbreaking Origin of 'Me Too,'* CNN (Oct. 17, 2017), https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html [https://perma.cc/GG6V-TAPM].

62 Azza Abudagga, *States, Medical Regulators and Institutions Must Act to End Physician Sexual Abuse*, MS. MAG. (June 8, 2021).

63 Trina Jones & Emma E. Wade, *Me Too? Race, Gender, and Ending Workplace Sexual Harassment*, 27 DUKE J.L. & POL'Y 203, 205 (2020).

64 Lisa de Moraes, *Seth Meyers Tackles Al Franken, Updates Roy Moore Sex Misconduct Claims*, DEADLINE (Nov. 17, 2017), https://deadline.com/2017/11/seth-meyers-al-franken-roy-moore-donald-trump-sexual-misconduct-late-night-1202210506/# [https://perma.cc/4VVH-JXNS].

65 Amanda Arnold, *Time's Up Initiative Has Raised Nearly $16 Million*, THE CUT (Jan. 7, 2018), https://

protesters who descended on the United States Capitol and the steps of the Supreme Court during the hearings over accusations that Brett Kavanaugh had sexually harassed multiple women still reverberated in D.C.[66] Finally, just weeks before the DeVos NPRM was announced, voters elected 117 women to Congress in the second "Year of the Woman,"[67] the first having occurred in 1992 after the last Senate hearing over accusations that Supreme Court nominee Clarence Thomas had sexually harassed Professor Anita Hill.[68]

DeVos's ED also turned a blind eye to the overwhelming evidence that those involved with and concerned about sexual harassment in education approved of the Obama administration's rigorous administrative enforcement of Title IX's prohibition on sexual harassment and were pleading with 45's administration to continue it.[69] This position and the fact that it is widely held were well-known to ED when it issued the DeVos NPRM, because of the response to an earlier call for comments that DeVos's ED issued in June 2017. This call was unconnected to a rulemaking and asked generally about where ED should deregulate and therefore was not specifically about Title IX. Nevertheless, approximately 12,000 of the 16,000 comments filed addressed ED's enforcement of Title IX, ninety-nine percent of which urged DeVos's ED to continue enforcing Title IX as rigorously as the Obama administration had.[70] Only 137 comments, forty percent of which were anonymous,

www.thecut.com/2018/01/times-up-initiative-has-raised-nearly-usd16-million.html [https://perma.cc/Q5FH-9JX7].

66 Cheyenne Haslett, *Kavanaugh Protests Escalate, Over 120 Arrested on Capitol Hill*, ABC NEWS (Sept. 24, 2018), https://abcnews.go.com/Politics/kavanaugh-protests-escalate-120-arrested-capitol-hill/story?id=58048599 [https://perma.cc/Z8HX-R66W].

67 Maya Salam, *A Record 117 Women Won Office, Reshaping America's Leadership*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html [https://perma.cc/BH7S-3D6R].

68 Michael S. Rosenwald, *No Women Served on the Senate Judiciary Committee in 1991. The Ugly Anita Hill Hearings Changed That*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/ [https://perma.cc/SU6W-P928].

69 Letter from Five Student Affairs Ass'ns to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. 7 (Jan. 29, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-11689 [https://perma.cc/AZ4K-39BB]; Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 219 (2011) [hereinafter *Heads in the Sand*].

70 Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 72 (2019).

asked for changes to the Obama administration's enforcement, which had been consistent with the historical approach of ED's OCR of enforcing Title IX over many administrations, both Democrat and Republican.[71] Rather than acceding to the pleas of nearly 11,900 comments, some of which were signed by multiple individuals—resulting in a total of 60,796 expressions of support for the Obama-era enforcement of Title IX by members of the public[72]—DeVos first rescinded the Obama-era agency guidance documents, then issued the DeVos NPRM and Final Rules.[73]

B. Excluding Those Opposed to DeVos's Proposed Rules During the Rulemaking

Not only did the DeVos ED willfully ignore the widespread support for the Obama-era and historical approach to enforcing Title IX, but it also actively sought out and almost entirely engaged only with the tiny number of organizations, many funded by dark money, that opposed the Title IX Movement the most.[74] For example, when *The Nation* looked at documents and email communications obtained via Freedom of Information Act requests, it found that DeVos ED staff and three "men's rights" groups collaborated with a very small group of constituents—ones who were on the record as being extremely hostile to Title IX and its beneficiaries—to write the DeVos NPRM's proposals.[75] This exclusionary process produced both proposed and Final Rules that are so diametrically opposed to the text, spirit, and previous administrative enforcement of Title IX (dating back decades) that they appear to have been deliberately written to get as close to the total elimination of Title IX protections as possible and to enable, even force, schools to discriminate against the very classes of people whom Title IX was passed into law to protect.

Moreover, even the regulated industry's hostility to the NPRM was not the usual

71 *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 5 (2019) [hereinafter *And Even More of Us Are Brave*].

72 *See* Buffkin et al., *supra* note 70, at 89.

73 Phil McCausland, *DeVos Rescinds Obama-Era Title IX Protections, Drawing Mixed Reactions From Advocates*, NBC News (Sept. 22, 2017), https://www.nbcnews.com/news/us-news/devos-rescinds-obama-era-title-ix-protections-drawing-mixed-reactions-n803976 [https://perma.cc/QN9Y-6N7N]; Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html [https://perma.cc/58Z4-43G9].

74 *Dog Whistles and Beachheads*, *supra* note 11, at 307.

75 *See* Barthélemy, *supra* note 11.

discontent displayed when industries are informed of new or changed regulations. The standard objections to regulation[76] surely motivated some industry opponents of the DeVos NPRM and Final Rules, but even those objections were more intense and were complicated by the nature of education (higher education in particular), the size and diversity of the population impacted by a problem as widespread as sexual harassment, and the influence of the Title IX Movement on key sectors of American education.

First, because the branch of American education most heavily regulated by the Final Rules is higher education, that sector already had the greatest number of traditional reasons to oppose regulation.[77] Added to these typical factors was the nonprofit status of most of United States schools and the diversity of higher education, both in type of institution and in the internal diversity of each institution's population.[78] Educational institutions' non-profit status means that their policy positions are less consistently motivated by financial considerations because their central mission is not to increase profits for owners and investors. This lack of an all-consuming drive to maximize profit removes a barrier to research and intellectual activity on issues that are not moneymakers. In addition, largely because of how the institution of tenure protects faculty from being fired for unpopular ideas, higher education institutions have a relatively flat governance structure and less hierarchy than the for-profit corporations that make up most regulated industries.[79] Tenure also means that many colleges and universities house many members with significant expertise on even potentially fraught political topics such as sexual harassment.[80] Tenured faculty can be and are very vocal about their views on such issues and their voices are powerful because of their depth of knowledge and the professional protections tenure affords them.

Second, by the time the DeVos NPRM was issued, even those faculty and administrators

76 *See generally* Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 DAVIS L. REV. 2569 (2019).

77 *Id.*

78 *See generally* Andra Picincu, *What Is a 501(c)(3) Educational Organization?*, CHRON. (Aug. 10, 2020), https://smallbusiness.chron.com/501c3-educational-organization-60098.html [https://perma.cc/9HMT-MKSJ].

79 William O. Brown Jr., *University Governance and Academic Tenure: A Property Rights Explanation*, 153 J. OF INST. AND THEORETICAL ECON., 441, 459 (1997).

80 *See, e.g.*, *Professor Drobac Sought for Expertise in Sexual Harassment Law in Tri-West High School Case*, IND. UNIV. (Feb. 3, 2020), https://mckinneylaw.iu.edu/news/releases/2020/02/professor-drobac-sought-for-expertise-in-sexual-harassment-law-in-tri-west-high-school-case.html [https://perma.cc/4NC5-VK48].

who had not spent their careers researching, studying, or working to prevent sexual harassment and gender-based violence would have been increasingly confronted with the problem. Social scientists have documented high rates of primarily peer campus sexual harassment in the form of sexual assault as far back as the 1980s, with both national and institution-specific samples.[81] Although several studies documented that official reporting by student victims was extremely low, they also found that students often disclose victimization (along with other personal information) to faculty, especially female faculty and openly LGTBQ faculty.[82] In addition, the #MeToo revelations by women and gender-minority faculty, graduate students, and graduate school alumni exposed that faculty sexual harassment of students, staff, and more junior or untenured colleagues remains all too common, and often is equally or more severe and abusive than peer sexual assault.[83] Add to these facts the abuse perpetrated by some campus doctors who victimized hundreds, if not thousands, of their student patients, predation that later disclosures and litigation would show was known by at least some other employees at those schools.[84]

Third, the increasingly widespread demonstrations protesting sexual harassment that started in academic settings, especially on college campuses, and the Obama administration's response to the Title IX Movement,[85] made it impossible for anyone but the most determined to continue to bury their heads in the sand to remain unaware of these problems. Even more importantly, as I have traced in a chapter of the *Oxford Handbook of Feminism and Law in the United States*, the Title IX Movement's analysis educated wide swaths of people inside and outside education about sexual harassment as systemic discrimination, not just about individual "bad apples."[86] The Movement did so by articulating the many ways in which sexual harassment and gender-based violence is

81 *See* Kelly Cue Davis, et al., *How to Score the Sexual Experiences Survey? A Comparison of Nine Methods*, 4 PSYCH. OF VIOLENCE 445 (2014).

82 Kathryn A. Branche et al., *Professors' Experiences with Student Disclosures of Sexual Assault and Intimate Partner Violence: How "Helping" Students Can Inform Teaching Practices*, MDSOAR (2011), https://mdsoar.org/bitstream/handle/11603/5435/FemCrim_Branch%20et%20al.%202011-2.pdf?sequence=3 [https://perma.cc/8RRH-DBFM].

83 *See* Nancy Chi Cantalupo & William Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 674 (2018).

84 *See* Abudagga, *supra* note 62.

85 *See Title IX Against Campus Sexual Violence*, *supra* note 47.

86 *Id.* at 247.

a violation of the civil and human right to equal educational opportunity.[87] Many officials and professionals—including those in law enforcement and those who do not identify as feminists—were so persuaded by the Movement that their associations and representatives adopted and repeated the Movement's tenets in their comments on the DeVos NPRM.[88]

Thus, DeVos's ED proposed and then finalized rules that both the regulated industry and a large grassroots movement, which included many intended beneficiaries of Title IX, were determined to stop. Exceptionally, while controversial rulemaking usually finds the industry (e.g., polluting factories) and the statutory beneficiaries (e.g., people who want to breathe clean air) on opposite sides, here the industry and the beneficiaries were mainly aligned both in their desire to stop the DeVos rules and in their reasons for opposing the rules.

C. Proving Opposition Post-Comment Period: The Big Comment Catalog Project

Given the circumstances described above, as well as 45 and his administration's general reputation for dishonesty and corruption,[89] a significant post-comment-period difficulty immediately emerged. How were civil society organizations going to read and track all 124,000+ comments on the DeVos NPRM? Which organization—or individual person—had the bandwidth to read, organize, and synthesize so many comments? The definitive answer was "none." Yet not knowing what the commenters said would hamstring the ability of challengers to make a case under APA §706(2)(A) that the Final Rules were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[90] Twenty-seven amici law professors pointed out this predicament in a brief supporting the Title IX Coalition's lawsuit:

> To determine whether an agency regulation is "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" . . . To survive judicial scrutiny, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[91]

87 *See id.* at 241–47.

88 *See id.* at 252.

89 Glenn Kessler et al., *President Trump Has Made More Than 5,000 False or Misleading Claims*, WASH. POST (Sept. 13, 2018) https://www.washingtonpost.com/politics/2018/09/13/president-trump-has-made-more than-false-or-misleading-claims/ [https://perma.cc/5G6C-M2AZ].

90 The arbitrary and capricious standard is the standard by which judges review and potentially invalidate an agency regulation. Administrative Procedural Act § 706(2)(A).

Without an external, non-agency review of the comments, there was no way to know if whatever DeVos's ED said it had done to "examine the relevant data" or if the "facts [ED said it had] found" were even truthful.[92] Absent such a fact-check, evaluating whether DeVos's ED did actually "articulate a satisfactory explanation for its action" or a "rational connection" between those facts and the policy decisions in the Final Rules was essentially impossible.[93]

1. ED Reporting and Public Access to Comments During Agency Review of Comments

This problem was created in part by the legal requirements (or lack thereof) and conventional methods by which agencies deal with large numbers of comments, none of which assist the public in engaging in any independent review. There is no requirement that agencies provide any account of how they read and analyze comments received, nor are they required to make an organized and synthesized database of the comments available to the public.[94] With regard to the DeVos NPRM, the extent of the assistance that ED provided to anyone who might want to review the comments was a spreadsheet, available for download from regulations.gov. That spreadsheet included about 105,000 of the comments filed, and it provided (1) each commenter's name and the comment's URL, (2) whether each comment was filed on behalf of an organization, and (3) whether each comment included an attachment.[95]

91 Amicus Curiae Brief of Law Professors at 12, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

92 *Id.*

93 *Id.*

94 *See Dog Whistles and Beachheads, supra* note 11.

95 *See* DEP'T OF EDUC., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, REGULATIONS.GOV, https://www.regulations.gov/document/ED-2018-OCR-0064-0001/comment [https://perma.cc/89WN-RNQ7] (displaying all comments posted by the Department of Education in response to the DeVos NPRM); DEP'T OF EDUC., *Bulk Data Download*, REGULATIONS.

Nearly 20,000 comments were inexplicably not in the ED spreadsheet, including comments with and without attachments.[96] In addition, although an October 2019 Senate report on *Abuses of the Federal Notice-And-Comment Rulemaking Process* makes clear that agencies have the ability to notify the public of how many comments in the agency's review were judged to use duplicate language (the Securities and Exchange Commission does this),[97] DeVos's ED made no attempt to pass this information along to the public. It simply uploaded all the comments, including tens of thousands of boilerplate comments, to regulations.gov without any particular ordering or identification of the boilerplate comments on the spreadsheet.

The information about organizations and attachments in ED's spreadsheet identified at least those comments (excluding the 20,000 not listed in the spreadsheet) that were lengthy and that were likely to provide the kind of sophisticated analysis associated with "insider" comments.[98] Because this group of comments—those with attachments, filed by organizations, or both—was a fraction of the total comments filed, anyone relying on ED's spreadsheet would have an incentive to find these comments on regulations.gov and to download, read, and review only those comments. Thus, not only were the tens of thousands of "outsider" comments filed by general members of the public likely dismissed by ED, but the ED's manner of making them available to the public rendered any outside, independent review that would even include and consider such outsider comments nearly impossible.

2. The Big Comment Catalog Project

Concerned about the inability to determine the truthfulness of the DeVos ED comment review and objecting to the undemocratic and unequal treatment of comments that was not only likely to be conducted by DeVos's ED but was being forced on any external review, I launched an interdisciplinary effort to "crowd-research" the 124,000+ comments and

GOV, https://www.regulations.gov/bulkdownload [https://perma.cc/3QX4-G4EV] [hereinafter DeVos NPRM Spreadsheet] (to download the DeVos NPRM comments from regulations.gov, follow the hyperlink; fill in the "Document" field with the DeVos NPRM number—ED-2018-OCR-0064-0001; check the "Download all available comments" box; enter your email; click "Submit."). *See also* Dirks et al., *supra* note 14, at 4 (detailing researchers' discovery of the 20,000 comment discrepancy and possible reasons for the discrepancy).

96 *See* Dirks et al., *supra* note 14, at 4.

97 *See* S. REP. NO. 117-1, (2021) [hereinafter Abuses of Federal Notice-And-Comment Rulemaking]; *See also Astroturfing Hearings*, *supra* note 16.

98 *See* DeVos NPRM Spreadsheet, *supra* note 95.

create a database that would code certain information about each comment.[99] The resulting Big Comment Catalog Project was very low-tech. It launched in June 2019, consisting of (1) approximately 500 volunteers and six law student Research Assistants, who together "hand-catalogued" 35,741 comments, (2) a web scraping program written by Kenneth R. Bundy, a volunteer cataloguer and University of Maine computer science professor, that, in conjunction with AI software analysis run in partnership with the law firm Steptoe & Johnson, identified over 80,000 comments that repeated one of four sets of boilerplate language.[100]

Because of the significant resource challenges faced by the almost entirely *pro bono* project, the Catalog took three years to complete and encountered several data gaps, highlighting the near-impossibility of comprehensive external reviews of the comments filed in such large rulemakings, at least when those rulemakings are managed in the way in which DeVos's ED did here.[101] Nevertheless, the Catalog "review[ed] the comments filed completely enough to confirm what circumstantial evidence . . . and . . . less comprehensive reviews of the comments" had indicated "prior to completion of the Catalog: the American public was almost unanimously opposed to the proposals in DeVos's NPRM."[102] "Of the 117,358 comments cataloged, nearly 114,817 opposed the proposed rules" and 1688 comments were not categorized as supporting or opposing, leaving "only 853 comments—less than one percent—of the cataloged-comments [in support of] the DeVos NPRM's proposals."[103] Although catalogers were unable to account for and catalog 6802 comments that ED included in its count of comments on regulations.gov, "even if all of the 6802

99 Dircks et al., *supra* note 14, at 2. See Section II of the Dircks et al. report for a comprehensive overview of the creation, conduction, and troubleshooting involved in the Big Comment Catalog Project. Special thanks to the Steptoe & Johnson team and the many volunteer cataloguers, whose efforts are chronicled throughout the Dircks et al. report.

100 *Id.* at 3.

101 *See id.* at 4–5 (describing research gaps resulting from missing comments, apparent template malfunctions causing some comments to be categorized as boilerplate, the AI software's inability to distinguish boilerplate and "boilerplate-plus" comments, and difficulties in capturing joint comments.)

102 *Id.* at 5.

103 *Id.*

. . . supported the proposed regulations," they "would still only add five percent (6802 / 124,160)" to the support column.[104] This overwhelming opposition was also true for every subgroup that catalogers tracked.[105]

The Catalog's findings also question any justifications of the Final Rules based on the technocratic and oligarchic purposes that are arguably reflected in the "significant" comment doctrine, the boilerplate comment convention, and the overall dismissal of mass comments. The significant comment doctrine defines significant comments as those which present the agency with new information or innovative solutions that the agency has not heard or considered already.[106] Therefore, significant comments are much more likely to cite to research studies and to contain legal analysis. Of the 35,741 hand-cataloged comments, volunteers cataloged 33,200 as opposing the DeVos NPRM and 853 as supporting it.[107] While a greater percentage of supporters, 18.6% (159 / 853), versus opposers, 6.2% (2,050 / 33,200), used legal arguments in their comments, only 9.3% (79 / 853) of supporters cited research, whereas 30.4% (10,077 / 33,200) of opposers cited research.[108] Since "legal arguments are generally strengthened by research-based support," when no more than half of the comments that advanced legal arguments in favor of the DeVos NPRM used any research or similar support for those arguments, the strength of and support for those arguments is weakened significantly.[109] In addition, note that in raw numbers, nearly 13 times as many opposers used legal arguments as supporters did (2,050 / 159 = 12.89).[110] Moreover, this difference pales in comparison to the raw number difference in NPRM opposers' versus supporters' use of research to substantiate the content of their comments.

104 *Id.*

105 Dircks et al.*, supra* note 14, at 5. Section III of the Dircks et al. report provides a thorough quantitative analysis of the results of the study, including a breakdown of identified subgroups and their strong opposition of the DeVos NPRM.

106 Oakbrook Land Holdings, L.L.C. v. Comm'r, 28 F.4th 700, 714 (6th Cir. 2022) (finding that "an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision" (quoting *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019))); 5 U.S.C. § 553.

107 Dircks et al., *supra* note 14, at 8.

108 *Id.* at 9.

109 *Id.*

110 *Id.* at 8–9.

In fact, "*over 127 times* (10,077 / 79 = 127.56) as many DeVos NPRM-opposers cited research as did NPRM supporters."[111]

Even the boilerplate comment convention in all its technocratic and oligarchic glory is ultimately insufficient in diluting public hostility towards the DeVos NPRM to a level that justifies the Final Rules. If the 81,617 boilerplate comments—which uniformly opposed the DeVos NPRM proposals—are reduced to a mere five comments, as the boilerplate comment convention would do, of the 35,746 comment total (35,741 non-boilerplate comments + 5 boilerplate comments), the 853 comments filed by supporters are only two percent of the comments considered.[112] Furthermore, even if all the approximately 6,800 missing comments were not boilerplates and supported the DeVos NPRM, *and* the 81,617 boilerplates were still reduced to five, support for the DeVos proposals would still only reach twenty-one percent (7,655 (6,802 + 853) / 35,746).[113] If the 81,617 boilerplate comments were put back in the mix and not diluted, this speculative level of support would drop to six percent (7,655 / 124,160).[114] Thus, no matter what assumptions one makes, the opposition to the DeVos proposals negates any justification for the DeVos ED to have done anything other than scrapping its proposed rules entirely and starting anew with an almost completely different NPRM.

3. Anti-Democratic Consequences of Public Inability to Fact-Check Agencies

This account thus amply shows why the DeVos rulemaking and its aftermath serve as a cautionary tale. Most clearly and importantly, the public's opposition to the DeVos NPRM was so strong and so consistent with abundant other evidence of public antagonism that it could not have been more obvious that 45's administration was being both dishonest and anti-democratic when it finalized the rules. Yet, the Final Rules are still in effect at this writing, at least in part because the one court to render a decision on the merits of the numerous APA-based challenges to the Final Rules only invalidated one portion of those rules.[115]

111 *Id.* at 9.

112 *See id.* at 5.

113 *See* Dircks et al., *supra* note 14, at 5.

114 *See id.* at 5.

115 Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. 2021), *order clarified*, No. CIV 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual

That court did not have the findings of the Big Comment Catalog to consider because the technocratic/oligarchic structures of the rulemaking process (i.e., the lack of transparency regarding the agency's own review of the comments) necessitated an independent civil society review, and the economic inequalities that plague the individuals and organizations with the most interest in such a review slowed completion of the Catalog to a snail's pace. While there is no way to know whether the Catalog's findings would have made a difference to the court's analysis and decision, it certainly seems more likely that a court that saw these findings would have invalidated more, if not all, of the Final Rules. It certainly would have found it harder to uphold the DeVos ED's actions as not arbitrary and capricious because the Catalog's findings would have made it nearly impossible for the agency to show "a 'rational connection between the facts found and the choice made.'"[116]

These practical difficulties and their likely-unintended-yet-very-real inequitable and anti-democratic effects are potentially underscored by the current and ongoing Title IX rulemaking, where the number of comments almost doubles the DeVos rulemaking's comments.[117] Granted, this current rulemaking is preceded by much evidence, such as the extensive public hearings and informal comment period held in September 2021,[118] that the Biden-Harris administration's ED is making extra effort to hear what is of concern to the American public regarding sexual harassment and is carefully considering how the public's views should be integrated into Title IX regulations.[119] In other words, the current ED is doing the exact opposite of what 45 and DeVos's ED did: repeatedly shut its ears to the American public no matter how many urged it to change course, how many times its members protested, or the quality of the research and legal arguments that they cited

Exploitation v. Cardona, No. 21-1773, 2022 WL 950944, at *1 (1st Cir. Feb. 7, 2022).

116 Brief for Law Professors as Amici Curiae at 2, Victim Rts. L. Ctr. v. DeVos, 552 F.Supp.3d 104 (2021) (No. 1:20-cv-11104) (citing Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

117 *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, REGULATIONS.GOV, https://www.regulations.gov/docket/ED-2021-OCR-0166 [https://perma.cc/C9PN-CFUF].

118 *See The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, DEP'T OF EDUC. (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment [https://perma.cc/M6S3-2KJV].

119 *See id.*

in support of their opposition.[120] In addition, my preliminary research indicates that the large number of comments to the 2022 NPRM may be a reflection of an even greater number of boilerplate comments, and ones focused on a relatively specific issue not directly involving sexual harassment and gender-based violence.[121] Nevertheless, a more comprehensive examination of the comments may reveal greater significance to the 2022 Title IX rulemaking's mass commenting.

The Big Comment Catalog's experience thus highlights why a close consideration of notice-and-comment rulemaking's purposes and whether those purposes are being served by current rulemaking processes and conventions is imperative. On the one hand, any notion of the American public acting as a democratic and constitutional check on administrative agency power is laughable if it is difficult-to-impossible for the public to do an independent review of what commenters said and whether the agency told the truth in its §706(2)(A) explanation.[122] On the other hand, if these processes and conventions accurately show that notice-and-comment rulemaking is just about providing expert information to government technocrats,[123] then federal administrative law should dispense with the gloss—and ultimate fiction—of public accountability and keep ordinary Americans as well as stretched public interest organizations from wasting their time and too-few resources on writing and filing comments. It is to that examination of purposes and methodologies—and their alignment with each other—that this Article now turns.

II. Justifications for the American Administrative State Through the Lens of the DeVos Rulemaking

Those who study the United States' administrative state, even in introductory administrative law courses, learn quickly that it is bedeviled by legitimacy questions.[124]

120 For example, the process the Biden-Harris administration followed prior to issuing the 2022 NPRM varies drastically from the DeVos rulemaking. Instead of deliberately ignoring the expressed views of the public, as 45's administration did in 2017 (discussed in greater detail, *infra*), in June 2021, ED took *extra* steps to ask for information from the public before and as it was crafting its NPRM by holding a public hearing. The 2022 NPRM makes many references to that multi-day hearing, demonstrating its careful attention to what was said there, despite the hearing's lack of legal force.

121 *See, e.g.*, Sherry Boschert, *Comments on Title IX Regulations Hit Record*, 37 WORDS (Sept. 14, 2022), https://www.sherryboschert.com/comments-on-title-ix-regulations-hit-record/ [https://perma.cc/66QC-LTXT].

122 *See* Kochan, *supra* note 18, at 601–02.

123 *See id.* at 610.

124 *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L.

Often referred to as the "fourth branch" of the federal government,[125] this massive modern bureaucracy made up of various agencies does not appear in the United States Constitution as the Article I (legislative),[126] Article II (executive),[127] and Article III (judicial)[128] branches do. Not appearing as an independent branch of the government in the Constitution means that agencies potentially have no constitutional check on their power, since the Constitution arguably only defines checks and balances within the federal government in terms of those three branches.[129] A related problem is how federal agencies are structured to combine legislative, executive, and judicial powers in opposition to the constitutional preference to separate government powers between both federal government branches and the federal and state governments.[130] Yet, it has been accepted for nearly as long as agencies have existed that without such agencies the United States—or any modern nation—would cease to function.[131] Nothing emphasizes our dependence on agencies like the COVID-19 pandemic, during which the effective functioning of the federal bureaucracy literally saved or sacrificed lives, depending on which part of the federal government one considered.[132]

The practical dependence that we all have on administrative agencies makes it understandable why many would ignore the agency legitimacy problem or accept some

REV. 1511, 1512–13 (1992).

125 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, COLUM. L. REV. 573, 582 (1984).

126 U.S. CONST. art. I.

127 U.S. CONST. art. II.

128 U.S. CONST. art. III.

129 *But see* Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 97–98 (2021).

130 Strauss, *supra* note 125, at 583.

131 *See, e.g.*, Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (noting that "the administrative state is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government" and commenting that such "delegations are necessary given the economic, social, scientific, and technological realities of our day"); Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. REG. 1100, 1104 (2022) (observing that "presidents have come to rely on the administrative state as a primary mechanism for accomplishing their policy objectives").

132 *See* Connor Raso, *Emergency Rulemaking in Response to COVID-19*, BROOKINGS (Aug. 20, 2020), https://www.brookings.edu/research/emergency-rulemaking-in-response-to-covid-19/ [https://perma.cc/C5LX-6Q4W].

justification for agencies' legitimacy that would collapse if subjected to any real scrutiny. However, crises involving the administrative state put significantly more stress on such justifications than mere scrutiny does. Thus, times of crisis can expose these justifications as ephemeral and require more careful thinking about legitimacy than is required in "normal" times.

The United States and its administrative state are (hopefully) emerging from such a crisis right now, the impact of which is possibly going to create certain permanent changes and, even if not, is going to remain with us for some time after the crisis is solidly in the rear-view mirror. The crisis was created in part by the moves of 45's administration. Despite the administration's claims that it wanted to shrink the administrative state through deregulation, it aggressively *regulated* in certain areas and did so in a manner designed to force the administrative state to dismantle accepted practices and processes developed over time through many previous administrations, both Democrat and Republican.[133]

The DeVos rulemaking can be put into this latter category. As a matter of substance, the DeVos rulemaking took every opportunity available to allow schools that do not wish to protect students from sexual harassment to withhold Title IX protections, and to make it harder, if not impossible, for schools that *do* wish to protect their students' Title IX rights to achieve that goal. The Final Rules also affirmatively discriminate against sexual harassment victims in at least two ways deserving of mention here. First, the Final Rules treat sexual harassment victims differently from students who face discrimination based on race, disability, etc.[134] Second, the rules force schools to adopt investigation procedures that rely on discriminatory stereotypes based in centuries-old criminal law doctrines claiming that sexual harassment victims—synonymous with women under these ancient doctrines—lie.[135] In these and many other ways, the Final Rules turn decades of previous, legally correct OCR Title IX enforcement inside out, eviscerate Title IX's abilities to fulfill its own purposes, and use a statute that prohibits discrimination to discriminate against the very classes of students that it is designed to protect.

133 Cary Coglianese, Natasha Sarin & Stuart Shapiro, *Deregulatory Deceptions: Reviewing the Trump Administration's Claims About Regulatory Reform*, PENN. PROGRAM ON REGUL. REP. 1, 9 (Nov. 1, 2020). https://www.law.upenn.edu/live/files/11017-coglianesesarinshapirotrumpderegulationreport11012 [https://perma.cc/AH9R-7BLF].

134 *Title IX Against Campus Sexual Violence*, *supra* note 45, at 243–45; Nancy Chi Cantalupo, *Title IX Symposium Keynote Speech: Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILLIAMS UNIV. L. REV. 225, 235–36 (2020) [hereinafter Cantalupo Keynote Speech].

135 *Heads in the Sand*, *supra* note 69, at 34 (providing examples of how stereotypes about victims lead to the belief that victims lie).

It is precisely this aggressive use of administrative law to damage a civil rights statute and harm its intended beneficiaries that inspired the remarkable public response to the DeVos NPRM. In addition, the fact that the DeVos NPRM commenters expressed their opposition mainly through boilerplate or mass comments is very likely a reflection of the anti-Title IX purpose of the DeVos NPRM, which is obvious and one that even relatively "unsophisticated" commenters likely understood. In other words, it was blatantly obvious that the DeVos rulemaking was not about getting better and more technically sophisticated ideas for fulfilling the agency's mandate from Congress (to ensure that schools receiving federal funds do not discriminate on the basis of sex). Rather, the DeVos rulemaking was about denying that sexual harassment exists, denying that it is a form of sex discrimination, and denying that people who state that they have been harassed (overwhelmingly women, girls, and gender minorities) are telling the truth.

Moreover, as the data from the Big Comment Cataloged reviewed in Section I.C., *supra*, details, DeVos's team at ED did not have anything more than what *The Nation* called "junk science" to support their policy positions,[136] as hundreds of commenters with expertise in sexual harassment-related fields (such as criminology, civil rights law, or treatment of sexual trauma) asserted in their comments and supported with (conservatively estimated) thousands of pages of studies and data cited and/or attached to those comments.[137] Essentially, the DeVos NPRM offered a bare policy preference, a policy preference that was answered by nearly 115,000 expressions of disagreement by the American public.

A. The Formalist and Technocratic/Expertise Justification Models

The circumstances of the DeVos rulemaking thus expose the inadequacies of two of the three common justifications for why the American administrative state, although undefined as a separate branch in the Constitution, is nevertheless legitimate. The first of these models is called the Formalist Model and the second is the Technocratic or Expertise Model.[138] By some accounts, the Technocratic/Expertise Model is actually two separate models, one focused on the expertise of the agency in its particular field (environment, transportation, etc.) and the other on market justifications positing that delegating policymaking powers to agencies is efficient.[139] Both of these models have been rejected by scholars for so long

136 *See* Barthélemy, *supra* note 11.

137 *See* Dircks et al., *supra* note 14, at 8–9.

138 David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012).

139 Seidenfeld, *supra* note 124, at 1513–14.

that Harvard Law Professor Gerald E. Frug urged his readers in a 1984 issue of the *Harvard Law Review* not to skip his critique of these models just because "no one believes in them anymore."[140] Nevertheless, legal practice by agencies and the insiders who seek to influence agencies suggests that the Technocratic/Expertise Model is actually the dominant model.[141]

For these reasons, it is worth reviewing each model and why each has been so roundly rejected, both of which are well-summarized by Managing Director of Public Citizen's Climate Program, David Arkush. First, Arkush discusses the Formalist Model, explaining that this model justifies administrative agencies as being like courts: constrained by the law and merely applying the legal and policy choices made by Congress, but not making policy choices themselves.[142] This claim has been widely rejected for two reasons. First, it is practically impossible to separate law and policy-making authority from each other in delegations to agencies.[143] Second, Congress tends to grant policy-making authority explicitly to agencies anyway.[144]

Under the Technocratic/Expertise Model, in contrast, the claim is that "agency discretion is legally broad but constrained and channeled by sound science."[145] As Arkush points out, however, while sound science "can resolve questions of fact . . . the facts alone cannot make a decision."[146] Ultimately, the facts must be resolved through policy judgments. For instance, the "most prominent tool" associated with the Technocratic/Expertise Model, deriving from the model's concern with efficiency, is "cost-benefit analysis."[147] The use of this tool requires "assigning values to the objects of the analysis,"[148] which is unquestionably a policy decision.

The DeVos rulemaking provides a specific illustration of the problems Arkush

140 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1297 (1984).

141 *See* Arkush, *supra* note 138, at 613.

142 *See id.* at 613–14.

143 *See id.* at 615.

144 *See id.*

145 *See id.* at 612.

146 *See id.* at 616.

147 *See* Arkush, *supra* note 138, at 616.

148 *See id.* at 618.

identifies in each of these models. Regarding the Formalist Model, the Final Rules, by engaging in discrimination against sexual harassment victims as previously noted, violate the statute they purport to enforce. Particularly if the Final Rules survive the numerous legal challenges filed, one of which is still outstanding, the DeVos rulemaking will make clear that agency power is not checked by law and add to the already ample evidence that the Formalist Model does not provide a workable justification for the existence and constitutionality of the American administrative state.

The DeVos rulemaking likewise confirms the failures of the Technocratic/Expertise Model as articulated by Arkush and regardless of which type of scientific expertise one believes the model uses as a constraint on agencies, the subject-matter expertise of the agency (environment, transportation, etc.), or expert economic analyses regarding efficiency. As already noted, if the rulemaking involved any subject-matter expertise regarding sexual harassment and its effects, it was not found on the side of DeVos's ED. Prior to issuing the DeVos NPRM, the DeVos ED was aware of scientific knowledge, such as thirty years of studies confirming high rates of sexual harassment inside and outside education,[149] and extensive research on the damage sexual trauma can do to victims.[150] In addition, hundreds of experts also filed comments informing the DeVos ED of such research. For instance, almost 1,000 medical and counseling professionals specializing in helping sexual trauma victims signed and submitted a comment opposing the proposed rules.[151] The comment was written by Dr. Judith Herman of Harvard Medical School, whose book *Trauma and Recovery*, first published in 1992, is canonical reading for those in the field.[152] As discussed more below with regard to the Madowitz Declaration, this science was roundly ignored by DeVos's ED in favor of discriminatory gender stereotypes.

149 *See* Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?utmterm=.fee7bdlb7921 [https://perma.cc/ZH9M-57EG]; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT 1, 1–2 (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL- 10-20-17.pdf [https://perma.cc/5STP-2Y35] (summarizing findings from research on the effects of sexual trauma).

150 *See* Cantalupo Keynote Speech, *supra* note 134, at 228–29; *see also For the Title IX Civil Rights Movement*, *supra* note 6, at 295 (discussing articles in the symposium issue by Dana Bolger, Alyssa Peterson, Olivia Ortiz, and Zoe Ridolfi-Starr).

151 Judith Herman, Comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://www.regulations.gov/comment/ED-2018-OCR-0064-104087 [https://perma.cc/4AQ8-NWCN].

152 *See generally* JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992).

The DeVos rulemaking also exposes as ephemeral the view that agencies are supposedly constrained by the Technocratic/Expertise Model via the economic efficiency analysis. The cost-benefit analysis that DeVos's ED did, according to a declaration filed by an independent economist, Michael Madowitz, in the multi-state Attorneys General lawsuit,[153] provides multiple examples of the central problem Arkush identifies, as well as several other equal protection-oriented problems. In addition to pointing out that DeVos's ED did not provide "the public the required fundamental underlying information and the complete cost-benefit analysis methodology" needed to replicate the agency's analysis, Madowitz demonstrated the inaccuracy of several central numbers and claims in the DeVos ED's statutorily-required Regulatory Impact Analysis.[154] First, Madowitz examined the agency's claim that the Final Rules would be only modestly costly because they would significantly reduce sexual harassment investigations that schools would have to conduct, resulting in savings that Madowitz determined accounted for eighty-seven percent of the savings leading to the DeVos ED's moderate cost estimate.[155] However, Madowitz determined that this estimate was based on data sets that had been shown to be "incomplete, limited, and potentially inconsistent" with data such as the thirty years of studies mentioned above, which had repeatedly confirmed higher rates of sexual harassment in education than those in the data sets DeVos's ED used.[156] Commenters responding to the DeVos NPRM had repeatedly referred the agency to the correct datasets, yet DeVos's ED did not use them.[157]

Second, Madowitz points out that the DeVos ED did not factor into its cost-benefit analysis the likely effect that its regulations would have on rates of sexual harassment. The agency absolved itself of any responsibility for this omission by stating that it had "insufficient evidence" to determine such an effect, thus assigning a cost of zero to it.[158] Madowitz demonstrates how the many fewer investigations estimated by DeVos's ED will inevitably result in many fewer findings of responsibility for sexual harassment and many fewer sanctions. In the context of well-known studies on repeat perpetration, finding that "at least two-thirds of college students who commit rape are repeat offenders and are

153 Ex. 31, Decl. of Michael Madowitz at 5–7, Pa. v. DeVos, 480 F. Supp. 3d 47 (D.D.C. 2020) (No. 1:20-cv-01468) [hereinafter Madowitz Declaration].

154 *Id.* at 4.

155 *Id.* at 8.

156 *Id.* at 7.

157 *Id.* at 5–7.

158 *Id.* at 10.

responsible for over 90 percent of all campus rapes,"[159] fewer investigations must lead to more sexual harassment. In other words, if repeat perpetrators' actions are not investigated, they are likely to continue to perpetrate, so the precipitous drop in investigations about which DeVos's ED speculated would lead to more sexual harassment in comparison to a world in which investigations continued at the same level. Madowitz also points to the costs that would come from diminished deterrence of potential perpetrators who would be more likely to perpetrate if they were less likely to face investigation of their conduct.[160] Finally, Madowitz finds no citations or discussions by DeVos's ED of countervailing data or information that would negate this evidence and justify its "insufficient evidence" determination.[161]

Thus, in both examples, the DeVos ED did exactly what David Arkush warned that the Technocratic/Expertise Model of agency legitimacy enables: created the cost-benefit analysis that would justify its actions by selecting values that would lead to the conclusion it wanted. In addition, these examples expose a Technocratic/Expertise Model equal protection problem. In the background of the DeVos ED's economic efficiency analysis is its political position, based in longstanding stereotypes of sexual harassment victims that most of the conduct labeled as sexual harassment is overblown at best and a flat-out lie at worst.[162] Recall the words of Candice Jackson, 45's first Acting Assistant Secretary for Civil Rights, to the *New York Times*: "the accusations—90% of them fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[163] Holding stereotypes about sexual harassment victims as liars enabled the administration to rationalize its position that fewer investigations will automatically lead to cost saving. "After all," the DeVos ED's stereotype-based rationale goes, "schools will no longer have to waste time investigating false allegations, a significant improvement to the efficiency of their Title IX compliance." Likewise, the DeVos ED's position reasons, the Final Rules will have little effect on rates of sexual harassment because there is not really any true sexual harassment or what little exists is negligible. Furthermore, in the DeVos

159 Madowitz Declaration, *supra* note 153.

160 *Id.* at 10–11.

161 *Id.* at 21.

162 *See Dog Whistles and Beachheads*, *supra* note 11, at 336.

163 Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html [https://perma.cc/TQ8K-B8VD].

ED's view, the evidence regarding rates of sexual harassment is insufficient because it is mainly based on victim's reports, which, again, the agency's stereotyping paints as false and therefore unreliable.[164]

Combine this stereotyping-based economic analysis with the Technocratic/Expertise Model's more obvious equality problem, arising from the cost of an independent analysis like Madowitz's (Madowitz was paid $400 per hour to do the analysis he did),[165] and the DeVos rulemaking illustrates how the model presents additional equal protection issues. Using invidious gender stereotypes such as the ones spouted by Candice Jackson to justify an agency's cost-benefit analysis means that only stereotyped groups will face this particular barrier—this *discrimination*—and receive less protection of their rights *by* the agency as well as *vis-à-vis* the agency. Again, particularly if all the legal challenges to the Final Rules are rejected by the courts and this stereotyping/discrimination is ultimately allowed, the DeVos rulemaking will simply confirm the inadequate legitimizing force of the Technocratic/Expertise Model.

B. The Democracy/Civic Republican Justification Model

Indeed, the DeVos rulemaking confirms why only the third model, commonly referred to as the Democracy or Civic Republican Model, has a chance of actually legitimating the American administrative state. Arkush describes the Democracy Model as one that "admits that discretion exists in administration and attempts to import a basic source of legitimacy—citizen preferences—into the process."[166] This Model "envisions a high degree of citizen participation in the administrative process, or at least strong democratic accountability for agency officials regarding whether they actively consider public views."[167] Moreover, a primary mechanism for such participation and accountability is the commenting power, which others have called "a brilliantly crafted check and balance on governmental regulation . . . [that] rests in the people," rather than another branch of government.[168] This power is in fact what the APA §706(2)(A) process described above appears aimed to facilitate, because it requires that "when an agency proposes a rule, individuals get a

164 *See Dog Whistles and Beachheads*, *supra* note 11, at 336.

165 *See* Madowitz Declaration, *supra* note 153, at 4.

166 Arkush, *supra* note 138, at 620–21.

167 *Id.* at 620.

168 Kochan, *supra* note 18, at 601–02.

chance to comment, and an agency must respond to significant comments raised during the rulemaking before the rule can become final and effective."[169]

The Democracy Model thus highlights the problems with certain rulemaking conventions like the one regarding boilerplate comments. If the commenting power comprises "one of the most fundamental, important, and far-reaching of democratic rights"[170] provided to the American public, then a convention such as the boilerplate comment convention should be summarily rejected as violative of democratic rights. It should be *prima facia* unacceptable to reduce millions, tens of thousands, or even dozens of comments down to one. Moreover, treating comments that express a bare policy preference without offering additional data or scientific expertise as virtually useless is an evisceration and perversion of the democratic right embodied by the commenting power. Doing so in the context of an anti-gender discrimination statute makes that evisceration and perversion *also* a violation of equal protection legal principles at least, if not a violation of anti-discrimination law itself. I therefore turn to these topics in the next section, beginning with the boilerplate comment convention. This convention serves as merely the tip of a large iceberg of problems created for technocratic and oligarchic approaches to rulemaking by various forms of "mass commenting," all of which highlight the democratic legitimacy tensions endemic to agency lawmaking generally and notice-and-comment rulemaking specifically.

III. Mass Commenting, Democracy and Equal Protection

Since at least as early as President Obama's first term in office, administrative law scholars have devoted significant and sustained attention to the problems with mass commenting, how agencies handle mass commenting, and the impacts on democratic legitimacy and the public's interest in civic participation.[171] Although their research, critiques, and recommendations for addressing these problems have been available for more than a decade, the DeVos rulemaking shows that no such work was attempted by 45's administration and possibly not by the Obama administration either.[172] In addition, the insights of the DeVos rulemaking and the Big Comment Catalog project have been

169 *Id.* at 601.

170 *Id.* at 602.

171 Aryamala Prasad, *Are Agencies Responsive to Mass Comment Campaigns?*, GEO. WASH. UNIV. REGUL. STUD. CENTER (Oct. 7, 2019), https://regulatorystudies.columbian.gwu.edu/are-agencies-responsive-mass-comment-campaigns [https://perma.cc/3X6P-AD6U].

172 When ED first invited comments on how it might "deregulate," it received nearly 61,000 comments for preserving a robust Title IX and only 137 comments opposed. *See* Buffkin et al., *supra* note 70.

joined by those resulting from congressional scrutiny in the form of an investigation by the Republican-controlled Senate in 2019 and invited testimony by Beth Simone Noveck before the Democrat-controlled House in 2020.[173]

In both instances, Congress was focused on abuses of the notice-and-comment rulemaking process that manifest in various forms of mass commenting, but the DeVos rulemaking is not mentioned in either the Senate report or Noveck's expert testimony.[174] This lack of attention could be due to the low rate of mass commenting abuses of most concern to Congress (and—apparently and justifiably—everyone else considering this issue), such as fake and/or bot-generated comments that are often profane, nonsensical, and falsely attributed to real people. While the Catalog does identify approximately 1,688 comments in which even support or opposition to the DeVos NPRM was hard for catalogers to glean,[175] and catalogers noted that many of these comments used profanity, slurs against Betsy DeVos, and other "trolling"-type content, 1,688 is a fairly minimal number of comments. In addition, as far as the Project Team could tell, the Catalog does not include any evidence that more sinister abuses such as "astroturfing," a practice whereby "interest groups mask their own identities and send comments on behalf of their members in order to create the appearance of grassroots support for or opposition to a proposed rule,"[176] occurred. While it is possible that bot-generated commenting, trolling, and/or astroturfing occurred—indeed, the 6,802 missing comments may have been excluded from regulations.gov for such reasons—not only could the Catalog find no evidence of bot-generated comments, astroturfing, or other abuses, there was not really a need for such abuses in the DeVos rulemaking.[177]

The DeVos rulemaking arguably did involve several other mass commenting problems that scholars began talking about in the early 2010s, however, including problems created or exacerbated by agencies themselves. In addition, many of those problems implicate issues of democratic participation, accountability, and legitimacy that were at the core of these scholars' concerns. Moreover, because the DeVos rulemaking dealt with sexual harassment, a civil rights issue that has been spurring American women's democratic participation for at least the last thirty years—as well as confronting us anew with the deep racial and

173 *See Astroturfing Hearings*, supra note 16.

174 *See* Buffkin et al., *supra* note 70.

175 *See* Dircks et al., *supra* note 14, at 5.

176 *See* Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97.

177 *See* Cantalupo et al., *supra* note 13.

gender inequalities that mar this democracy—the rulemaking adds issues of (in)equality to the democratic legitimacy concerns at the basis of all notice-and-comment rulemaking. This section will accordingly set out the concerns about mass commenting that are most relevant to democratic participation, accountability, and legitimacy and that scholars and others have been articulating for at least the last decade. It will also explain how those concerns played out in the DeVos rulemaking, then turn to the additional questions of equal protection for democratic rights raised by this rulemaking.

A. Mass Commenting's Origins and Use by Ordinary Americans

Prior to the advent of mass commenting, administrative law scholars mainly worried about the *lack* of participation by ordinary Americans in notice-and-comment rulemaking. These concerns were particularly acute because, as noted above, these scholars saw—and see—notice-and-comment rulemaking both as a method of shoring up the legitimacy of the administrative state and as doing so through requiring agencies to engage with and be accountable to the American public.[178] Instead, as already described and for the reasons described, the notice-and-comment rulemaking process had come to be dominated by the regulated industry, leading to "agency capture" by those industries and inadequate protection of the public's interests in agency rulemaking and enforcement. The struggle for these scholars, then, was to change the notice-and-comment rulemaking process to encourage more ordinary people to participate, leading to new rulemaking processes such as negotiated rulemaking. Indeed, "e-rulemaking" was the hot new thing back in the mid-2000s largely because of precisely this drive to make commenting easier and more attractive to the general public.[179] At the time, certain scholars were skeptical of whether e-rulemaking would have the intended effects, pointing to what they characterized as the failure of negotiated rulemaking to fulfill that goal.[180]

Enter mass commenting. The current focus on fake comments and astroturfing distracts from more genuine and non-manipulative uses of mass commenting. Indeed, evidence exists that mass commenting was first used by progressive political organizations seeking to amplify outsider voices and participation in politics. For instance, one of the earliest

178 *See, e.g.*, Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1343–44 (2011) [hereinafter Mendelson Foreword].

179 *See, e.g.*, Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 944-45 (2006); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 442 (2004).

180 *See, e.g.*, Coglianese at 944–45; Noveck.

studies of mass commenting centered around a 2004 boilerplate comment campaign led and facilitated by MoveOn.org.[181] MoveOn.org was one of the most prominent progressive organizations in the country during the George W. Bush administration, with which it deeply and vociferously disagreed. As suggested by its name, MoveOn.org focuses on "innovating new ways digital tech can empower ordinary people from all walks of life to make their voices heard," and it "pioneered the field of digital organizing, innovating a vast array of tactics that are now commonplace in advocacy and elections, and shifting power toward real people and away from Washington insiders and special interests."[182] While MoveOn.org almost certainly funds its operations at least in part through donations from those who participate in its digital activism, it seems very unlikely that, particularly in 2004, it was using mass commenting "simply as an opportunity to recruit new members and solicit personal information for subsequent donation solicitations," as Noveck characterizes organizations engaged in what she calls "clicktivism."[183] It is much more likely that MoveOn.org was using a digital organizing strategy that it may have pioneered, and this strategy saw a large uptick in use during the years of 45's administration and the Resistance.

Disability rights lawyer Matthew Cortland and law professor Karen Tani have discussed the Resistance's use of this organizing strategy in a 2019 entry on the Law and Political Economy Project blog entitled "Reclaiming Notice and Comment."[184] They provide multiple examples of how various groups—some through formal organizations and some not—used notice-and-comment processes to try to protect Obama-era regulations from 45's "besieg[ing of] the administrative state."[185] Also, Cortland wrote an online guide instructing grassroots activists on how to write and file comments fighting against Medicaid work requirements that 45's Health and Human Services was encouraging states to adopt via Medicaid Section 1115 waivers.[186] In it, he notes that "[45] isn't going to stop attacking

181 *See* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23 (2009).

182 *A Short History of MoveOn*, MOVEON.ORG, https://front.moveon.org/a-short-history/ [https://perma.cc/2GMT-97HN].

183 *See Astroturfing Hearings*, *supra* note 16, at 11.

184 Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, L. & POL. ECON. PROJECT (July 31, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment/ [https://perma.cc/CWL4-GF64].

185 *Id.*

186 *See* Matthew Cortland, *Comment on Trump's Attack on Medicaid*, PATREON (Aug. 8, 2018), https://www.patreon.com/posts/20618943 [https://perma.cc/XAW6-2ZG2].

Medicaid. But we're not trying to change his mind, or the mind of anyone who works for him . . . We're commenting because it will make a difference in court."[187]

The ethos of Cortland's advice was also very present in the Title IX Movement's comment organizing efforts in response to the DeVos NPRM. As Cortland and Tani note, Know Your IX, one of the organizations resulting from Movement organizing beginning in 2013, also had a guide explaining to commenters how to comment most effectively.[188] Know Your IX was also among the group of organizations represented by the ACLU that filed the first legal challenge against the Final Rules.[189]

Some of the rulemakings during 45's administration that drew the largest numbers of comments also suggest that many comments were filed in an effort to protect existing agency rules from being dismantled. Many of these rules had been originally created at least in part as a result of massive—and genuine—grassroots campaigns. The record-breaking second rulemaking on net neutrality, for instance, was initiated by 45's Federal Communications Commission (FCC) to undo the rules put in place during the first, Obama-era, rulemaking.[190] Both rulemakings saw massive participation from real Americans, alongside bots and other fake comment-generators, due perhaps to encouragement by people with very large media platforms such as political comedian John Oliver, who did one episode of his popular HBO show for each rulemaking, and in each episode explained what the FCC proposed rules would do and how to comment.[191] After each episode, so many comments flooded in that it led to speculation that Oliver's viewers were responsible for overwhelming the FCC's servers.[192]

Especially when motivated by a desire to defend existing regulations widely viewed as serving the public interest from changes equally broadly seen as against the public

187 *Id.*

188 *See Notice and Comment 101*, KNOW YOUR IX, https://knowyourix.org/wp-content/uploads/2018/03/Notice-and-Comment-101.pdf [https://perma.cc/9TYS-5JHY].

189 Know Your IX, *supra* note 48.

190 *See* Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html [https://perma.cc/9M76-LJEA].

191 *See Last Week Tonight with John Oliver: Net Neutrality* (aired on HBO June 1, 2014); *Last Week Tonight with John Oliver: Net Neutrality II* (aired on HBO May 7, 2017).

192 Tony Romm, *John Oliver Is Urging Internet Users to Defend Net Neutrality*, VOX (May 8, 2017), https://www.vox.com/2017/5/8/15577732/john-oliver-net-neutrality-fcc. [https://perma.cc/N3CH-C3PP].

interest, such massive responses could serve two protective purposes. First, they could be intended to show how much public support there is for the *existing* regulations, including for anticipated APA-based court challenges to any changes. Second, they could have the additional benefit—at least in resistors' minds—of slowing down the agency's ability to finalize their proposals because it must read and respond to comments. Such a slow-down is potentially increased if the comments are lengthy, use different enough language to avoid being identified and easily processed by AI software, present (and attach) research and other documentation to support the commenters' positions, and/or are snail-mailed to the agency.

Regarding Title IX, one can see both of these protective measures being used in commenters' responses to the 2017 de-regulation comment call and the DeVos NPRM. The overwhelming response of commenters urging DeVos's ED to keep the Obama administration's guidance documents in place in 2017 was clearly an effort to show how wide the public support for those Obama-era documents was.[193] It reflected the commenters' awareness that the DeVos ED had the power to rescind those documents with the stroke of a pen and underscored the difference that the legal requirements attached to notice-and-comment rulemaking make. DeVos's ED had no legal obligation to do what the commenters urged—or even to read and respond to those comments—as the agency confirmed by doing the exact opposite of what ninety-nine percent of the de-regulation comment call commenters who addressed Title IX urged it to do: announcing that it would rescind the documents even while comments begging the agency to keep them were still being filed.[194]

Once DeVos's ED escalated its attacks on Title IX using the rulemaking process, it had to meet the requirements of the APA, giving commenters even more reasons to use their comments to try to protect the historical (and legally correct) approach to Title IX enforcement that DeVos's ED was trying to dismantle. Here, not only would showing overwhelming opposition to the DeVos NPRM's proposals communicate the public's antipathy to 45's administration in the admittedly slim hopes that they would scrap the proposals, but doing so could also help convince a court to overturn any regulations finalized despite that impossible-to-ignore opposition. Because the APA required the ED to respond to the comments, inundating the agency with comments also meant its staff had many more comments to process before the regulations could be finalized, and processing those comments would lengthen the time until the rules could be finalized.

193 *See generally* Buffkin et al., *supra* note 70.

194 *See id.* at 74.

Furthermore, as I speculated with other faculty conducting research and writing on sexual harassment and/or other relevant topics, ED staff—especially those not politically appointed by 45's administration who might view the political appointees' actions as illegitimate and illegal—would potentially be able to use comments with lengthy attachments such as research studies to lengthen their review. With no idea how possible such moves might be for actual ED staff, I imagined myself, in such a position, using lengthy comments with even lengthier research studies and academic documents attached to slow the review and response process to a crawl as I read every page of each submission closely, meticulously, and as many times as I could get away with.

Returning briefly to MoveOn.org's use of boilerplate comments in 2004, it is entirely possible that some of the motivations animating various Resistance-led mass commenting efforts during 45's term were also involved in that early use of mass commenting by MoveOn.org. These mass commenting examples, spanning nearly 15 years, demonstrate that mass commenting can be and has been used in multiple genuine efforts to amplify the voices and participation of ordinary people and outsider commenters.[195] Lumping such efforts together with cynical and abusive uses of mass commenting such as bot-generated comments, astroturfing, and even genuine clicktivism as Noveck defines it, ends up dismissing the ordinary members of the public organized by legitimate mass comment efforts. Even when such efforts use boilerplate comments, as the 2004 MoveOn.org commenters and 80,000+ DeVos NPRM commenters did, virtually ignoring them by using conventions such as the boilerplate comment convention undercuts and devalues the public participation upon which the commenting power's democratic legitimating force depends.

B. Mixed Reviews of Mass Commenting

Indeed, even those who are highly critical and dismissive of mass commenting mainly object to it because of the abuses already noted, as well as their belief that mass commenting does not encourage the *right* kind of public participation.[196] Here, not only is the definition of "right kind" unclear, but there is evidence that, even though the scholars concerned about mass commenting indicate that they are supporters of the Democracy Model of agency

195 Nina Mendelson, *Democracy, Rulemaking, and Outpourings of Comments*, REGUL. REV. (Dec. 20, 2021), https://www.theregreview.org/2021/12/20/mendelson-democracy-rulemaking-and-comments/ [https://perma.cc/LX8Q-2YX4].

196 Michael Herz, *Mass Comments' Opportunity Cost*, REGUL. REV. (Dec. 21, 2021), https://www.theregreview.org/2021/12/21/herz-mass-comments-costs/ [https://perma.cc/R2E9-95MH].

legitimacy, they struggle with whether and how much notice-and-comment rulemaking should serve the values of the Technocratic/Expertise Model.

For instance, a group of scholars who ran the Regulation Room at Cornell University—"an experimental online public participation platform" on which certain agencies allowed the researchers to host live rulemakings and study the comments that were filed—observed "a fundamental incongruence between the ways that 'insiders' think and talk in rulemaking and the ways that novice commenters do."[197] These scholars define "insiders" as "agency and other executive branch staff involved in writing and reviewing new regulations; industry, trade associations, and national advocacy groups who routinely take part in the process . . . ; and reviewing courts."[198] The scholars describe the problem they observed thusly: "Rulemaking, as it has been legally constructed, emphasizes empirical 'objective' evidence in the form of quantitative data and premise-argument-conclusion analytical reasoning. By contrast, the behavior of novice commenters in Regulation Room confirms . . . [that] what rulemaking 'outsiders' tend to offer is highly contextualized, experiential information, often communicated in the form of personal stories."[199]

Although the rulemakings hosted by the Regulation Room do not appear to have involved mass commenting, these researchers address mass commenting in other articles, confirming that those who are concerned about facilitating public participation in rulemaking must consider mass commenting. For example, in an article published not long after sharing their Regulation Room observations, the researchers discuss the mismatch between the goals of rulemaking and mass commenting, which they view as limited to expressing commenters' policy preferences and liken to voting or plebiscites.[200]

197 Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 102 (Nov. 13, 2012) [hereinafter *Knowledge in the People*].

198 *See id.* at 103.

199 *Id.*

200 *See* Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T. & ADMIN. L. 123 (2012).

They explain the differences between mass commenting/voting/plebiscites and rulemaking thusly:

> Voters are asked for outcomes, not reasons . . . By contrast, decades of judicial elaboration have constructed rulemaking as a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation . . . the expression of outcome preferences, per se, has little value in this process: Participation that counts requires reason-giving, and this will inevitably privilege some types of preferences over others.[201]

In other words, "To the extent rulemaking is a 'democratic' process, we expect it to be a process of deliberative, rather than electoral, democracy."[202]

The Regulation Room researchers ultimately recommend that outsider comments, with the "situated knowledge" they offer, be viewed by agencies as a supplement to "the expertise of rulemaking insiders."[203] Unfortunately, such a recommendation basically accepts that these commenters are marginal outsiders. More discomforting, even though the Regulation Room researchers devote an entire study to showing the value in these outsider comments, they end up suggesting that agencies are almost as dismissive of these kinds of comments as they are of mass comments, even though there is no indication that such comments result from abuses such as bots, astroturfing, or clicktivism. That is, if agencies already take outsider comments seriously, why would these researchers need to demonstrate their value and then urge agencies to view them as a valuable supplement?

The researchers' recommendation does even less for those commenters who participate in some form of non-abusive and non-corrupted mass commenting (hereinafter "legitimate mass comments" or "legitimate mass commenting"), including via boilerplate language provided to individual commenters in an organized effort to facilitate outsider comments. Indeed, the researchers' recommendation really only applies to individually written comments, ones which provide no indication that they are a part of an organized effort. In this view, comments that do provide indications that they are part of a larger, organized effort—even if genuine and not attempting to abuse the process—are merely attempting to cast a vote and therefore appear not to be worthy of even supplemental status.

201 *Id.* at 135.

202 *Id.* at 139.

203 *See Knowledge in the People*, *supra* note 197, at 103.

To be clear, I am not arguing that every comment, including boilerplate comments, be treated as a "vote" or that rulemaking should adopt the mechanisms of electoral democracy. Even if I was convinced that such mechanisms could and should be used in rulemaking (I am thus far *not* so convinced), as the Regulation Room researchers point out, it is too late for such a change. Many years of judicial interpretation of the APA mean that rulemakings use (or at least *should* use) a different form of democratic engagement than an electoral system.

However, a system and process can show respect for and facilitate democratic purposes and principles without making everything a vote. The boilerplate comment convention could, for instance, take into account the size of the group using a particular boilerplate comment. Such an approach might not treat a boilerplate comment as having the same weight as a commenter who wrote a unique comment, as "vote" treatment arguably would. Comments that had particularly helpful or relevant content, such as by drawing the agency's attention to pertinent research or showing the agency how application of its proposed regulation would affect the commenter, a particular group of people, or the general public, might legitimately get even more agency attention.

Nevertheless, the number of commenters who submitted a particular boilerplate comment could be credited with some significance—certainly more significance than that given to them by the boilerplate comment convention. For example, if a boilerplate is submitted by fifty commenters, should not the fact that fifty people thought the content of the comment was worth publicly associating with their name give it some greater weight in the agency's considerations? Such a comment should be deserving of even more attention if 50,000 people sign onto the same content, or if the fifty commenters that submitted a particular boilerplate were all organizations with constituencies of a substantial size. A single comment signed petition-style by hundreds, thousands, tens of thousands, and so on, should also be taken seriously, with due weight given to the number of signatures.

This focus on taking legitimate mass comments seriously is not just mine. Law professor Jonathan Weinberg has suggested that public comments get so little serious attention from agencies that any meaningful change to the system will require recognition of a new right: a right to be taken seriously.[204] In fact, after a brief but effective review of the extensive scholarship and theorizing relating to rulemaking, deliberative democracy, and civic republicanism, Weinberg rejects the characterization of notice-and-comment

204 Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIA. L. REV. 149 (2002).

rulemaking as a form of deliberative democracy.[205] At the heart of Weinberg's concern is that the "dialogic, discursive relationship in which government must show the citizenry the respect of explaining itself—of hearing public comments and responding to them directly" is *simulated*.[206] Although "that sort of relationship builds connection because it creates a sense that governors and governed are part of a shared community[,] it's not really true."[207]

Law professor Nina Mendelson shares Weinberg's concerns. Moreover, Mendelson worries that "to the extent members of the public perceive that the opportunities to participate are not authentic, they may be deterred from engaging in the government process."[208] For many people, especially outsider commenters, commenting is additional, uncompensated work. The vast majority of insider commenters and agency staff are, after all, involved in the commenting process as part of their jobs. Unlike legitimate mass commenters, these insider commenters receive a salary, a share of profits, or similar compensation for their work on the notice-and-comment rulemaking process. If outsider commenters perceive that their comments are not taken seriously, why would they make the uncompensated sacrifice required to participate in the process?

This point underlines another positive aspect of legitimate mass commenting that seems lost in the overwhelmingly negative view of mass commenting. Boilerplate comments along with, presumably, petitions filed as comments and joint comments (by significantly large groups of people) allow outsider commenters to reap the benefits of collective action. First, if the comment is written by one or several people within a potentially quite large group of uncompensated commenters, the labor can be spread around between multiple people, or one person with the time and energy to write the comments can share that benefit with the others. Second, if the comment is written by an organization, the organization provides the labor and other resources so that many commenters with busy lives and limited time who agree with the comment can use it. Third, when organizations like MoveOn.org encourage their members to comment, they often provide a digital platform in which members can start with the boilerplate language but can edit or add to it. These organizations also often alert members to the existence of a particular rulemaking and likely educate them on the rulemaking process and the roles that public comments play. Fourth, working in concert

205 *See id.* at 153.

206 *See id.*

207 *See id.*

208 Mendelson Foreword, *supra* note 178, at 1373.

with other like-minded people is energizing, generally encouraging greater participation, not less.

All these benefits were present in the organizing effort that generated the vast majority of the 124,000+ comments filed in response to the DeVos NPRM. Because I was in close communication with many of the Title IX Movement activists who were a part of the organizing effort, I closely observed just how many different campaigns were launched to encourage members of the public to comment on the DeVos NPRM. A coalition of Movement organizations such as Know Your IX, End Rape on Campus, and SurvJustice created the HandsOffIX website and comment-filing platform, along with links to Title IX-related research and publications, as well as educational materials about how to write a comment in a manner that would maximize the chances that the comment would be viewed as "significant" or otherwise taken seriously by the agency.[209] Alyssa Milano used her prominence in the #MeToo organizing efforts to encourage people to file comments via a video of her reading a Dr. Seuss parody holiday story called "One ShIXtty Gift."[210] Student organizations, sometimes using HandsOffIX's platform and sometimes on their own, did comment-writing pizza parties on campuses across the country, even though many campuses were holding final exams at the time.[211] Many college graduates did the same over wine.[212] Law students on at least two campuses encouraged classmates, coworkers, and others to use and modify a menu of comment-starting drafts created by students at Rutgers Law's International Human Rights Clinic under the leadership and supervision of Professor Penny Venetis. The National Women's Law Center created various online tutorials, factsheets, etc., to assist people in filing comments either electronically or via snail mail.[213] A California Women's March organization and the Enough is Enough Voter Project printed postcards to be distributed via various branches of the Resistance, thousands

209 *See, e.g.*, *Notice and Comment 101*, *supra* note 188; Press Release, Know Your IX, Student Survivors Urge Department of Education to Withdraw Their Proposed Regulation on Title IX (Jan. 31, 2019) https://knowyourix.org/press-room/press-releases/ [https://perma.cc/6GZ2-JN85] (describing the Hands Off IX campaign).

210 Pauly, *supra* note 37.

211 *See id.*

212 *Id.*

213 *See, e.g.*, *Here's an Effective Way to Challenge Betsy DeVos' Attacks on Survivors*, NAT'L WOMEN'S L. CTR. (Nov. 29, 2018), https://nwlc.org/heres-an-effective-way-to-challenge-betsy-devos-attacks-on-survivors/ [https://perma.cc/7KS8-N8VL].

of which were written out and mailed to ED, as the Big Comment Catalog confirmed.[214] All of these efforts are examples of both collective action and its benefits, as individual people and civil society organizations pooled their resources in various ways to generate as many comments—and as many *effective* comments—as possible.

Finally, collective action has and continues to be especially important when the action involves asserting civil and human rights. In countless ways, the various Title IX Movement efforts to facilitate as many comments as possible and to maximize their effectiveness are reminiscent of and draw from the United States' long history of civil rights collective action focusing on equal protection of the law: both in terms of protesting denials of and demanding equal protection. Such movements date back at least to the mid-19th century in the United States, when the movements for abolition of slavery, suffrage (for both women and formerly enslaved people), and American labor not only began around the same time but often worked in coalition with each other.[215] Without equal—often without *any*—rights and power, discriminated-against people and groups have always known that we need to pool our numbers, strength, and resources to make progress towards greater—and hopefully, someday full—equality.

C. Mass Commenting and Equal Democratic Participation

The discussion above should make clear why the dismissal of legitimate mass comments not only presents problems with democratic participation in general but particularly with *equal* democratic participation. Moreover, given the United States' past and present *de jure* and *de facto* discrimination against democratic participation by all people of color and by all women (with women of color being a part of both groups), discrimination demonstrated first and foremost in unequal voting rights,[216] such a dismissal is especially unacceptable. When added to the attacks on American democracy itself that have continued past even 45's January 6, 2021, attempted coup[217] and that have unquestionably focused on disenfranchising people of color, dismantling even—or perhaps especially—subtle anti-democratic conventions is more urgent at this writing than ever before.

214 *See* Dircks et al., *supra* note 14, at 4.

215 *See* TRAISTER, *supra* note 31, at 116–17.

216 Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859, 863–64 (1995).

217 *See Capitol Riots Timeline*, *supra* note 2.

1. Sexual Harassment and Women's Democratic Participation

As already noted, 45's years in office witnessed—even arguably caused—a level of democratic engagement by women not seen in the United States since the 1970s.[218] While the Title IX Movement started well before 45's administration, the scope of public participation in the DeVos rulemaking likely went well beyond Movement activists, especially in light of the DeVos NPRM's timing, with the #MeToo movement barely a year old[219] and the massive protests over the multiple sexual harassment allegations leveled at Brett Kavanaugh[220] still echoing on Capitol Hill and outside the Supreme Court. These events, as well as earlier eruptions of public anger over sexual harassment, provide multiple examples of the catalyzing effects of sexual harassment on women's democratic engagement.

These catalyzing effects are important beyond more equal participation for women, moreover, because equal voting rights for people of color especially, as well as democracy itself, *need* women's sustained engagement. This need, in turn, increases the stakes of heeding Mendelson's warning that agencies' pretense of paying attention to mass comments will cause disillusionment and disengagement with rulemaking and other democratic processes.[221]

Women's engagement is needed because, as already noted, women are not a minority population; we are a subjugated majority.[222] Therefore, when large numbers of women form coalitions with minoritized groups, such as people of color, our combined power

218 *See generally*, WOMEN'S MARCH ORGANIZERS & CONDÉ NAST, *supra* note 59; *See also* Why Is This Happening?, *Rebecca Traister Explains Why Women Are so Furious: Podcast & Transcript*, NBC NEWS (Oct. 2, 2018), https://www.nbcnews.com/think/opinion/rebecca-traister-explains-why-womenare-so-furious-podcast-transcript-ncna9l5646 [https://perma.cc/S8QY-2E6L].

219 Katie Underwood, *One Year After #MeToo, We're Only Just Starting to Have the Right Conversations*, FLARE (Oct. 3, 2018), https://www.flare.com/news/metoo-movement-anniversary/ [https://perma.cc/D98R-ETX6]; *See also* Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/ [https://perma.cc/7PAD-YJZK].

220 Dana R. Fisher, *Here's Why the Protests Against Kavanaugh (and the Trump Administration) Won't Go Away*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/06/heres-hythe-protests-against-kavanaughs-confirmation-and-trumps-administrationwont-go-away/ [https://perma.cc/PGK4-SNR4].

221 *See* Mendelson Foreword, *supra* note 178, at 1373.

222 *See* TRAISTER, *supra* note 31, at 116.

is significantly more likely to achieve the changes sought. Thus, the fact that sexual harassment—or rather victims' and allies' reaction to it, as well as the increasingly widespread recognition of how sexual harassment is entangled with gender and racial inequality—has often pushed women to increase their democratic engagement is critically important. Recall that both of the "Years of the Woman" referred to above occurred in the wake of accused sexual harassers being nominated and confirmed for the Supreme Court.[223] However, women's rage over sexual harassment—specifically Clarence Thomas's sexual harassment of Professor Anita Hill—in 1992 was not adequately sustained and almost three decades would pass until another multiply-accused sexual harasser spurred a second "Year of the Woman."[224]

2. Dangers of Allowing Suppression of Women's Democratic Participation

The experience of the decades between 1992 and 2020 show the difference that women's engagement in our democracy makes: as voters, as elected officials, as activists, and as supporters of elected officials. For instance, during the years when women were not particularly politically active, efforts to suppress non-white people's ability to participate in that most basic of democratic activities, voting, gained in strength and intensity.[225] The effects of this inactivity are especially salient in regards to white women, as much evidence suggests that women of color have remained consistently politically active over centuries,

223 Maya Salam, *A Record 117 Women Won Office, Reshaping America's Leadership*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html [https://perma.cc/FDZ3-ME9Z]; Michael S. Rosenwald, *Anita Hill Hearings Led to the 1992 Year of the Woman*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/ [https://perma.cc/TUA6-QXRT]; Elaine Karmack, *2018: Another 'Year of the Woman*,' BROOKINGS (Nov. 7, 2018), https://www.brookings.edu/blog/fixgov/2018/11/07/2018-another-year-of-the-woman/ [https://perma.cc/AP8G-ANPP].

224 Note that in 2018, there were multiple multiply-accused harassers, not just Kavanaugh, whose abuses pushed previously non-politically-engaged women to activism. *See, e.g.*, Fiza Pirani, *#MeToo: A Timeline of 2018's Sexual Harassment Scandals*, Atlanta J.-Const. (May 25, 2018) https://www.ajc.com/news/national/metoo-timeline-2018-sexual-harassment-scandals/Lv8ftAS6o0EMSdmqfo2R1L/ [https://perma.cc/2TYJ-ZS6D] (chronicling timelines of #MeToo accusations in the first half of 2018, including many multiply-accused harassers); Nigel Chiwaya, *New Data on #MeToo's First Year Shows 'Undeniable' Impact*, NBC News (Oct. 11, 2018), https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821 [https://perma.cc/54TJ-GAV8] (describing increases in sexual harassment lawsuits and other legal and political #MeToo activism that occurred in 2018).

225 Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL'Y 1088, 1089-–90 (2013).

even while their activism is consistently rendered invisible by a variety of forces.[226] Efforts to suppress non-white people's ability to participate in that most basic of democratic activities, voting, also gained in strength and intensity.[227] Thus, experience suggests that equality of democratic participation for multiple marginalized groups is, on balance, increased by women's greater democratic participation.

In this context, the disillusionment with democratic participation that could result from the anti-democratic aspects of rulemaking exposed by the DeVos rulemaking raises the specter of deterring future political engagement for other groups beyond women, causing widely harmful effects on equality of democratic participation in general. Most concerning is how democratic disengagement by women potentially removes large numbers of college-educated white women—and their significant resources—from the coalition of those fighting discrimination against voters of color of all genders.

Moreover, the view that it is far-fetched to believe women who commented in the DeVos rulemaking would disengage from American democracy more broadly "merely" because they realized their comments were essentially ignored by their government (including both the agency and the courts) fails to consider the ways women, especially white women, in the United States have historically been successfully discouraged from democratic participation. First of all, patriarchy's all-encompassing public-private structural divide has only partially been dismantled, and to the extent it remains, it sets up the private realm as the ideal and indeed only valuable place for women—even when economic realities mean and have long meant that, for the most part, only women who are white and connected to propertied white men could be confined on such a supposed pedestal.[228] This patriarchal scaffolding was key to the denial of women's right to vote that was amended out of the Constitution barely a hundred years ago.[229]

Once the 19th Amendment went into effect, moreover, the white, male, and propertied ruling class of the time quickly realized that they could retain power if white women voted with them.[230] However, white women's voting could not be diluted and/or controlled

226 *See And Even More of Us Are Brave*, *supra* note 71, at 54–69.

227 *Id.*

228 *Id.*

229 Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 538 (2016).

230 *See* REBECCA TRAISTER, ALL THE SINGLE LADIES 490–91 (Simon & Schuster, 2016).

through the *de jure* methods[231] that diluted or eliminated entirely the votes of non-whites. White women, after all, were not segregated geographically from white men the way that communities of color were and often continue to be segregated—again through both *de jure* and *de facto* methods—from white communities.[232] Instead, the ruling minority of white, propertied men effectively got white women to vote *with them* for much of the subsequent hundred years, with some—if contested[233]—evidence that white women's voting patterns even in 2016 and 2020 fit this historical pattern.

3. Race, Economic Dependency, and Women's Democratic Participation

Furthermore, history teaches us that two of the most effective methods for getting white women to vote with white men were and are economic dependency and racism. For instance, research indicates that white women who are or have been married to men are much more likely to vote in favor of continuing white male dominance of the government and political spheres, as compared to white women who have never been married.[234] Because largely unabated economic gender discrimination such as massive pay inequity makes rejecting marriage impoverishing, even today, marriage is often a sign of economic dependency or at least co-dependency for women.[235] In such economic circumstances, the perception that what is good for white men will be good for their dependents, including

231 U.S. CONST. art. I, § 2, cl. 3 (in relevant part, the Three-Fifths Compromise reads: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

232 *See* Segregated by Design, SILKWORM STUDIOS (April 2019), https://www.segregatedbydesign.com/ [https://perma.cc/JB53-3R82].

233 For instance, some rely on exit poll data, which others criticize as unreliable. *See. e.g.*, Jonathan Chait, *'White Women Voted for Trump' Is the Worst Election Trope*, INTELLIGENCER (Dec. 1, 2020), https://nymag.com/intelligencer/article/did-white-women-vote-for-trump-no.html [https://perma.cc/SQ2Y-MXG8]. The Pew Research Center developed a non-exit poll reliant research method, which shows that a majority of white women voted Democratic in 2016, 2018, and 2020. Ruth Igielnik et al., *Behind Biden's 2020 Victory*, PEW RSCH. CTR. (June 30, 2021), https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/ [https://perma.cc/B2VP-8ZYN].

234 *See* TRAISTER, *supra* note 31, at 123 (discussing Dara Z. Strolovitch, Janelle S. Wong & Andrew Proctor's research showing that "59 percent of never-married white women voted for Hillary Clinton, compared to the almost reverse majority of married white women, 57 percent, who voted for Donald Trump").

235 Christopher T. Stout et al., *Gender Linked Fate, Race/Ethnicity, and the Marriage Gap in American Politics*, 70 POL. RSCH. Q. 509, 511 (2017).

their wives, logically leads many white women to see it as in their interest to vote as their husbands do.[236]

With regards to racism, a long and plentiful history of white men using racism to divide white women from people of color includes such notable examples as what journalist Rebecca Traister has called "The Ballot Box Divide":[237] when the right to vote was used as a wedge to successfully divide the once strong coalition between the abolition and women's suffrage movements of the 19th century. That coalition fought for voting rights for all Black people during pre-Civil War efforts to abolish slavery and during part of the five years between Juneteenth, 1865, and the ratification of the 15th Amendment. However, the fight over whether the 15th Amendment would include women (of any race) ultimately fractured not only that coalition but also the women's suffrage movement itself.[238] It did so by pitting against each other those who felt that securing the right to vote for African American men was more important; those who were concerned that opposing a 15th Amendment for Black male votes would doom *any* expansion of voting rights; those who opposed voting expansions that excluded women; those who felt white women should get the right to vote before any African Americans did; and those in any number of variations between those positions.[239] Specific examples of the divide-and-conquer tactics used during those years include state ballot referenda,[240] presumably written by white men who had exclusive control of all levels of government at the time, which forced voters to choose between women's suffrage and Black male suffrage. A pro-slavery white man also offered funding to Elizabeth Cady Stanton and Susan B. Anthony to publish a suffragist publication, one that ultimately exposed these white women's willingness to spout deeply racist beliefs in

236 *See* Lucia Graves, *Why Hillary Clinton Was Right About White Women—And Their Husbands*, THE GUARDIAN (Sept. 25, 2017), https://www.theguardian.com/us-news/2017/sep/25/white-women-husbands-voting [https://perma.cc/X53B-UMZZ].

237 TRAISTER, *supra* note 31, at 116.

238 Margaret E. Johnson, *Lessons Learned from the Suffrage Movement*, 2 MD. BAR J. 115, 117 (2020); Women's Suffrage, HISTORY.COM (Mar. 9, 2022), https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage [https://perma.cc/66EM-AHSG]; *Why the Women's Rights Movement Split over the 15th Amendment*, NAT'L PARK SERV., (Jan. 14, 2021), https://www.nps.gov/articles/000/why-the-women-s-rights-movement-split-over-the-15th-amendment.htm [https://perma.cc/MW47-FAS3].

239 *See generally* KYLA SCHULLER & BRITTNEY COOPER, THE TROUBLE WITH WHITE WOMEN: A COUNTERHISTORY OF FEMINISM (Pub. Affs. 2021). *See also* Virginia Sapiro, *The Power and Fragility of Social Movement Coalitions: The Woman Suffrage Movement to 1870*, 100 B.U. L. REV. 1557 (2020).

240 *See* TRAISTER, *supra* note 31, at 118.

order to secure their own rights and interests, which they were ultimately unsuccessful at doing, since both women died before the 19th Amendment was ratified.[241]

Another example comes from competing stories about the addition of "sex" to Title VII of the 1964 Civil Rights Act. One story is that "sex" was introduced by a white southern congressman, Howard W. Smith, who opposed Title VII, in order to defeat it and its anti-*race* discrimination provisions.[242] The competing version of the story[243] suggests that the addition of "sex" was a result of lobbying on the part of Alice Paul's National Women's Party, an organization whose history, founder, and membership at the time were hardly pro-racial equality. For instance, as a leader of the crucial 1913 Women's Suffrage Parade, Paul tried to force African American suffragist and anti-lynching activist, Ida B. Wells, to march at the back of the parade, where the other Black suffragists were segregated during the procession.[244] By the 1960s, the National Women's Party was made up mainly of elderly white women who did not support the civil rights movement or civil rights legislation.[245] According to the competing version of the story, these members lobbied Smith to propose the "sex" amendment because they objected to the way the legislation would leave white women unprotected from discrimination (unsurprisingly, they did not appear to recognize or care about how women of color might face discrimination based on sex).[246]

Regardless of which of these stories is more accurate, it seems clear that Smith would have seen proposing the addition of "sex" as a "win-win" situation for him and for the

241 *See id.* at 117–21.

242 Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), https://slate.com/news-and-politics/2014/02/the-50th-anniversary-of-title-vii-of-the-civil-rights-act-and-the-southern-segregationist-who-made-sure-it-protected-women.html [https://perma.cc/5KBZ-96MK]; *see also* John Feehery, *The Poison Pill*, THE HILL (Oct. 28, 2009), https://thehill.com/blogs/pundits-blog/lawmaker-news/65239-the-poison-pil [https://perma.cc/QR3J-6ALS]; Rebecca Onion, *The Real Story Behind "Because of Sex,"* SLATE (Jun. 16, 2020), https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html [https://perma.cc/975W-PVB3].

243 Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

244 *See* TRAISTER, *supra* note 31, at 133.

245 *See e.g.*, COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT (1977), *reprinted in* HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE, 15–27 (Keeanga-Yamahtta Taylor ed., 2017) (commenting, in part, on the exclusion of Black feminists from the white feminist movement of the 1960s).

246 *See* Freeman, *supra* note 243.

ruling white male minority to which he belonged. That is, either the addition would doom the bill and its protections against race discrimination, or it would ingratiate him with white women constituents who cared about sex discrimination and/or worried about having supposedly less legal protection than African Americans. (Smith likely assumed that white women constituents who did not care about such issues voted similarly to their white husbands, so Smith did not need to ingratiate himself with them.)

An even more recent example involving the use of racism to (attempt to) retain white women as voters for the ruling white male minority appeared in the 2020 Republican National Convention and 45's appeals to "suburban housewives." In a tweet on August 12, 2020, for instance, 45 claimed, "The 'suburban housewife' will be voting for me. They want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood. Biden would reinstall it, in a bigger form, with Corey Booker in charge!"[247]

45's references to "safety" and to an African American male Senator are clear references to another way in which white men have historically used race to convince white women that it is in their interests to politically support white men: by promoting stereotypes of black men as violent criminals, including through what civil rights leader Angela Davis long ago identified as the "Myth of the Black Rapist"[248] and what law professor Paul Butler has more recently named "The Thug"[249] stereotype. White men involved in white supremacist organizations like the Ku Klux Klan used the rapist myth as the primary excuse for lynching Black men in the Jim Crow South.[250] Although lynching was mainly perpetrated by men, white women certainly collaborated in both active and passive ways in lynching and other Jim Crow institutions.[251]

Indeed, white supremacists justified violence and discrimination against men of color by appealing to a pretext of protecting white women's bodies from Black men's sexual

247 Caroline Kitchener, *The Republican National Convention Is Targeting 'Suburban Housewives,'* THE LILY (Aug. 27, 2020), https://www.thelily.com/the-republican-convention-is-targeting-suburban-housewives-voters-ask-is-that-code-for-racist-white-woman/ [https://perma.cc/B7FA-VNY4].

248 *See generally* Angela Davis, *Rape, Racism and the Myth of the Black Rapist*, *in* WOMEN, RACE & CLASS 172 (1981).

249 *See generally* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

250 *See* Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 HASTINGS L. J. 27, 37–38 (2021).

251 *Id.*

violence. This racist tactic was such a reliable strategy that it became a formula used repeatedly outside the lynching context. For instance, in an article about the campaign led by white male labor unions during the 1890s–1920s against Chinese restaurants, law professor Gabriel Chin and attorney John Ormonde discuss how Chinese restaurants were alleged to be sites of sexual exploitation and assault of white women by Chinese men.[252] This campaign resulted in various bills and legislation barring white women from working in Chinese restaurants, as well as police practices of ordering white women to leave Chinese restaurants.[253]

The more current "Thug" stereotype at the heart of 45's tweet does not limit the supposed violence to sexual violence, but simply paints all Black men as violent criminals and "a threat . . . [that t]he state—especially the police—is authorized to control . . . by any means necessary."[254] Indeed, the references to safety and Senator Booker cannot be considered dog-whistles only because their racism is so obvious.[255] Equally obvious is that the "suburban housewives" to whom the tweet is calling out are white women like those who have been filmed over the last few years threatening to or actually calling the police on African Americans for: selling water in a public park;[256] asking the white woman to leash her dog (as she was required to do by law);[257] barbecuing;[258] yelling instructions to their child during a soccer game;[259] and accidentally brushing the white woman with a backpack

252 *See* Gabriel Jackson Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018).

253 *Id.* at 698–716.

254 *See* BUTLER, *supra* note 249, at 9.

255 *See* Jennifer Weiner, *Trump is Dog Whistling. Are 'Suburban Housewives' Listening?*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/opinion/trump-white-women.html [https://perma.cc/U5EV-8PUJ].

256 Jessica Campisis et al., *After Internet Mockery, 'Permit Patty' Resigns from Her Position as CEO of Cannabis-Products Company*, CNN (June 26, 2018), https://www.cnn.com/2018/06/25/us/permit-patty-san-francisco-trnd/index.html [https://perma.cc/M7UF-RQS6].

257 April Siese, *White Woman Amy Cooper Fired from Her Job After She Called the Cops on a Black Man in Central Park*, CBS NEWS (May 27, 2020), https://www.cbsnews.com/news/central-park-karen-amy-cooper-white-woman-calls-cops-black-man-fired-franklin-templeton/ [https://perma.cc/DTT2-ZH4B].

258 Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops on Black BBQ, 911 Audio Released: 'I'm Really Scared! Come Quick!*', NEWSWEEK (Sept. 4, 2018), https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057 [https://perma.cc/C28L-AVKZ].

259 Antonia Noori Farzan, *BBQ Becky, Permit Patty and Cornerstore Caroline: Too 'Cutesy' for Those White Women Calling Police on Black People?*, WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/19/bbq-becky-permit-patty-and-cornerstore-caroline-too-cutesy-for-those-white-women-calling-cops-on-blacks/ [https://perma.cc/QC33-5W5Q].

while passing her in a convenience store.[260] It is an open question whether the majority of white American women voted for 45 in 2016,[261] whether they are of the "Cornerstore Caroline" (or the broader "Karen") variety, or whether they instead fueled the 2018 "Year of the Woman" and joined lines of white women standing between police and Black Lives Matter protesters.[262] Nevertheless, the history of white women voting for and supporting political white male dominance despite—or perhaps because of—its racist policies, is clear.

It is also important to recognize how the Thug stereotype and its consequences are actually a disenfranchisement twofer. They not only convince at least a significant minority of white women[263] to dilute their own potential power (had they been unified and/or working in coalition with non-white people) to do more than simply prop up the ruling white male minority, they also contribute to racist policing and the mass incarceration of African Americans that Michele Alexandre has characterized as "The New Jim Crow."[264] That is, because one of the collateral consequences of criminal convictions in many states is loss of the right to vote, the Thug stereotype, by enabling and justifying racist policing, criminal conviction and incarceration, enables disenfranchisement of black voters.

Indeed, the disenfranchisement of voters of color through the racially discriminatory

260 Kristine Phillips, *A Black Child's Backpack Brushed up Against a Woman. She Called 911 to Report a Sexual Assault.*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/nation/2018/10/13/black-childs-backpack-brushed-up-against-woman-she-called-report-sexual-assault/ [https://perma.cc/6QZ4-8RRG].

261 *See* Chait, *supra* note 233; *see also* Dora Mekouar, *Women Outnumber and Outvote Men, but They Don't Vote Alike*, VOA NEWS (May 5, 2021), https://www.voanews.com/a/usa_all-about-america_women-outnumber-and-outvote-men-they-dont-vote-alike/6205437.html [https://perma.cc/4MGZ-J6EN].

262 Jenna Amatulli, *'Wall Of Moms' in Portland Protects Protesters from Federal Agents*, HUFFPOST (July 20, 2020), https://www.huffpost.com/entry/wall-of-moms-portland-oregon_n_5f15a73ac5b6cec246c5990e [https://perma.cc/9HMD-9TKQ]; Savannah Eadens, *Viral Photo Shows Line of White People Between Police, Black Protesters at Thursday Rally*, LOUISVILLE COURIER J. (May 29, 2020), https://www.courier-journal.com/story/news/local/2020/05/29/breonna-taylor-photo-white-women-between-police-black-protesters/5286416002/ [https://perma.cc/EJL8-2M49].

263 Erin Delmore, *This is How Women Voters Decided the 2020 Election*, MSNBC (Nov. 13, 2020), https://www.nbcnews.com/know-your-value/feature/how-women-voters-decided-2020-election-ncna1247746 [https://perma.cc/9EER-AF7L].

264 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

criminal legal system[265] and its collateral consequences joins a long list of other methods used to attack the voting rights of people of color. Recent years have drawn increasing and needed attention to a host of state law-based strategies to exclude non-white people from voting. The baldly discriminatory laws passed in several states after Americans of color—especially Black Americans—voted in large numbers in the 2020 election and the January 2021 Georgia runoff election are only the most recent examples.[266] Race-based gerrymandering, for instance, is accomplished by state governments exercising their constitutional powers to draw the boundaries of congressional districts.[267]

In addition, state laws awarding all of a state's electors in the Electoral College to whichever candidate wins the majority of votes in the state play into the racist history of the Electoral College and likely decrease the voting power of non-whites in presidential elections.[268] As already noted, the Electoral College was constructed as a part of the "Three-Fifths Compromise" in the original Constitution, which gave slave-holding states outsized federal voting power by treating enslaved African Americans as three-fifths of a person for determining the numbers of electors a state received—without allowing enslaved persons to vote, of course.[269] Nor has this history of both racist and general inequality been left behind by the current Electoral College, largely because the "winner take all" state laws cause the "worth" of a vote in one state to be as much as quadruple the power of a vote in another state.[270] Two of the most "underrepresented" states as a result of this combination (winner-take-all state laws plus the Electoral College)— California and Texas—are also the two most populous states of the four states in which the non-white population outnumbers the

265 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. POL. 491, 492 (2004).

266 *Voting Laws Roundup: October 2022*, BRENNAN CTR FOR JUST. (Oct. 6, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022?_ga=2.43314341.1212300263.1665682698-323802553.1665682698 [https://perma.cc/MWQ6-Q2RS].

267 Adriane M. Kappauf, *Twin Flames: A Story of Racial Gerrymandering and Partisan Gerrymandering*, 28 WIDENER L. REV. 119, 127 (2022); Laura Odujinrin, *The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 164, 170 (2021).

268 David Schultz, *Minority Rights and the Electoral College: What Minority, Whose Rights?*, 55 GA. L. REV. 1621, 1643–44 (2021).

269 *Id.* at 1629–30.

270 Denise Lu, *The Electoral College Misrepresents Every State, but Not as Much as You May Think*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/graphics/politics/how-fair-is-the-electoral-college/?noredirect=on [https://perma.cc/TW26-YGEW].

white population.[271] Thus, the combination of these two facets of the system makes it even more likely that people of color are being underrepresented or are having their votes diluted disproportionately in presidential elections. This history and the current operation of state laws together have gifted the Electoral College with the negative distinction of being "one of the most fundamentally undemocratic parts of U.S. elections . . . [and] government."[272]

4. "Divide and Conquer" Tactics to Suppress Women's Democratic Participation under Title IX

In case such examples still seem too remote from the DeVos rulemaking, I have documented efforts by DeVos and her collaborators that rely on a similar divide-and-conquer playbook. They have tried to deploy a set of narratives that pit women (whom the narratives assume are all white) against people of color (whom the narratives assume are all men).[273] Unsurprisingly, given the Title IX Movement's focus on sexual harassment and gender-based violence, these narratives returned to the familiar "men of color sexually assault white women" myth. However, the tactics used by DeVos and her partners rely on this stereotype in a different way, deploying a narrative that accusations of sexual assault on college campuses are just another iteration of white women *falsely* accusing men of color of sexual assault, false accusations that are leading to discriminatory discipline directed at, especially, Black male students.[274] In two articles written during 45's term, I dissected this narrative and showed how it is not based on known or knowable facts, largely because no laws or regulations require colleges and universities to disclose demographic information on student discipline matters.[275] Rather, this narrative relies on intersectional racialized sex stereotyping that does an enormous amount of damage, notably to women of color, but also to men of color and white women.[276]

271 Hans Johnson et al., *California's Population*, PUB. POL'Y INST. OF CAL. (Jan. 2022) https://www.ppic.org/publication/californias-population/ [https://perma.cc/RS49-A7VG]; Alexa Ura, *Hispanic Texans May Now Be the State's Largest Demographic Group, New Census Data Shows*, TEX. TRIBUNE (Sept. 15, 2022) https://www.texastribune.org/2022/09/15/texas-demographics-census-2021/ [https://perma.cc/R79M-A4LC].

272 Alex Cohen, *The National Popular Vote, Explained*, BRENNAN CTR. FOR JUST. (Dec. 8, 2020), https://www.brennancenter.org/our-work/research-reports/national-popular-vote-explained [https://perma.cc/M357-LPPE].

273 *See Dog Whistles and Beachheads*, *supra* note 11, at 308.

274 *See id.*

275 *See Dog Whistles and Beachheads*, *supra* note 11; *And Even More of Us Are Brave*, *supra* note 71.

276 *See And Even More of Us Are Brave*, *supra* note 71, at 16–20.

Although the infinitesimally small amount of support expressed for the DeVos NPRM suggests that this narrative had little persuasive effect on comments filed, it remains impossible to know whether it dissuaded some from commenting at all and how large such a group may have been. After all, due to editing and publication schedules, neither of my pieces[277] was published before or during the short comment period for the DeVos NPRM, whereas prominent usages of the narrative I was calling out were published before the comment period closed in such venues as *The Boston Globe* and *The New York Times*.[278] Aside from what data might have shown, had it been even possible to gather it, logic suggests that the deterrent effect would likely have been strongest on women—white and non-white—if they were inclined to oppose or criticize the DeVos NPRM. First, the narrative reminds women of color of racist stereotypes faced by men with whom they may share a community. This reminder could dissuade them from openly opposing the proposed regulations so as to avoid potentially having their opposition interpreted as approval of such stereotypes.[279] Second, the narrative could dissuade white women from commenting in opposition because the narrative suggests that white women who oppose the proposals are doing so because they are racists, liars, or both.

These examples show how discrimination outside the rulemaking process can create inequalities within the rulemaking process, especially when the rulemaking takes on an issue that is politically complex and fraught, as many civil rights issues can be. This discrimination is piled on top of the already strong and pervasive economic inequality endemic to the rulemaking process and the unequal agency attention received by insider comments as compared to outsider comments.[280] In light of these inequalities, those from marginalized groups may have additional reasons to participate in commenting as a part of an organized, collective voice that uses some form of legitimate mass commenting. In this context, dismissing legitimate mass comments adds to discrimination already pervasive in the process and further dilutes the rights and democratic participation of certain classes of outsider commenters. A new way of valuing legitimate mass comments is needed, the topic to which the next and final section turns.

277 *See generally Dog Whistles and Beachheads*, *supra* note 11; *And Even More of Us Are Brave*, *supra* note 71.

278 *See Dog Whistles and Beachheads*, *supra* note 11, at 319–24.

279 *See id.* at 309.

280 *See* Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENVTL. L. REV. 175, 183–85 (2019).

IV. A Proposal: Equalizing Participation in Rulemaking via "Modified Negotiated Rulemaking"

Both the Senate committee report[281] and Noveck's 2021 testimony[282] provide multiple recommendations, mainly relying on technological solutions, for addressing the problems with mass commenting and increasing meaningful participation by more commenters, especially outsider commenters. Several of these recommendations, even if not implicated in the DeVos rulemaking, make eminent sense. For instance, both the Senate committee report and Noveck discuss agencies' failure to use bot-screening technology to prevent or eliminate fake comments from being filed, and thus recommend adoption of CAPTCHA technology as a solution.[283] The Senate committee report also recommends that: agencies develop protocols for screening and ensuring that fake or abusive comments are not posted; the APA be amended to "provide guidance to agencies on the degree to which they should consider the volume of comments they receive in favor of or against a proposed rule"; agencies sort and figure out how to avoid posting "duplicative comments"; and agencies prohibit damaging technology and use the threat of criminal penalties to prevent identity theft and comments from being filed under fake identities.[284] Noveck also provides numerous suggestions of other technologies and methods by which governments could encourage more meaningful citizen participation in comment processes.[285] Finally, Noveck emphasizes that "the real problem . . . is not astroturfing, but taking the value of public commenting seriously."[286]

With regard to boilerplate comments in particular, the Senate committee report recognizes as a problem that agencies publish "thousands of duplicate or near-duplicate comments that make a docket difficult or impossible for the public to review . . . for substantive information."[287] The report notes that, in contrast, the Securities and Exchange

281 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97.

282 *Astroturfing Hearings*, *supra* note 16.

283 *See id.* at 21–22.

284 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97, at 3–4.

285 *See Astroturfing Hearings*, *supra* note 16, at 6.

286 *Id.* at 4.

287 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97, at 25. *See also id.* at 27.

Commission posts one sample of the boilerplate comment, with a number corresponding to how many times the same comment language was repeated.[288]

Though these suggestions contain valuable initial insights, they do not address the issue of how to deal with legitimate mass commenting, nor do any of the solutions address the loss of democratic participation or the unequal democratic participation involved in just eliminating all mass commenting, legitimate or not. To confront such issues, I return to Weinberg's *The Right to be Taken Seriously* and make a proposal for a new/adjusted notice-and-comment process.

A. Deliberative Democracy and the Proposed Modified Negotiated Rulemaking Method

In *The Right to be Taken Seriously*, Weinberg describes two kinds of deliberative-democracy:

> The first is deliberation among the people . . . It is marked by some measure of equality; no one person or advantaged group dominates. Participants engage with each other, trying to convince each other [in] an open-minded search for a larger public good, rather than the selfish goals of the participants . . . Alternatively, deliberation can be seen to take place not among ordinary people, but among elites with decision-making authority . . . The goal is the same as before, though: As the participants, somewhat shielded from democratic pressures, seek to reconcile their contrasting viewpoints, "a policy emerges that can serve a more universal consensus of the common good."[289]

Weinberg then confirms what anyone who has read this Article to this point already knows:

> Notice-and-comment is neither of those things. It is neither communication among members of the public nor communication among elites. Rather, it is communication across that line as members of the public seek to influence agency decision-makers. Even more importantly, it is not deliberative. There is . . . little opportunity for members of the public to engage with each other in any sustained way . . . Notice-and-comment does not facilitate consensus.[290]

288 *See id.* at 27.

289 Weinberg, *supra* note 204, at 172–73.

Rather, Weinberg concludes, "Each member of the public participating in a notice-and-comment process has the instrumental task of convincing the agency (an authoritative decision-maker) of the correctness of that participant's positions."[291]

While I agree with Weinberg's conclusion regarding the DeVos rulemaking and, indeed, regarding rulemaking generally, I know of—indeed, have participated in—a rulemaking that fits his deliberative-democracy description and thus shows that it is *possible* to achieve such deliberative democracy in a rulemaking proceeding. Specifically, in early 2014, during the Obama administration, I served as a Negotiator in a Negotiated Rulemaking that amended regulations under the Clery Act after the 2013 Violence Against Women Act (VAWA 2013) amended the statute.[292] Over four months, this Negotiated Rulemaking Committee—made up of negotiators who had been nominated by organizations and educational institutions and then selected by the ED officials that convened the rulemaking—met repeatedly in Washington, D.C., to negotiate a consensus set of regulations.[293]

I had been nominated by the Victim Rights Law Center, where I was serving as a research fellow, and ED selected me to represent off-campus advocacy organizations. Other negotiators represented a range of offices and organizations concerned with and working in campus crime prevention and response, including (as far as I can remember) campus police, campus women's and victims' advocacy centers, the National Association of College and University Attorneys, off-campus legal services organizations, off-campus student activist organizations, Student Affairs offices, and Title IX coordinator offices.[294] Trained facilitators and a range of agency staff from the Office of Postsecondary Education at ED, which implements and enforces the Clery Act, participated in the meetings. Staff from other parts of ED that had an interest in the negotiation, as well as possibly from the

290 *Id.* at 173–74.

291 *Id.* at 174.

292 *See Negotiated Rulemaking 2013-2014 Violence Against Women Act (VAWA)*, U.S. DEP'T OF EDUC. (Aug. 15, 2018) https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html [https://perma.cc/8ARP-UNNP].

293 *Id.*

294 *Violence Against Women Act (VAWA) Negotiated Rulemaking Committee 2013*, U.S. DEPT' OF EDUC. (Feb. 21, 2014) https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf [https://perma.cc/UW3K-ALMW].

Office on Violence Against Women in the U.S. Department of Justice, which implements VAWA, observed. The meetings were open to the public, so there was also a group of non-agency observers at each meeting, including members of the trade press.

Although I am unsure if the VAWA 2013 Negotiated Rulemaking Committee's membership would fit Weinberg's definition of a deliberation among ordinary people or among elites, the process did have the marker of equality and the engagement between peers that Weinberg describes.[295] Also consistent with Weinberg's description, the Committee's goal was to reach a consensus about a common public good (i.e. rules that both fulfilled the statutory purposes of getting schools to better protect students from crimes committed on campus—especially the four "VAWA crimes" of dating violence, domestic violence, sexual assault, and stalking—and to set out workable compliance obligations).

By the conclusion of the four-month negotiation, the Committee had written proposed rules.[296] Agency staff added explanatory text and background information about the Negotiated Rulemaking and published the package as an NPRM on June 20, 2014. The public had thirty days to comment on the proposed rules, and the final rule with the required responses to comments filed was published in the Federal Register on October 20, 2014.[297]

Never having participated in a Negotiated Rulemaking before, despite having practiced administrative law for a brief time as a new attorney, I learned an enormous amount and am sure that the other participants did as well. The negotiators taught agency staff a lot about the problems that the VAWA 2013 amendments to Clery aimed to address.[298] At the same time, the negotiators—who were overwhelmingly not lawyers—never mind administrative lawyers—learned not only about how the rulemaking process worked but, more importantly, what could be accomplished through such a process. Finally, because almost all the negotiators worked on only a subset of the problems at the heart of the rulemaking, we all enhanced our knowledge of a topic on which we already had significant but often narrow expertise. The fact that no single person knew everything, combined with

295 *See* Weinberg, *supra* note 204.

296 Violence Against Women Act, 79 Fed. Reg. FR35418 (proposed June 20, 2014) (to be codified at 38 C.F.R. pt. 668).

297 Violence Against Women Act, 79 Fed. Reg.FR 62752 (Oct. 20, 2014) (to be codified at 38 C.F.R. pt. 668).

298 *See*, *e.g.* Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONGRESSIONAL RESEARCH SERVICE, Apr. 2019, at 22–23.

the structure of the process (a negotiation), created the sense of equality (with regard to status and power) that Weinberg characterizes as deliberatively-democratic.

As a result of these deliberatively-democratic characteristics, I forged relationships with other negotiators that I retain to this day. And even though there were plenty of disagreements, several quite intense, and tactical maneuvering abounded, almost everyone involved in the negotiation worked hard to achieve the common goal of writing the best possible rules. Unsurprisingly, the subsequent comment period and the comments filed showed no evidence of the kind of animosity between the agency and the commenters that was pervasive in the DeVos rulemaking.

The stark contrast between these two rulemakings—combined with the larger challenges to democratic participation and equal protection endemic to rulemaking generally and especially acute with regard to mass commenting and surrounding attitudes—show a desperate need for a better strategy. I therefore propose that federal agencies engaged in rulemakings in which legitimate mass commenting occurs, or is anticipated to occur, use a version of negotiated rulemaking to engage legitimate mass commenters—alongside rulemaking insiders, both commenters and agency staff—in writing new rules.

This modified-negotiated rulemaking process would change the order that was used in the Clery Act rulemaking so that, instead of negotiators being nominated, selected, and then negotiating an NPRM that is released to the public for comment, the comments to the NPRM published by the agency would identify potential negotiators. Undoubtedly a fair number of those negotiators would end up being or representing the usual rulemaking insiders. However, legitimate mass commenters would get a place (or several, depending on how many legitimate mass commenters there are and how they are organized) at the negotiating table as well.

How would the representatives of the legitimate mass commenters be identified and selected? There are several potential methods. If a particular organization (e.g., MoveOn.org) organized a significant number of comments (e.g., over one thousand), for instance, the agency could ask the organization to nominate one of the members or constituents who commented. Alternatively, regulations.gov (or whichever platform is being used for comment submissions) could ask commenters to check a box indicating their willingness to participate in a committee that would help the agency amend or finalize the rules based on the comments after the comment period had closed. The agency could, for instance, select commenters who all filed the same boilerplate comment and checked the box expressing interest to serve as negotiators at random, and could thus issue invitations to

join the committee until one was accepted. If more screening is needed or preferred, the agency could email those that checked the box expressing interest and ask them to apply and provide further information needed for screening. Alternatively, the agency could invite commenters that changed or added to the boilerplate language in some way to join the rulemaking committee (an approach that would treat such changes as an indication that the commenter put extra thought into their comment and is less likely to be a "clicktivist").

Once the committee is convened, the agency could present the committee members with a set of questions, possible amendments, or additions suggested by the comments and ask the committee to come to a consensus decision on those questions. Meetings could be held via Zoom or a similar platform to make participation more accessible. The committee's decisions would then be incorporated into the final published rules.

Granted, this proposal currently consists of only broad brushstrokes. Many details still need to be fleshed out. But this proposal is not without precedent. Mendelson discusses a 1997 rulemaking that predates mass commenting, but in which 600 of the 700 comments filed came from the general public and collectively raised concerns which the agency took seriously.[299] As a result, the agency convened focus groups (which presumably included people who filed a critical comment or shared these commenters concerns) on the topic before finalizing the rule.[300]

This recommended change in the order of the negotiation, the NPRM, and the issuance of the final rules makes this proposal more inclusive, especially regarding its involvement of rulemaking outsiders. Under the existing order, as was the case with Clery Act rulemaking, when negotiators are convened to help write proposed rules, the negotiators are much more likely to be insiders of some sort. They are likely to be insiders because in order to become negotiators, they have to know about the rulemaking process, understand the importance of participation, likely get an organization of some sort to nominate them, and finally be perceived by the agency as having some expertise or subject matter knowledge that is relevant and valuable.

Negotiators identified in this traditional way are also much more likely to be participating as a part of their job, since serving in such a capacity is a significant time commitment and may require, as was the case for the Clery Act negotiated rulemaking, several trips to Washington, D.C., not entirely funded—if funded at all—by the government. With the

299 *See* Mendelson Foreword, *supra* note 178, at 1366.

300 *Id.*

exception of the two student representatives on the Clery Act rulemaking, I believe I was the only negotiator whose work on the Committee was not being compensated in some fashion by an employer, and my availability and geographical location in the D.C. metropolitan area were convenient coincidences that enabled my participation without major personal expenses. Such circumstances are unlikely to frequently recur—if they ever do.

By switching the order of the NPRM and the convening of the Committee, the comment process would allow rulemaking outsiders to identify themselves to the agency. It would also expand the pool of outsiders, so as to increase the chances that at least one will be in a situation similar to mine during the Clery Act rulemaking process. The potential negotiator or negotiators who thusly identify themselves will then have the time and geographic location necessary to participate without the support of an employer or some other compensation. Note that the pandemic's lessons about conducting business over Zoom alleviate some of the geographical concerns.

Because such Committees engage in a deliberative dialogue like Weinberg describes[301] and like I experienced, the agency is likely to learn valuable things from the rulemaking outsiders on the Committee. Moreover, those outsider insights are much less likely to be already known by the agency and other insiders. In turn, the rulemaking outsiders are likely to learn from the agency and from the rulemaking insiders on the Committee—most importantly, information about communicating effectively with and influencing the government. The likelihood of the agency learning new and worthwhile information is also increased exponentially in rulemakings involving the rights and lives of marginalized groups because such groups are outsiders multiple times over, which can render them virtually invisible to the government. Agencies especially need mechanisms that can help them identify and communicate with such extreme outsiders, or the agency could end up regulating in a manner that harms or facilitates violations of the marginalized group's rights.

With regard to topics like sexual harassment and gender-based violence, in which the victims for centuries (indeed, millennia) have been shamed and intimidated into silence, the need to include and listen to these groups' perspectives is especially acute. This acute need makes Title IX rulemaking a perfect area in which to experiment with this proposed approach. In addition to this general ideal fit, however, a specific issue about Title IX enforcement that (re-)emerged in the 2022 NPRM provides an especially appropriate opportunity in which to pilot this proposal. The next section turns to this potential pilot.

301 Weinberg, *supra* note 204, at 172–73.

B. Using Modified Negotiated Rulemaking to Write (Better) Rules for "Mandatory Reporting"

This particularly appropriate issue involves what is often referred to as "mandatory reporting," a term denoting, in this context, situations wherein employees of non-elementary and non-secondary schools must notify the school's Title IX Coordinator when they have information about conduct that may constitute sex discrimination under Title IX.[302] As I and others, mainly university faculty from a variety of disciplines, have argued, the 2022 NPRM unfortunately did not take the best, trauma-informed, and most non-discriminatory approach to mandatory reporting.[303] This failure appears to be caused by the incompatibility of ED's proposed approach with certain organizational realities of higher education institutions that can counteract and ultimately defeat the purposes of mandatory reporting.[304] Ironically, the motivation of the 2022 Title IX NPRM is clearly ED's wish to *encourage* sexual harassment and gender-based violence survivors to tell school employees when they have been victimized so that the survivors can access the wide range of remedies that schools are supposed to provide. Instead, the 2022 Title IX NPRM's proposal will almost certainly *chill* victim reporting.[305]

The reason why the 2022 Title IX NPRM's proposal will almost certainly chill victim reporting is that it requires the vast majority of campus employees to pass student disclosures of information about experiences with sexual harassment and gender-based violence on to the school's Title IX Coordinator, who then decides whether to investigate further based on this information.[306] Such an approach is harmful to survivors in numerous ways, but most importantly, it strips survivors of control over their private information and

302 Note that "mandatory reporting" is often used in the K-12 context to refer to the obligations of school employees under state laws that often require adults who suspect that a minor is being sexually or otherwise physically abused to report that information to local law enforcement. Such laws address minors' particular vulnerability to such abuse, but generally do not apply to postsecondary students who are adults.

303 I have argued this in a comment filed with ED in the 2022 Title IX rulemaking, in which I reference other comments filed by other faculty on this issue. *See* Nancy Chi Cantalupo, Comment Regarding Proposed Rule 106.44 on 'Mandatory Reporting' in the U.S. Department of Education's Rulemaking on Title IX (Docket #ED-2021-OCR-0166) (Sept. 27, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230943 [https://perma.cc/2RS8-3PN6] [hereinafter Cantalupo Comment].

304 *Id.* at 1–2.

305 *Id.* at 2.

306 *Id.* at 4.

robs them of the ability to make decisions about what remedies to pursue and whether any further investigation into the events disclosed by the survivor should occur.

The easiest way to explain why this is harmful is in comparison to what happens in the typical criminal case. Once victims report sexual harassment or gender-based violence to law enforcement, police (and perhaps later, prosecutors) take over and make any and all decisions about whether to move forward and how. Law enforcement decides whether an investigation happens, what information from the survivor's disclosure should be shared with others (potentially including the reported harasser), whether the reported perpetrator should be criminally prosecuted, and how.[307] If the case goes to court, the prosecutor represents the state, not the survivor. So, the survivor cannot keep the prosecutor from sharing certain private information or otherwise exert any control over how the prosecutor proceeds with the case.[308]

Title IX cases, as civil rights matters, should and, when done correctly, *do* operate differently than the traditional criminal case, giving control over such decisions to survivors[309] *as long as* survivors' private information is not in the Title IX Coordinator's hands. Once the information has been shared with the Title IX Coordinator, however, survivors lose a certain amount of control over that information, including any ability to keep the Title IX Coordinator from sharing the information with others.[310]

Therefore, as a practical matter, "mandatory reporting" reduces (if not eliminates entirely) the number of employees on a campus to whom survivors can disclose what has happened to them and still maintain control over that private information.[311] That is, the greater number of employees designated "mandatory reporters," the fewer to whom a survivor can share information and be assured that it will not be disclosed without the survivor's consent. This loss of control causes many victims simply to not report or disclose to anyone—using what law professor Doug Beloof calls the "victim's veto."[312] Obviously,

307 Cantalupo Keynote Speech, *supra* note 134, at 230–31.

308 *See generally id.*

309 *See generally id.*

310 *Id.* at 231–32.

311 Cantalupo Comment, *supra* note 303, at 2–3.

312 *See* Cantalupo Keynote Speech, *supra* note 134, at 230.

using the victim's veto harms the survivors who use it, because they then cannot access other remedies that they may need in the aftermath of the violence.

I filed a comment in response to the 2022 Title IX NPRM explaining in some detail a method by which ED could alter the current proposed rule on mandatory reporting.[313] Using this method, ED would require campuses to designate confidential employees who are not mandatory reporters and who would have the skills and experience to help survivors access a range of resources and remedies provided by a campus and available to a survivor who wants to maintain control over their private information. In the comment, I pointed out how colleges and university organizational structures are incompatible with the mandatory reporting requirements that ED laid out in the 2022 Title IX NPRM—at least if ED's goal is what it appears to be: to get more survivors to come forward and thus be able to access multiple types of remedies.

Now, if ED were to follow the plan that I articulate in my comment on mandatory reporting, I would of course be very satisfied. Short of that, however, ED has a perfect opportunity to use this particular NPRM to experiment with my proposed modified-negotiated rulemaking method. While such a pilot would allow for this experiment, it would not be experimentation for experimentation's sake. Instead, it would give ED an opportunity to gain expertise and knowledge about how campuses actually work with regard to sexual harassment and gender-based violence reporting—knowledge that the misguided mandatory reporting approach in the 2022 Title IX NPRM suggests ED very much needs. In doing so, ED would be wisely taking the kind of step that the agency discussed by Mendelson took when it convened focus groups to educate itself more and delve more deeply into a particular issue that commenters from its initial NPRM flagged as seriously flawed.[314]

Here is how I suggest ED could undertake such a pilot. First, ED would convene a negotiated rulemaking committee on the relatively narrow topic of mandatory reporting, while finalizing the rest of its proposed rules (including any changes commenters have convinced ED to make to its proposals), so that this one issue would not delay finalizing the other rules. ED would then use the comments filed on the topic of mandatory reporting to identify a group of negotiators to meet and talk through the issue. Presumably, the negotiators selected would include people with particular, relevant expertise. In addition, non-experts—or folks with a different kind of expertise, such as that drawn from personal

313 *See generally* Cantalupo Comment, *supra* note 303.

314 *See* Mendelson Foreword, *supra* note 178, at 1366.

experience—could also be identified and invited to join the negotiation. The negotiators would start with the already-proposed rule, consider the whole range of comments filed on the rule, and then negotiate a final version of the rule. From my preliminary research, I did not find any mass or boilerplate comments dealing with mandatory reporting in the even larger number of comments filed in the 2022 rulemaking (238,000+). However, if there are any, those folks could be contacted and asked to nominate themselves or others to represent the position of the mass comment at the negotiating table. In this way, ED could not only try out my proposed modified-negotiated rulemaking to see if it will work but also use the process to fix a serious flaw in its original proposals on mandatory reporting.

CONCLUSION

In *Believing: Our Thirty-Year Journey to End Gender Violence,* Anita Hill makes explicit how American women's democratic participation and gender-based violence are intertwined. After noting that "early suffragists saw the vote as key to all women's personal as well as political autonomy," Hill states emphatically that "gaining the right to vote or run for office will not be enough" because "violence against women is an existential threat to our democracy" and "gender-based violence . . . limits our ability to exercise our rights as citizens."[315]

We cannot afford yet another existential threat to democracy. The fact that Title IX, a groundbreaking civil rights statute, could be enforced to not only perpetuate gender-based violence, but directly undermine democratic participation, rubs salt into the wound. What the DeVos rulemaking and its aftermath have exposed about notice-and-comment rulemaking's failings make its democratization urgent and imperative. Fortunately, the histories of civil rights movement-organizing and success in equalizing democratic participation, as well as efforts to democratize rulemaking (including through mass commenting), demonstrate how many Americans are willing and able to do the work required for such democratization. Using the modified form of negotiated rulemaking proposed here to seize the opportunities to further expand and equalize democratic participation presented by legitimate mass commenting, including boilerplate comments, is the clear and indispensable next step.

315 ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 205–10 (2021).

STATE ACTIONS TO BAN GENDER-AFFIRMING CARE FOR MINORS AND THE WAYS FORWARD

ALI LIBERTELLA*

INTRODUCTION

As of October 2023, twenty-one states have passed laws that ban medically necessary gender-affirming care to minors.[1] This Note will discuss the actions of three such states—Texas, Florida, and Arkansas—in 2022.[2] These state actions demonstrate three different ways in which states have restricted access to medically necessary gender-affirming care. To move forward, lawyers and advocates must continue to litigate against these bans, state legislatures should enact sanctuary statutes protecting trans youths' access to gender-affirming care, and the U.S. Food & Drug Administration (FDA) should make medications—including puberty blockers and hormones—available on-label and across state lines through Telehealth. It is important to recognize that disapproving parents pose insurmountable barrier to minors' self-realization, exploration of their genders, and access to care. There is abundant legal scholarship on parental consent in this context and analogous ones, such as the mature minor doctrine that concerns minors accessing abortion and reproductive care like birth control. However, this Note focuses solely on situations in which transgender youths' parents support their children's identities and allow them to receive gender-affirming care. When a state has a ban on gender-affirming care, parents' consent would not matter in the face of such a ban, unless the family is financially able and willing to move to a state allowing access to such care.[3]

* J.D. 2024, Columbia Law School; B.A. 2021, New York University. With special thanks to Professor Josh Gupta-Kagan for his expert guidance as I researched and wrote this Note and to the editorial staff of the *Columbia Journal of Gender & Law* for their wonderful comments and for preparing my piece for publication.

1 *Bans on Best Practice Medical Care for Transgender Youth,* MOVEMENT ADVANCEMENT PROJECT (Oct. 18, 2023), www.mapresearch.org/equality-maps/healthcare/youth_medical_care_bans [https://perma.cc/GA4L-AVKH].

2 This Note was written between 2022 and 2023.

3 *See* Olivia Yarvis, *With a 'Feeling of Betrayal,' One Family Flees Texas in Search of Safer Climate for Their Transgender Daughter*, THE TEX. TRIB. (Aug. 22, 2022), https://www.texastribune.org/2022/08/22/family-with-transgender-daughter-flees-texas/#:~:text=Watch%3A%20With%20a%20%E2%80%9Cfeeling%20of,such%20family%20to%20leave%20home [https://perma.cc/VT24-5BFW] (telling the story of a family in Texas with a transgender child who moved out of the state in response to Governor Abbott's directive).

It is especially urgent and necessary to further academic scholarship and rigorous journalism on the topic of gender-affirming care because current conversations are rife with misinformation. Indeed, substantial amounts of the rhetoric of opponents of gender-affirming care for transgender minors is based on blatant misinformation.[4] The public and the people in power must be educated on the results of scientific studies of gender-affirming care and what those results mean for the safety of this care. Moreover, journalists must be more responsible when writing about topics with real life consequences as harsh as that of access to necessary care.[5] A November 2022 *New York Times* article[6] surveying the debate on the safety of gender-affirming care for minors is an example of mainstream, irresponsible journalism on this topic. The World Professional Association for Transgender Health (WPATH) criticizes the article's careless journalism, explaining that this article "furthers the atmosphere of misinformation and subjectivity that has grown to surround the area of gender-affirming medical interventions for transgender youth" and "supports inaccurate narratives that puberty blocking medicines are conclusively harmful to long-term bone density or other health outcomes, and that transition reversal and transition regret is a common outcome for these treatments."[7] The spread of misinformation through such irresponsible journalism will incentivize politicians to further restrict access to this care. Accurate, informed narratives are needed in this area.

4 *See infra* notes 7, 20–39 and accompanying text.

5 Kaiyti Duffy, *Recent Anti-Trans Articles Miss the Point of Gender-Affirming Care*, TEEN VOGUE (Nov. 29, 2022), https://www.teenvogue.com/story/recent-anti-trans-articles-miss-the-point-of-gender-affirming-care [https://perma.cc/4RZH-W7Y2]; Audrey McCabe, *Print and Online Outlets Failed to Connect Club Q Shooting to Long Standing Anti-LGBTQ Hate*, MEDIA MATTERS (Nov. 23, 2022), https://www.mediamatters.org/cnn/print-and-online-outlets-failed-connect-club-q-shooting-long-standing-anti-lgbtq-hate [https://perma.cc/G49U-HTS8].

6 Megan Twohey & Christina Jewett, *They Paused Puberty, But Is There a Cost?*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/health/puberty-blockers-transgender.html [https://perma.cc/J6A3-9WHP].

7 USPATH Board & WPATH Executive Committee, *USPATH and WPATH Respond to NY Times Article "They Paused Puberty, But Is There a Cost?"*, U.S. PRO. ASSOC. FOR TRANSGENDER HEALTH & WORLD PRO. ASSOC. FOR TRANSGENDER HEALTH (Nov. 14, 2022), https://www.wpath.org/media/cms/Documents/Public%20Policies/2022/USPATHWPATH%20Statement%20re%20Nov%2014%202022%20NYT%20Article%20Nov%2022%202022.pdf?_t=1669173834 [https://perma.cc/7N77-5RWJ].

This Note proceeds in three parts. Part One will define the relevant terms, describe the populations affected, and lay out the parties involved in regulating and influencing access to gender-affirming care. Part Two will describe respective state actions restricting this care in Arkansas, Texas, and Florida. Arkansas's Act 626 of 2021 banned all gender-affirming care for transgender people under 18 years old.[8] In June 2023, an Arkansas district court judge struck down Act 626 as unconstitutional.[9] In Texas, a technically non-binding directive by Governor Greg Abbott to the Department of Family and Protective Services (DFPS) instructed child welfare agents to investigate families suspected of affirming their transgender youths' identities.[10] These investigations, and any investigations of Texas families that belong to PFLAG (an organization supporting families with LGBTQ+ members), have also been enjoined by the court.[11] Ultimately, Texas banned gender-affirming care for minors in September 2023.[12] In February 2023, Florida's State Board of Medicine and the State Board of Osteopathic Medicine confirmed a rule that prohibits any gender-affirming care for minors, even in clinical trial settings.[13] Florida is the only state so far that has used its medical board to confirm a rule prohibiting such care. This Note focuses on only these three states' actions, which use distinctively different methods of banning the care and exert particularly prominent influence at the time of writing this Note.

Part Three will outline potential ways forward, each with a varying degree of viability for the near future. States may look to the abortion context, particularly involving

8 ARK. CODE ANN. § 20-9-1502 (West 2023).

9 Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023) (this decision is currently on appeal in the Eighth Circuit).

10 Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Comm'r of Fam. and Protective Services (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/6L3X-CEAJ] [hereinafter Abbott Letter].

11 Temporary Restraining Order for Plaintiffs, PFLAG v. Abbott, No. D-1-GN-22-002569 (Tex. Dist. Ct. June 10, 2022), https://www.aclu.org/cases/pflag-v-abbott?document=pflag-v-abbott-temporary-restraining-order [https://perma.cc/5TWY-APVW] [hereinafter PFLAG TRO]; Order Granting PFLAG Inc.'s and Plaintiffs Briggles' Application for Temporary Injunction, PFLAG v. Abbott, No. D-1-GN-22-002569 (Tex. Dist. Ct. Sept. 16, 2022), https://www.aclu.org/cases/pflag-v-abbott?document=pflag-v-abbott-order-granting-pflag-incs-and-plaintiffs-briggles-application [https://perma.cc/G9KQ-FP3C] [hereinafter PFLAG Temporary Injunction].

12 *Court Cases: Loe v. Texas*, ACLU, https://www.aclu.org/cases/loe-v-texas [https://perma.cc/47B6-4WHK].

13 Amanda D'Ambrosio, *Florida Medical Boards Ban Gender-Affirming Care for Kids*, MEDPAGE TODAY (Nov. 7, 2022), http://www.medpagetoday.com/special-reports/features/101624 [https://perma.cc/3MHJ-NMC9].

regulations on the abortion medication Mifepristone, for creative ways to protect access to gender-affirming medical care. Following California and New York in providing sanctuary to minors with consenting parents from states banning the care could be helpful. On a national scale, federal actions would likely be more effective in preventing opponents of transgender rights from proposing bills and taking other actions to ban such care in the first place. Therefore, the FDA should declare the medications prescribed to minors as puberty blockers on-label to delay puberty in gender-diverse youth.[14] The federal Transgender Bill of Rights should be amended and passed to minimize pushback as much as possible.[15] The scientific and medical communities should continue supporting gender-affirming care for minors while conducting more research to further disprove that such care is as dangerous or experimental as its opponents say. Public policy-oriented solutions include widespread education of the general public, and especially parents, on what gender identity is, what gender-affirming care for minors is, and what the care's benefits are.[16] Providers in states that allow gender-affirming care, like puberty blocking medication and hormones, should make these medications available to minors via Telehealth and delivery services. Planned Parenthood should be more holistic and offer gender-affirming care in addition to abortion services. Facing state perpetuated violence and attacks on bodily autonomy, transgender and gender nonconforming people should continue to share stories of joy and thriving.[17]

14 *Cf.* Merrick B. Garland, *Attorney General Merrick B. Garland Statement on Supreme Court Ruling in* Dobbs v. Jackson Women's Health Organization, U.S. DEP'T OF JUST. (June 24, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s [https://perma.cc/3KXL-7NR9] ("We stand ready to work with other arms of the federal government that seek to use their lawful authorities to protect and preserve access to reproductive care. In particular, the FDA has approved the use of the medication Mifepristone. States may not ban Mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."). *But see* Marco Rubio, *Same Left That Freaks Out Over Ivermectin Wants to Pump Kids Full of Transgender Hormones*, THE FEDERALIST (May 26, 2022), https://thefederalist.com/2022/05/26/same-left-that-freaks-out-over-ivermectin-wants-to-pump-kids-full-of-transgender-hormones/ [https://perma.cc/U8B7-PCJ5] (criticizing promotion of puberty blockers partly because they are off label).

15 *See infra* Part III.A.1.

16 *See* Deanna Adkins et al., *Supporting & Caring for Transgender Children*, HUM. RTS. CAMPAIGN (Sept. 2016), https://www.hrc.org/resources/supporting-caring-for-transgender-children [https://perma.cc/8YCX-RGW6] (listing resources on caring for transgender children); Jason Rafferty, *Gender Diverse and Transgender Children*, HEALTHYCHILDREN.ORG (June 8, 2022), https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Diverse-Transgender-Children.aspx [https://perma.cc/M8W6-YLL7] (a guide for parents trying to learn about their trans children, published by the American Academy of Pediatrics).

17 *See* Chase Strangio, *No One Can Take Away My Joy*, THE NATION (Nov. 25, 2022), https://www.thenation.com/article/society/colorado-shootings-trans-joy/?utm_campaign=SproutSocial&utm_content=thenation&utm_medium=social&utm_source=twitter [https://perma.cc/3LEM-DHVR].

This Note does not explicitly discuss current legal strategies in its suggested solutions. At the time of writing this Note, some state laws banning gender-affirming care are being successfully challenged in court, only to await appeal or a new state law or policy banning gender-affirming care. This is to say, existing bans are being successfully challenged through litigation, spearheaded especially by Chase Strangio at the American Civil Liberties Organization (ACLU). Such notable litigation strategies include the Equal Protection Clause argument that won the day in the Eighth Circuit's injunction of Arkansas's Act 626.[18] This Note seeks to explore ways to protect trans youths' access to care to supplement such successful litigation strategies. Even though some bans are being preliminarily enjoined or completely enjoined, other bans continue to proliferate around the country.[19] Through this Note, I hope to find ways to bolster trans minors' access to care beyond reactionary litigation. I hope to experience a country where these bans are no longer proposed in the first place.

I. Background

Transgender *identities* are not new; there are records of transgender people who have existed across all cultures throughout history.[20] The American Psychological Association defines transgender as "an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."[21] Transgender persons are not all adults; transgender youths exist.[22] Transgender youths are those individuals under the age of eighteen who identify as transgender.[23] According to statistics from the Williams Institute, 300,000 minors ages thirteen years and older identify as transgender in the United States, and 1.3 million

18 *See infra* notes 94–104 and accompanying text.

19 *See Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS. (2022), https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/ [https://perma.cc/HML6-Y5B5].

20 HRC Foundation, *Seven Things About Transgender People That You Didn't Know*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/seven-things-about-transgender-people-that-you-didnt-know [https://perma.cc/FT45-UJNP].

21 *What Does Transgender Mean?*, AM. PSYCH. ASS'N. (June 6, 2023), https://www.apa.org/topics/lgbtq/transgender [https://perma.cc/K6AF-MHVT].

22 Sam Levin, *Trans Kids Are Not New: A Historian on the Long Record of Youth Transitioning in America*, THE GUARDIAN (Apr. 1, 2021), https://www.theguardian.com/us-news/2021/apr/01/trans-children-history-jules-gill-peterson-interview [https://perma.cc/FU4V-2ZPA].

23 *Get the Facts About Trans Youth Infographic,* MOVEMENT ADVANCEMENT PROJECT https://www.lgbtmap.org/file/Advancing%20Acceptance%20Infographic%20FINAL.pdf [https://perma.cc/52QX-KJ9C].

American adults identify as transgender.[24] The Pew Center identified that 1.6% of adults in the United States are transgender.[25] Crucial research and surveys on the demographics of transgender people in the United States are ongoing. One such important demographic survey is the U.S. Trans Survey of 2022, which focused on transgender people ages sixteen and older and was open from October 19 to December 5, 2022.[26] The results from this survey are crucial in informing advocacy efforts going forward. In a video celebrating the closure of the survey, after tens of thousands of trans people responded, the study's director Josie Caballero remarks, "with our record-breaking number of respondents, we have made this dataset the largest dataset of trans people in U.S. history."[27]

Transgender youth are not "confused" about their gender identity.[28] The supporters of banning gender-affirming care for transgender youth often argue that the youths' transgender identification may be a fleeting choice or a sign of a deeper mental health issue that should be treated first.[29] Studies have shown, however, that transgender adolescents

24 Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ [https://perma.cc/45PM-66TE].

25 Anna Brown et al., *The Experiences, Challenges, and Hopes of Transgender and Nonbinary U.S. Adults*, PEW RSCH. CTR. (June 7, 2022), https://www.pewresearch.org/social-trends/2022/06/07/the-experiences-challenges-and-hopes-of-transgender-and-nonbinary-u-s-adults/ [https://perma.cc/K6QQ-P82V].

26 *2022 U.S. Trans Survey*, USTRANSSURV.ORG, https://www.ustranssurvey.org/ [https://perma.cc/89LC-EBRY] ("The U.S. Trans Survey is the largest survey of trans people, by trans people, in the United States. The USTS documents the lives and experiences of trans and nonbinary people ages 16+ in the U.S. and U.S. territories. USTS reports have been a vital resource, including the reports on the experiences of people of color and reports by state. More than ever, it's important to ensure that trans voices will shape the future.").

27 *Id.*

28 "What I wish people would talk about more is not just the direct impacts of this legislation . . . but just the conversations we have about these things have a substantial impact," said Dr Jack Turban . . . "Hearing politicians say you're actually confused, you shouldn't be offered your medical care, your medical care should be taken away from you hurts your mental health." Carrie Richgels et al., *Policy Brief: State Bills Restricting Access of Transgender Youth to Health Care, School Facilities, and School Athletics Threaten Health and Well Being*, THE FENWAY INST., 2021, at 22, https://fenwayhealth.org/wp-content/uploads/Anti-trans-legislation-policy-brief-FINAL.pdf [https://perma.cc/QL7C-V4KW].

29 A.R. Legis. Assemb. Act 626. Reg. Sess. 2021–22, *Save Adolescents From Experimentation Act* (2021) (stating that "individuals struggling with distress at identifying with their biological sex often have already experienced psychopathology, which indicates these individuals should be encouraged to seek mental health services to address comorbidities and underlying causes of their distress").

have a particularly stable sense of gender identity. [30] A 2022 Princeton study showed that "retransitions are infrequent. More commonly, transgender youth who socially transitioned at early ages continued to identify that way."[31] Inflated, fabricated rates of "retransition," or more colloquially called "detransition," are used by state legislatures to inflame and garner public support for these bans.[32] In Florida, Governor Ron DeSantis cited one statistic that around 80% of trans youth will detransition.[33] This is a false statistic, and a review of the study cited by DeSantis described its flawed methodology.[34] Although some number of transgender youth will "detransition" at some point in the future, use of any statistics of detransition to cast doubt on the efficacy of gender-affirming care for minors is misleading; one cannot discount the effect of social pressures and discrimination on one's decision to present as a certain gender.[35]

30 Christina Roberts, *Persistence of Transgender Gender Identity Among Children and Adolescents*, 150 PEDIATRICS, Aug. 2022, at 2, https://publications.aap.org/pediatrics/article/150/2/e2022057693/187006/Persistence-of-Transgender-Gender-Identity-Among?autologincheck=redirected [https://perma.cc/XY92-CFMW] (describing "the persistence of gender identity during the first 5 years of enrollment in a cohort of transgender children who completed a social transition before age 12. . . The high persistence rates in this prospective study confirm previous findings and suggest that regret after starting gender-affirming treatment should be an uncommon event").

31 Kristina R. Olson et al., *Gender Identity 5 Years After Social Transition*, 150 PEDIATRICS, Aug. 2022, at 1, https://publications.aap.org/pediatrics/article/150/2/e2021056082/186992/Gender-Identity-5-Years-After-Social-Transition [https://perma.cc/UYK7-WUXS].

32 *Detransition Facts and Statistics 2022: Exploding the Myths Around Detransitioning,* GENDERGP (June 21, 2021), https://www.gendergp.com/detransition-facts/ [https://perma.cc/R3RE-F8P5] ("Detransition is when a person who has already transitioned returns to live as the gender assigned by their birth sex.").

33 Brynn Tannehill, *The End of the Desistance Myth,* HUFFPOST (Jan. 1, 2016), https://www.huffpost.com/entry/the-end-of-the-desistance_b_8903690 [https://perma.cc/2T93-CY3P] (noting that the study cited by Ron Desantis was flawed because, among other things, it did not discriminate between young people with gender dysphoria, young people who socially but not medically transitioned, and young people simply exploring gender diversity).

34 Susan D. Boulware et al., *Biased Science: The Texas and Alabama Measures Criminalizing Medical Treatment for Transgender Children and Adolescents Rely on Inaccurate and Misleading Scientific Claims*, YALE L. SCH. (Apr. 28, 2022) (public law research paper forthcoming), https://medicine.yale.edu/lgbtqi/research/gender-affirming-care/report%20on%20the%20science%20of%20gender-affirming%20care%20final%20april%2028%202022_442952_55174_v1.pdf [https://perma.cc/B6FZ-PV95] (noting the bias of statistics produced by the Society for Evidence-Based Gender Medicine regarding "desistance" and cited by multiple lawmakers, and pointing instead to evidence that adolescents with gender dysphoria rarely find that their dysphoria resolves without treatment).

35 *Detransition Facts and Statistics 2022: Exploding the Myths Around Detransitioning,* GENDERGP, (June 21, 2021), https://www.gendergp.com/detransition-facts/ [https://perma.cc/WX63-8TTS] ("Detransition is a loaded term . . . Some people may even detransition due to the negative effects of conversion therapy.").

Transgender youth are on the latest front of America's culture wars.[36] Acknowledging that trans youth have always existed helps to dispel the persistent myth that they are a new phenomenon, a product of social contagion, or both.[37] The past several years have been devastating in terms of anti-trans legislation and bills in the United States.[38] This recent anti-trans legislative backlash is not unique to the United States. Gender nonconformity has become a politically divisive concept all around the world.[39]

A. What Transitioning May Entail

The 2015 U.S. Transgender Survey reported that about 25% of trans or gender nonconforming people seek some form of gender confirmation surgery.[40] But before considering any medical intervention, psychological or physical, many transgender people choose to "socially transition."[41] Social transition might include changing one's pronouns, clothing styles, and bathrooms or other gendered social spaces. Transgender people also may seek out gender-affirming psychological care.[42] Any access to medical

36 Brian Joseph, *Culture Wars Continue With Transgender Issues,* LEXISNEXIS (June 2, 2022), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/culture-wars-continue-with-transgender-issues [https://perma.cc/784D-P6H3].

37 *See* Jack L. Turban et al., *Sex Assigned at Birth Ratio Among Transgender and Gender Diverse Adolescents in the United States*, 150 PEDIATRICS, Aug. 2022, at 50, 53 (using data from Youth Risk Behavior Survey to explore "rapid-onset gender dysphoria" (ROGD), positing that young people begin to identify as transgender for the first time as adolescents rather than as prepubertal children and that this identification and subsequent gender dysphoria is the result of social contagion. Concluding that "the sex assigned at birth ratio of TGD adolescents in the United States does not appear to favor AFAB adolescents and should not be used to argue against the provision of gender-affirming medical care for TGD adolescents.").

38 *Legislative Tracker: Anti-Transgender Legislation*, *supra* note 19.

39 Judith Butler, *Why is the Idea of 'Gender' Provoking Backlash the World Over?*, THE GUARDIAN (Oct. 23, 2021), https://www.theguardian.com/us-news/commentisfree/2021/oct/23/judith-butler-gender-ideology-backlash [https://perma.cc/MQ6B-YH3G].

40 SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, 176 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/8MRL-4VF6].

41 *Social Transition,* TRANSWHAT? (Nov. 2017), https://transwhat.org/transition/socialtrans.html [https://perma.cc/4BRN-JV5L].

42 Mere Abrams, *I Needed More Than the Average Therapist Offered—Here's What I Found,* HEALTHLINE (Mar. 16, 2020), https://www.healthline.com/health/transgender/gender-therapy#questioning [https://perma.cc/D3KF-DLNJ].

gender-affirming care beyond psychotherapy requires a psychiatric diagnosis of gender dysphoria.[43]

To further affirm a minor adolescent's gender identity, a family, together with their physician, may choose to begin medical interventions. This might include medication called "puberty blockers" to stop the further progression of puberty of the unwanted sex, followed by a prescription of hormonal treatment which corresponds with the adolescent's gender identity. The earliest surgical intervention is not allowed until the minor is at least seventeen, with consent of their parents, and is usually "top surgery," the removal of breast tissue to make the chest appear more masculine.[44]

When a transgender child begins puberty, they may be prescribed puberty blockers to pause the child's progression into later stages of puberty of the sex they were assigned at birth.[45] Puberty blockers are gonadotropin-releasing hormone (GnRH) analogues[46] prescribed as part of a holistic treatment of a minor's gender dysphoria diagnosis. Puberty blockers do not cause permanent or irreversible changes to the body.[47] Mayo Clinic explains that, in simple terms, for "those identified as male at birth, GnRH analogues decrease the

43 *Gender Dysphoria Diagnosis*, AM. PSYCH. ASS'N, https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis [https://perma.cc/5577-A2CN].

44 *See* Helen Santoro, *The Myth That Fuels the Panic Over Surgery for Trans Teenagers*, SLATE (Oct. 11, 2022), https://slate.com/technology/2022/10/top-surgery-teens-gender-affirming-care-hurdles.html [https://perma.cc/CD7P-XGBP]; *About Top Surgery*, STANFORD MEDICINE CHILDREN'S HEALTH, https://www.stanfordchildrens.org/en/service/gender/about-top-surgery [https://perma.cc/BT26-3WNB] (describing top surgery).

45 Mayo Clinic Staff, *Pubertal Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 18, 2022), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/2VSF-3FZ4].

46 *See* Alexandra Benisek, *What Are Puberty Blockers?*, WEBMD (Dec. 16, 2022), https://www.webmd.com/children/what-are-puberty-blockers [https://perma.cc/3QCB-9F3F] ("These drugs suppress your child's sex hormones (testosterone and estrogen) during puberty."); *Gender-Affirming Hormone Therapy Improves Body Dissatisfaction in Youth*, CLEVELAND CLINIC (May 29, 2020), https://consultqd.clevelandclinic.org/gender-affirming-hormone-therapy-improves-body-dissatisfaction-in-youth/ [https://perma.cc/AFU6-74ML] ("We can consider prescribing pubertal suppression via gonadotropin-releasing hormone for our younger patients who have reached Tanner Stage 2 and have a diagnosis of gender dysphoria from a mental health provider. As far as we are aware, the puberty blocking effects are entirely reversible. If a patient wants to stop, they can, and then would proceed through their body's physiological puberty.").

47 *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, J. CLINICAL ENDOCRINOLOGY AND METABOLISM (2017).

growth of facial and body hair, prevent voice deepening, and limit the growth of genitalia. In those identified as female at birth, treatment limits or stops breast development and stops menstruation."[48]

After taking puberty blockers to suppress the progression of the puberty associated with the child's assigned sex at birth, the minor, together with their family and physician, may choose to pursue gender-affirming hormone treatment.[49] Hormone treatment differs from puberty blockers. In hormone treatment, actual hormones are taken in order to effect changes normally brought on by the gender those hormones are associated with. Gender-affirming hormone therapy (GAHT) is "the primary medical intervention sought by transgender people. Such treatment allows the acquisition of secondary sex characteristics more aligned with an individual's gender identity."[50] This is the first time over the course of anyone's gender-affirming transition that some irreversible changes may occur.[51] The Endocrine Society guidelines state that most adolescents have reached mental maturity by age sixteen, and can thus give the informed consent necessary to receive this type of hormone therapy at that time.[52] While more research into the health outcomes of trans

48 Mayo Clinic Staff, *supra* note 45.

49 *Gender-Affirming Hormones*, TEMPLE HEALTH (2023), https://www.templehealth.org/services/treatments/gender-affirming-hormones [https://perma.cc/R8TY-YTJV] ("Gender-affirming hormones are used to alter someone's physical appearance to more closely align their physical body with their gender identity.").

50 Madeleine B. Deutsch, *Overview of Gender-Affirming Treatments and Procedures*, UCSF TRANSGENDER CARE, (June 17, 2016), https://transcare.ucsf.edu/guidelines/overview#:~:text=Gender%2Daffirming%20hormone%20therapy%20is,with%20an%20individual's%20gender%20identity [https://perma.cc/26R4-9DHX].

51 *Masculinizing Hormone Therapy*, MAYO CLINIC (2023), https://www.mayoclinic.org/tests-procedures/masculinizing-hormone-therapy/about/pac-20385099#:~:text=Some%20of%20the%20physical%20changes,facial%20hair%2C%20cannot%20be%20reversed [https://perma.cc/649Y-CJ46] ("Some of the physical changes caused by masculinizing hormone therapy can be reversed if you stop taking testosterone. Others, such as a deeper voice, a larger clitoris, scalp hair loss, and increased body and facial hair, cannot be reversed."); *Feminizing Hormone Therapy*, MAYO CLINIC (2023), https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096 [https://perma.cc/3SRG-DSCF] ("Some of the physical changes caused by feminizing hormone therapy can be reversed if you stop taking it. Others, such as breast development, cannot be reversed").

52 Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/ Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLIN. ENDOCRINOL. METAB. (Nov. 2017) 3869, 3870–3871 ("Clinicians may add gender-affirming hormones after a multidisciplinary team has confirmed the persistence of gender dysphoria/gender incongruence and sufficient mental capacity to give informed consent to this partially irreversible treatment. Most adolescents have this capacity by age 16 years old. We recognize that there may be compelling reasons to initiate sex hormone treatment prior to age 16 years, although there is

youth communities will deepen knowledge of the effects of GAHT, existing studies have demonstrated positive outcomes for trans people who received gender-affirming hormone therapy. For example, research demonstrates the positive effects of GAHT on transgender adults' mood and behavioral health.[53]

B. Challenges Transgender People Face in the United States

Transgender people in the United States face a great amount of adversity in intersectional ways.[54] "Transmisogynoir" is one concept that elucidates the impact of intersectionality on trans adversity:

> Transmisogynoir, a term coined by writer Trudy as the specific oppression of Black trans feminine people where anti-Blackness, cissexism, and misogyny form a unique system of oppression . . . The concept is grounded in the theory of intersectionality, which analyzes how various social identities such as race, gender, class, and sexual orientation interrelate in systems of oppression.[55]

There are material consequences to queerness and transness in America, including increased poverty rates.[56] Houselessness is also common; according to the 2015 U.S. Trans Survey, nearly one in three trans people have reported being unhoused at some point in

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minimal published experience treating prior to 13.5 to 14 years of age.").

53 Hillary B. Nguyen et al., *Gender-Affirming Hormone Use in Transgender Individuals: Impact on Behavioral Health and Cognition*, 20 CURRENT PSYCHIATRY REP. 110 (2018) ("Overall, this review demonstrates that GAHT generally has positive effects at multiple levels on mood and behavioral health of transgender and gender dysphoric individuals.").

54 *See* LeAnne Roberts et al., *Black & LGBTQ+: At the Intersection of Race, Sexual Orientation & Identity*, AM. MED. ASS'N (June 24, 2021), https://www.ama-assn.org/delivering-care/population-care/black-lgbtq-intersection-race-sexual-orientation-identity [https://perma.cc/FJ4R-CLGY] (discussing the intersectionality of being LGBTQ+ and Black).

55 Nyla Foster et al., *Black Trans Women and Black Trans Femmes: Leading & Living Fiercely,* TRANSGENDER L. CTR. (2023), https://transgenderlawcenter.org/black-trans-women-black-trans-femmes-leading-living-fiercely [https://perma.cc/87FV-LWKR].

56 M. V. Lee Badget et al., *LGBT Poverty in the United States*, WILLIAMS INST. (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf [https://perma.cc/3VUJ-GNEM] ("LGBT people collectively have a poverty rate of 21.6%, which is much higher than the rate for cisgender straight people of 15.7%. Among LGBT people, transgender people have especially high rates of poverty—29.4%.").

their lives.[57] Trans youth sometimes attribute being unhoused to the fact that their families do not accept their identities.[58]

C. Mental Health Impacts

Transgender people disproportionately suffer from mental health issues, which are exacerbated by social stigma.[59] Transgender youth in particular disproportionately suffer from negative mental health outcomes, including depression and suicidality rates two to three times higher than the cisgender population.[60] Importantly, research also dispels the idea that "simply being transgender is the cause of poor health outcomes."[61] A Dutch study on psychological outcomes in transgender young adults found that after gender reassignment, transgender young adults' well-being was similar to or better than the well-being of young adults of the same age in the general population.[62] The study focused on young adults who had received puberty blockers during adolescence. These young adults were assessed before the start of puberty suppression—at around thirteen years old—when they started receiving hormonal therapy—at around seventeen years old—and at least one year after gender-reassignment surgery, at around twenty-one years old.[63] Moreover, an

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57 *See* James, *supra* note 40, at 176, 178.

58 Sarah Gilbert & Danielle Hubley, *Trans Experiences of Homelessness: Disparities, Discrimination, and Solutions,* P'SHIP FOR STRONG CMTYS. (2020), https://www.pschousing.org/blog/trans-experiences-homelessness-disparities-discrimination-and-solutions [https://perma.cc/TMJ9-4BMZ] ("Sadly, many trans adolescents and young adults face homelessness when family rejects them and kicks them out of the home after they come out about their gender identity. I've worked with several people who struggled with finding consistent housing after their parents told them they no longer were welcome in their home once they learned they identified as transgender. This puts people in a devastating situation wherein they have to make the difficult choice of living a lie to maintain housing, or living as their authentic selves, and end up living in their car, couch surfing, or being at a shelter.").

59 Walter O. Bockting et al., *Stigma, Mental Health and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH 943, 943 (2013) (Finding that "[transgender] respondents had a high prevalence of clinical depression (44.1%), anxiety (33.2%), and somatization (27.5%). Social stigma was positively associated with psychological distress.").

60 Daniel Shumer, *Health Disparities Facing Transgender and Gender Nonconforming Youth are Not Inevitable*, 141 PEDIATRICS, Mar. 2018, at 1.

61 *Id.*

62 Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 PEDIATRICS, Oct. 2014, at 696.

63 *Id.*

American study found that transgender children who had socially transitioned (i.e., were living as the gender not assigned to them at birth) and were supported in their gender identity had "developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group."[64] A larger study of 375 youth, including 148 transgender youth participants, demonstrated that "many socially transitioned transgender youth experience levels of anxiety and depression in the normative range and equal to or only slightly higher than siblings and cisgender peers."[65]

Further, state legislative bans themselves have negative impacts on transgender youth.[66] A 2022 survey of parents of transgender youth found five themes arising from their responses on how federal, state, and local laws and bills have impacted their children, including depression and suicidal ideation/risk of suicide, anxiety, increased gender dysphoria, decreased safety and increased stigma, and lack of access to medical care.[67] The parents who responded to this study also provided feedback directed to legislators and policy makers. They emphasized that transgender youth health is not a political issue and suggested that legislators decriminalize gender-affirming medical care, decrease discrimination and violence against transgender people, and become educated on transgender healthcare issues.[68]

II. States Denying Transgender Youth Access to Gender-Affirming Care

Several states across the country are creating a legal battleground for transgender and queer people, especially transgender youth. States have taken various approaches to deny

64 Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS, Mar. 2016, at 1.

65 Dominic J. Gibson et al., *Evaluation of Anxiety and Depression in a Community Sample of Transgender Youth*, JAMA NETWORK OPEN, Apr. 7, 2021, at 3, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2778206 [https://perma.cc/69K7-KSPV].

66 *See* Catherine Schaefer et al., *Discriminatory Transgender Health Bills Have Critical Consequences for Youth*, CHILD TRENDS, (Apr. 21, 2022), https://www.childtrends.org/publications/discriminatory-transgender-health-bills-have-critical-consequences-for-youth [https://perma.cc/8Z8W-M7RX] (Describing how banning care, criminalizing adults like physicians who provide it, and investigating families with parents who allow it, harm transgender youth. Recommending that policies should ensure access to appropriate gender-affirming care and create supportive environments for transgender youth.).

67 Roberto L. Abreu et al., *Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures' Perspective*, 36 J. FAM. PSYCHOL. 643, 643 (2022).

68 *Id.* at 648.

this care.[69] Some states, like Arkansas in 2021 and now Utah in 2023, attempt to ban care for minors through state legislative bans.[70] Other states attempt to ban such care through directives or orders. For example, a 2022 directive from Texas Governor Abbott instructed mandated reporters to inform child protective services of a minor's trans status and initiate DFPS child welfare investigations on the basis of this information.[71] By declaring gender-affirming care to be child abuse, Texas runs the risk of pulling many more families into the regulatory ambit of the family regulation system, a system that already treats queer children worse than their peers.[72] Finally, some states have approached gender-affirming care bans through Medical Board or Department of Health regulations. The Florida Department of Health's guidance intends to ban even *social transition*, the completely nonmedical process by which transgender youth live outwardly in accordance with their gender identity, such as by wearing affirming clothing or using preferred pronouns.[73]

69 *See* Keith J. Conron et al., *Prohibiting Gender-Affirming Health Care for Youth*, WILLIAMS INST. (Mar. 2022), https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/ [perma.cc/Q2LS-TSY8] ("As of March 2022, 15 states have restricted access to gender-affirming care or are currently considering laws that would do so. The bills carry severe penalties for health care providers, and sometimes families, who provide or seek out gender-affirming care for minors. This study estimates the number of transgender youth at risk of losing access to gender-affirming care under these bills.").

70 *See, e.g.,* Boram Kim, *Utah Governor Signs SB 16 into Law, Banning Gender-Affirming Procedures on Minors*, STATE OF REFORM, Jan. 30, 2023, https://stateofreform.com/news/2023/01/utah-governor-signs-sb-16-into-law-banning-gender-affirming-procedures-on-minors/#:~:text=Health%20Policy%20Conference-,Utah%20Governor%20signs%20SB%2016%20into%20law,gender%2Daffirming%20procedures%20on%20minors&text=Utah%20Gov.,on%20hormonal%20treatment%20for%20minors [https://perma.cc/6C82-QLYK] (reporting that Utah Governor Spencer Cox signed S.B. 16 into law in January 2023. S.B. 16 bans gender-affirming care for anyone under eighteen and is similar to the laws that have been enjoined by courts in Arkansas and Alabama).

71 Abbott Letter, *supra* note 10 (opening with the statement, "Consistent with our correspondence in August 2021, the Office of the Attorney General (OAG) has now confirmed in the enclosed opinion that a number of so-called "sex change" procedures constitute child abuse under existing Texas law. Because the Texas Department of Family and Protective Services ("DFPS") is responsible for protecting children from abuse, I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.").

72 Dorothy Roberts, *The Child Welfare System Already Hurts Trans Kids. Texas Made It a Nightmare*, WASH. POST (Mar. 3, 2022), https://www.washingtonpost.com/outlook/2022/03/03/texas-trans-youth-welfare/ [perma.cc/R2Q6-ZN4Y].

73 Press Release, Florida Department of Health, Treatment of Gender Dysphoria for Children and Adolescents (Apr. 20, 2022), https://www.floridahealth.gov/documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf [https://perma.cc/D8PF-5HSC] (presenting guidance, and listing that "social gender transition" should not be a treatment option for children or adolescents).

Legislative action concerning transgender youth extends beyond the elimination of gender-affirming care for trans minors. There has been a resurgence in "bathroom bills,"[74] which seek to prevent trans youth from using the public restroom that corresponds with their gender identity, and "sports bills,"[75] which seek to prevent transgender youth athletes, mainly transgender girls and women, from participating in the sports team corresponding with their gender.

A. Texas Attorney General Opinion

Texas serves a case study of states banning gender-affirming care using official opinions and directives. In February 2022, Texas Attorney General Ken Paxton issued an official attorney general opinion[76] in which he declared that certain gender-affirming medical procedures, if given to minors, fall within the definition of child abuse under the Texas Family Code. The summary states Paxton's aim succinctly: "each of the 'sex change' procedures and treatments enumerated above, when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code."[77]

A few days after the issuance of Paxton's opinion, Texas Governor Abbott issued a directive to the Texas DFPS, affirming the attorney general's definition of child abuse as including these "sex change" procedures.[78] Abbott further directed DFPS to investigate families suspected to be supportive of their transgender children—supportive meaning

74 *See* Press Release, Oklahoma Senate, Bullard's Bill Signed to Protect Boys' and Girls' Bathrooms in Public Schools, (May 27, 2022), https://oksenate.gov/press-releases/bullards-bill-signed-protect-boys-and-girls-bathrooms-public-schools?back=/press-releases [perma.cc/S4K8-MFAA] (describing Oklahoma Governor Kevin Stitt signing a bathroom bill, SB 615, into law mandating schools to "require every multiple occupancy restroom or changing room to be designated for the exclusive use of the male or female sex").

75 *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVOC. PROJECT (Feb. 2023), https://www.lgbtmap.org/equality-maps/sports_participation_bans [perma.cc/2RKF-WG3W] (mapping out the state patchwork of bills banning trans youth athletes from playing on the team of their gender, showing that eighteen states now have blanket bans against transgender students from participating in sports consistent with their gender identity). *See also* H.B. 25, 87th Leg., R.S. (Tex. 2021) https://capitol.texas.gov/BillLookup/History.aspx?LegSess=873&Bill=HB25 [perma.cc/B6HH-9FB4] (signed into law by Governor Abbott and "requiring public school students to compete in interscholastic competitions based on biological sex").

76 Att'y. Gen Ken Paxton, Opinion No. KP-0401 1, 2 (Feb. 18, 2022).

77 *Id.* at 13.

78 Abbott Letter, *supra* note 10.

potentially allowing them to receive gender-affirming care—as potential child abusers.[79] The directive by the Governor to the Commissioner of the DFPS opens: "[Because the agency is] responsible for protecting children from abuse, I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the state of Texas."[80]

Although neither Paxton's opinion nor Abbott's directive were legally binding on courts or DFPS, they still have a significant effect. This is in large part because, in Texas, anyone who suspects child abuse is mandated by law to immediately report it.[81] The day after Abbott's directive was released, a DFPS employee in Austin was assigned to investigate two families suspected to have transgender children receiving gender-affirming care.[82] The employee was himself transgender. By August 2022, Texas DFPS had investigated eleven families for providing gender-affirming care to their children in Texas.[83] Although DFPS and Texas Family Courts have not removed any children from their families as a result of this directive, it is widely recognized that involvement with, and being surveilled by, state authorities like child protective services is highly traumatic for families, especially families with marginalized members.[84]

The ACLU filed two separate cases against Abbott's directive: *PFLAG v. Abbott* and *Doe v. Abbott*.[85] The Court enjoined DFPS investigations of specific families under

79 *Id.*

80 *Id*.

81 TEX. FAM. CODE §261.101.

82 Casey Parks, *He Came Out as Trans. Then Texas Had Him Investigate Parents of Trans Kids*, WASH. POST (Sept. 23, 2022), https://www.washingtonpost.com/dc-md-va/2022/09/23/texas-transgender-child-abuse-investigations/ [perma.cc/SF8H-GT6B].

83 Will DuPree, *8 Child Abuse Investigations Involving Texas Families with Trans Children Closed, No Kids Removed*, KXAN (Aug. 23, 2022), https://www.kxan.com/news/texas/8-child-abuse-investigations-involving-texas-families-with-trans-children-closed-no-kids-removed/ [perma.cc/L77E-RKHN].

84 *See* Courtney G. Joslin & Catherine Sakimura, *Fractured Families: LGBTQ People and the Family Regulation System*, 13 CAL. L. REV. 78 (Nov. 2022), https://www.californialawreview.org/online/fractured-families-lgbtq-people-and-the-family-regulation-system/ [https://perma.cc/4VVY-Q49D].

85 Petition for Plaintiff at 1, PFLAG v. Abbott, No. D-1-GN-22-002569 (Tex. Dist. Ct. June 8, 2022), https://www.aclu.org/cases/pflag-v-abbott?document=pflag-v-abbott-petition [https://perma.cc/4K75-MMM5]; Petition for Plaintiff at 1, Doe v. Abbott, No. D-1-GN-22-000977 (Tex. Dist. Ct. Mar. 1, 2022), https://www.aclu.org/cases/doe-v-abbott?document=Plaintiffs-Petition-and-Application-for-Temporary-Restraining-Order-Temporary-Injunction-Permanent-Injunction-and-Request-for-Declaratory-Relief [https://perma.cc/2VZR-

active investigation and investigations into any families who were members of PFLAG in Texas.[86] These were not total victories, as they say nothing about families not involved in the lawsuits who are not members of PFLAG, and thus can still potentially be investigated going forward. In *PFLAG v. Abbott*, the injunctions are still in effect, though the state is appealing them.[87] *Doe v. Abbott* remains on appeal in the Third Circuit.[88]

In June 2023, Governor Greg Abbott signed SB 14 into law, banning gender-affirming care for transgender youth.[89] The ban was immediately challenged in court by the ACLU in *Loe v. Texas*, and a temporary injunction was issued.[90] The court held that the ban likely violated the parental rights of the parents of trans children under the Texas Constitution.[91] However, the plaintiff's request for emergency relief was denied, and the bill went into effect on September 1, 2023.[92] As of December 2023, the lawsuit is still ongoing.[93]

B. Arkansas's Act 626

Arkansas's actions tell the most straightforward story of attempts to ban gender-affirming care for transgender minors. Arkansas was the first state in the United States to pass a bill to outright ban gender-affirming medical care for minors—Act 626 of 2021, titled "Save Adolescents from Experimentation Act."[94] Act 626 prohibits a healthcare professional

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86 PFLAG TRO, *supra* note 11; PFLAG Temporary Injunction, *supra* note 11.

87 *Court Cases: PFLAG v. Abbott*, ACLU, https://www.aclu.org/cases/pflag-v-abbott#summary [https://perma.cc/V4PY-FC7C].

88 *Court Cases: Doe v. Abbott,* ACLU, https://www.aclu.org/cases/doe-v-abbott#summary [https://perma.cc/N2X5-CMLF].

89 S.B. 14, 88th Leg., 2023 Gen. Sess. (Tex. 2023).

90 Temporary Injunction Order for Plaintiffs at 2, Loe v. Texas, No. D-l-GN-23-003616 (Tex. Dist. Ct. Aug. 25, 2023), https://www.aclu.org/cases/loe-v-texas?document=Temporary-Injunction-Order [https://perma.cc/9LBA-U5VV] [hereinafter Loe v. Texas Temporary Injunction].

91 *Id*.

92 *Court Cases: Loe v. Texas*, *supra* note 12.

93 *Id.*

94 ARK. CODE ANN. § 20-9-1502 (West 2023); *see* Daniel Breen, *First in the nation gender-affirming care ban struck down in Arkansas*, NPR (June 20, 2023) https://www.npr.org/2023/06/20/1183344228/arkansas-2021-gender-affirming-care-ban-transgender-blocked#:~:text=Arkansas%20became%20the%20first%20

from "provid[ing] gender transition procedures to any individual under eighteen (18) years of age" or "refer[ring] any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures."[95] Arkansas Governor Hutchinson vetoed then-bill House Bill 1570; his veto was then overridden by the legislature, and Act 626 became law in Arkansas.[96] The ACLU promptly filed suit in *Brandt* v. *Rutledge*. A district court in Arkansas entered a preliminary injunction on Act 626,[97] and the Eighth Circuit affirmed.[98]

The preliminary injunction in *Brandt* was decided on Equal Protection grounds.[99] Because exactly the same treatments legally provided to cisgender minors were banned from being prescribed to transgender minors, Act 626 violated the equal protection rights of transgender minors.[100] The court also based its injunction on the due process clause of the Fourteenth Amendment, as parents have legally recognized constitutional rights to the "care, custody and control of their children."[101] These rights include decisions on medical care.[102] In the court's reasoning, Act 626 thus violated equal protection grounds, as it would have prevented parents from making medical decisions for their children. In June 2023, the Arkansas district court issued its final decision, permanently enjoining Act 626.[103] As of December 2023, the case is on appeal in the Eighth Circuit.[104]

state,passed%20Act%20626%20in%202021. [https://perma.cc/R4WH-E2TE].

95 Ark. Code Ann. § 20-9-1502 (West 2023).

96 Greg Mercer, *First, Do No Harm: Prioritizing Patients over Politics in the Battle over Gender-Affirming Care*, 39 GA. ST. U. L. REV. 479, 497 (2023).

97 Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021).

98 Brandt v. Rutledge, 47 F.4th 661, 667 (8th Cir. 2022).

99 Brandt v. Rutledge, 551 F. Supp. 3d at 894.

100 *Id*. at 891.

101 *Id*. at 892 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)).

102 *Id*. at 892 (citing Kanuszewski v. Mich. Dep't of Health and Human Serv's, 927 F.3d 396, 419 (6th Cir. 2019)).

103 Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *1 (E.D. Ark. June 20, 2023).

104 *Court Cases: Brandt et al v. Rutledge et al*, ACLU (Nov. 27, 2023), https://www.aclu.org/cases/brandt-et-al-v-rutledge-et-al [https://perma.cc/S365-SDCF].

C. Florida's Medical Board

Florida presents a unique case study and an illuminating example of the dangerous creativity of those leading the anti-trans movement. On November 4, 2022, the Florida Board of Medicine—a governmental organization ensuring that physicians meet requirements for safe practice—and the Florida Board of Osteopathic Medicine approved rules which would prohibit physicians from providing transgender minors with puberty blockers and hormones.[105] The rules were first proposed in a petition pushed by the State Surgeon General Joseph Ladapo and Governor Ron DeSantis.[106] A public hearing on the proposed rules was held in Florida on February 10, 2023.[107] As confirmed by the Florida Board of Medicine in February 2023, Florida's policy fully prohibits the use of puberty blockers for transgender minors, even in clinical trial settings.[108]

Florida's seems to be the most pernicious route to banning gender-affirming care. While Texas attempted to encroach on parental rights with directives from its Attorney General and Governor, and Arkansas attacked equal protection with a direct legislative ban, Florida has passed a medical board policy, which is fully out of touch with the power dynamics and bigotry involved in the regulation of gender-affirming care. Since this is a medical board-approved policy and not a state law, physicians who violate it face censure and fines, and could even lose their medical license in Florida.[109] Due to the rules' status as a policy approved by state medical boards, rather than a state law, they are more likely to be

105 D'Ambrosio, *supra* note 13.

106 Dara Kam, *Medical Boards Vote to Block Treatments for Transgender Minors*, WUSF (Nov. 5, 2022), http://www.wusf.org/health-news-florida/2022-11-05/boards-block-treatments-for-transgender-minors [https://perma.cc/QC8S-J8GB].

107 Stephanie Colombini, *A Public Hearing Is Scheduled for Proposals to Restrict Gender-Affirming Care for Minors in Florida*, WUSF (Jan. 9, 2023), http://www.wusf.org/health-news-florida/2023-01-09/public-hearing-scheduled-for-proposals-to-restrict-gender-affirming-care-for-minors-in-florida [https://perma.cc/W6B7-W8TC].

108 Romy Ellenbogen & Sam Ogozalek, *Florida to Ban Care for Transgender Youth — Even in Clinical Trials*, TAMPA BAY TIMES (Feb. 10, 2023), http://www.tampabay.com/news/health/2023/02/10/transgender-youth-gender-affirming-care-banned-florida-clinical-trials [https://perma.cc/HVD6-NUFJ].

109 *What Happens to the Healthcare Practitioner as a Result of a Complaint*, FLA. BOARD OF MED., http://flboardofmedicine.gov/help-center/what-happens-to-the-healthcare-practitioner-as-a-result-of-a-complaint [https://perma.cc/A35T-QJ65].

implemented and more difficult to challenge in court, posing a greater risk to transgender youth.[110]

In May 2023, Governor Ron DeSantis signed Senate Bill 254, titled "Treatments for Sex Reassignment" into law, which criminalizes doctors who provide gender-affirming care to transgender youth and also limits transgender adults' access to such care.[111] A group of Florida families with transgender children filed suit in response. The following month, a federal judge issued a preliminary injunction halting enforcement of the ban for just these three families, allowing the plaintiffs to continue receiving puberty blockers and hormones.[112] In its order granting the preliminary injunction, the district court cited the Eighth Circuit's decision in *Brandt v. Rutledge*, stating that Florida's ban is likely unconstitutional on equal protection grounds.[113] As of October 2023, the case is ongoing; the preliminary injunction is currently on appeal in the Eleventh Circuit.[114]

D. The Influence of State Bans Across the Country

As of October 2023, at least twenty-one states have enacted laws restricting gender-affirming care for minors.[115] For example, in January 2023, Utah enacted a bill banning such care for transgender youth.[116] Likewise, in September 2023, Missouri's legislature enacted a ban on gender-affirming care for minors. [117] As soon as the law took effect, doctors ceased

110 *See* Associated Press, *Florida Boards of Medicine Confirm Ban on Gender-Affirming Care for Transgender Youth*, WUSF (Feb. 10, 2023), http://www.wusf.org/health-news-florida/2023-02-10/florida-boards-of-medicine-confirm-ban-on-gender-affirming-care-for-transgender-youth [https://perma.cc/CG2V-TQ5R].

111 *See* Press Release, Ron DeSantis, Governor, Florida Governor's Office, Governor Ron DeSantis Signs Sweeping Legislation to Protect the Innocence of Florida's Children (May 17, 2023), http://www.flgov.com/2023/05/17/governor-ron-desantis-signs-sweeping-legislation-to-protect-the-innocence-of-floridas-children [https://perma.cc/LA85-L99F].

112 Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *17 (N.D. Fla. June 6, 2023).

113 *Id* at *7–*9.

114 *Doe v. Ladapo Case Summary*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE (Dec. 2, 2023), https://clearinghouse.net/case/44118/?docket_page=3#docket [https://perma.cc/5GJJ-9T5U].

115 *See Equality Maps*, *supra* note 75.

116 S.B. 16, 2023 Gen. Sess. (Utah 2023).

117 S.B. 49, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

providing such care to avoid repercussions under the statute.[118] Arguably, state legislative actions banning gender-affirming care for transgender youth, such as Act 626 in Arkansas, will not permanently eliminate access to this care because they are inevitably challenged in court and often raise constitutional issues.[119]

While some bills denying gender-affirming care have later been enjoined in court, such as Act 626 in Arkansas,[120] this does not eliminate the likelihood of similar legislation being passed in the future, nor does it mean the effects of these bills will not emerge in ways that are more difficult to challenge. These bans and looming future bans cause considerable distress for transgender youth in these states who seek gender-affirming care, making them "feel under attack."[121]

Florida's ban differs because it is not a state law, but rather a standard of care adopted by two state medical boards composed of licensed medical professionals. Since it may be harder to accept that a coalition of doctors can be politically motivated, even though Medical Boards are state governmental agencies, some may mistake Florida's ban to be a neutral scientific effort to protect minors from the ostensible dangers of gender-affirming care. This is simply a more pernicious route to the same outcome of denying transgender youth's access to potentially life-saving care. It will be important to watch and see if other states are influenced by Florida's approach.

E. Opposition to State Action

Governor Abbott's directive in Texas faced significant opposition, including from Xavier Becerra, the United States Secretary of the Department of Health and Human

118 *Id.*

119 H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (referred to as "Act 626").

120 The District Court's decision in *Brandt v. Rutledge* is on appeal in the Eighth Circuit. *See Court Cases: Brandt et al v. Rutledge et al*, *supra* note 104.

121 Orion Rummler, *How Utah's New Ban on Gender-Affirming Care for Minors is Affecting Trans Teens in the State*, THE 19TH (Feb. 2, 2023), https://19thnews.org/2023/02/utah-trans-youth-care-ban-signed [https://perma.cc/7FLJ-3MKP] (noting that six of a Utah mental health therapist's transgender teenaged clients reported experiencing suicidal ideation in the same week, caused by the state moving forward with a bill to ban gender-affirming care for minors).

Services.[122] The ACLU also filed two separate lawsuits against Governor Abbott.[123] Dr. Michelle Forcier, a renowned pediatrician and author of a textbook on pediatric gender identity, released a guide for fellow pediatricians and medical professionals who are committed to protecting access to gender-affirming care for minors.[124]

Several states have proactively responded to restrictions on gender-affirming healthcare. California's Governor Gavin Newsom signed a bill into law making California the first sanctuary state for transgender minors.[125] New York's Governor Kathy Hochul signed a similar bill into law in June 2023.[126] While establishing sanctuary states is not a perfect solution, given issues with accessibility and travel, any state action that safeguards the rights of transgender youth—either within or beyond its borders—is a positive step forward.

Even if gender-affirming care is protected, this is not enough to ensure access. The

122 U.S. Dep't of Health and Hum. Servs. Press Office, *Statement by HHS Secretary Xavier Becerra Reaffirming HHS Support and Protection for LGBTQI+ Children and Youth*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Mar. 2, 2022), https://www.hhs.gov/about/news/2022/03/02/statement-hhs-secretary-xavier-becerra-reaffirming-hhs-support-and-protection-for-lgbtqi-children-and-youth.html [https://perma.cc/G5CQ-XRML].

123 Petition for Plaintiff at 1, PFLAG v. Abbott, *supra* note 85; Petition for Plaintiff at 1, Doe v. Abbott, *supra* note 85.

124 *See* Jason R. Rafferty, Abigail A. Donaldson & Michelle Forcier, *Primary Care Considerations for Transgender and Gender-Diverse Youth*, 41(9) PEDIATRICS IN REVIEW 437 (2020).

125 *Senator Wiener's Historic Bill to Provide Refuge for Trans Kids and Their Families Signed into Law*, https://sd11.senate.ca.gov/news/20220930-senator-wiener%E2%80%99s-historic-bill-provide-refuge-trans-kids-and-their-families-signed-law [https://perma.cc/L5BR-4ZDZ] ("Governor Gavin Newsom signed into law Senator Scott Wiener (D-San Francisco)'s legislation to provide refuge for trans kids and their families, Senate Bill 107. It will take effect on January 1, 2023. SB 107 will protect trans kids and their families if they flee to California from Alabama, Texas, Idaho or any other state criminalizing the parents of trans kids for allowing them to receive gender-affirming care. If these parents and their kids come to California, the legislation will help protect them from having their kids taken away from them or from being criminally prosecuted for supporting their trans kids' access to healthcare."); Lesley McClurg, *California Becomes First Sanctuary State for Transgender Youth Seeking Medical Care,* KQED, (Oct. 18, 2022), https://www.kqed.org/news/11929233/california-becomes-first-sanctuary-state-for-transgender-youth-seeking-medical-care [https://perma.cc/ZAM6-3BGR] ("California is the first state in the nation to create a sanctuary for transgender youth seeking gender-affirming medical care. Gov. Gavin Newsom signed a new law in September that ensures transgender kids from elsewhere can safely access hormones or puberty blockers here. The legislation also shields families from child abuse investigations or from being criminally prosecuted for seeking gender-affirming care.").

126 Act of January 20, 2023, 2023–24 N.Y. Laws.

ability of transgender minors to access gender-affirming medical care hinges on the state in which they reside. Even if gender-affirming care is not banned in their state, their access then depends on their financial situation and health insurance policies. Although it is illegal to deny coverage for "medically necessary"[127] procedures, private insurance companies often deny coverage for transgender individuals' gender-affirming procedures.[128] Medicare, however, does cover medically necessary gender-affirming care.[129]

III. A Way Forward

Conservative lawmakers, governors, and medical boards continue to restrict or eliminate transgender minors' access to gender-affirming care. On the one hand, Republicans demand fortification of parental rights to protect children from drag queens, homosexuality, and critical race theory.[130] On the other hand, they support the denial of any parental right to work with qualified physicians so that trans children can be provided with gender-affirming medical care.

The well-established constitutional rights of parents to the care, custody, and control of their children are grounded in the Due Process clause of the Fourteenth Amendment.[131]

127 *Understanding Health Care Bills: What is Medical Necessity?*, NAT'L ASS'N OF INS. COMM'RS, https://content.naic.org/sites/default/files/consumer-health-insurance-what-is-medical-necessity.pdf [https://perma.cc/AK4L-F48S] (defining medical necessity).

128 *Know Your Rights Health Care*, NAT'L CTR FOR TRANSGENDER EQUALITY (Oct. 2021), https://transequality.org/know-your-rights/health-care [https://perma.cc/G4H7-35ZX] ("It is illegal for most private insurance plans to deny coverage for medically necessary transition-related care. Your private insurance plan *should* provide coverage for the care that you need. However, many transgender people continue to face discriminatory denials.").

129 *Know Your Rights Medicare*, NAT'L CTR FOR TRANSGENDER EQUALITY, https://transequality.org/know-your-rights/medicare [https://perma.cc/X86H-857X] ("For many years, Medicare did not cover transition-related surgery due to a decades-old policy that categorized such treatment as 'experimental.' That exclusion was eliminated in 2014, and there is now no national exclusion for transition-related health care under Medicare."). *See also* Anna Kirkland et al., *Health Insurance Rights and Access to Health Care for Trans People: The Social Construction of Medical Necessity*, 55 LAW & SOC'Y REV. 539, 540 (Dec. 6, 2021) (explaining the process by which a health insurer will authorize a treatment as necessary or cosmetic, noting importantly that "the indeterminacy created by the power of health insurers to determine coverage sits uneasily with expanded healthcare rights on the basis of gender identity.")

130 Nicholas Serafin, *The "Parental Rights" Lie at the Heart of GOP Efforts to Target LGBTQ Youth*, SLATE, (Nov. 1, 2022), https://slate.com/news-and-politics/2022/11/parental-rights-gop-lgbtq-youth-lies.html [https://perma.cc/R8RS-HMNR].

131 *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Prince

The landmark Supreme Court cases *Meyer v. Nebraska* and *Pierce v. Soc'y of Sisters* gave parents the right to decide the location and content of their children's education.[132] In line with these decisions, the Supreme Court held in *Troxel v. Granville* that the "interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[133]

Academic articles have already suggested the winning legal arguments against state bills banning gender-affirming care: namely, that such bans violate the Equal Protection Clause of the Fourteenth Amendment and the doctrine of parental rights based in the Due Process Clause.[134] If parents have the right to the custody and care of their children, this right should encompass the right to work together with the child and their physician to make medical decisions on such care. Following this line of reasoning, the court in *Loe v. Texas*—which granted a temporary injunction to the three families affected by the state ban in Texas—held that Texas's ban likely violates Article I, Section 19 of the Texas Constitution concerning parental rights.[135] In finding that the Act likely violates the Texas Constitution by infringing upon the parents' fundamental rights to the care, custody, and control of their children, the *Loe v. Texas* court stated that this right includes the right to consent to medical care for their children and "to seek and follow medical advice to protect the health and wellbeing of their minor children."[136]

v. Massachusetts, 321 U.S. 158 (1944); Troxel v. Granville, 530 U.S. 57, 65–66 (2000) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

132 *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

133 Troxel v. Granville, 530 U.S. 57, 65 (2000).

134 *See, e.g., Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 34 HARV. L. REV. 2163, 2178–79 (2021) (arguing that bills banning gender-affirming care for minors are unconstitutional because they violate the parental rights that are grounded in the Due Process Clause and violate the Equal Protection Clause); Beck Sigman, *Keeping Trans Kids Safe: The Constitutionality of Prohibiting Access to Puberty Blockers*, 71 AM. U. L. REV. F. 173, 173 (2021) (arguing that state legislative bans on trans minors' access to puberty blockers, specifically Arkansas's Act 626, are "unconstitutional under Fourteenth Amendment jurisprudence for two reasons. First, transgender individuals should be considered a quasi-suspect classification under Fourteenth Amendment Equal Protection Clause jurisprudence. Second, access to gender-affirming healthcare invokes the fundamental liberty interest in bodily autonomy under the Fourteenth Amendment Due Process Clause. Act 626 ultimately fails intermediate scrutiny analysis because it is not narrowly tailored to meet an important state interest.").

135 Loe v. Texas Temporary Injunction, *supra* note 90, at 2–3.

136 *Id.*

Because state bills banning gender-affirming care for transgender minors do not ban the same exact care for cisgender minors, these bans violate the Equal Protection Clause. For example, the medication used as a puberty blocker for transgender minors is also used to treat cisgender children who start puberty at a young age; puberty blockers are approved by the FDA for this purpose.[137] No legislative action on gender-affirming care for minors has tried to ban the actual medicine being used, only its use in affirming the gender of trans minors. Thus, the use of the medication for cisgender children experiencing early onset puberty is left untouched. State bills banning gender-affirming care interfere with parents' abilities to rear their children how they please, thereby interfering in their constitutional due process right to the care, custody, and control of their children. A parent who supports their transgender child's identity may consult with a doctor to consider possible medical interventions, such as puberty blockers. State laws banning all gender-affirming medical care for trans youth would prevent a parent from providing this care to their child.

Even as judges in some states rule that bans against trans youth's access to gender-affirming care are unconstitutional, efforts against transgender youth's access to such care continue in other states. Plaintiffs in existing cases have argued that bills which discriminate against transgender minors by denying them the exact health care that is allowed to cisgender minors violate the Equal Protection Clause of the Fourteenth Amendment, and that in preventing parents from providing their children with medical care recommended by their physician, these bills also violate constitutional parental rights. In *Brandt v. Rutledge*, the Eighth Circuit ruled that the district court did not abuse their discretion in issuing their preliminary enjoinment of Arkansas's Act 626 on equal protection grounds.[138] However, legislators and state authorities seeking to eliminate this care have not been swayed, as new measures continue to arise to ban gender-affirming care for transgender youth.[139]

In Texas, Attorney General Ken Paxton's opinion that "sex change procedures" for

137 *Puberty Blockers*, CHILDREN'S HOSPITAL SAINT LOUIS, https://web.archive.org/web/20230307100120/https://www.stlouischildrens.org/conditions-treatments/transgender-center/puberty-blockers (discussing the safety of puberty blockers).

138 Brandt v. Rutledge, 47 F.4th 661, 667, 671 (8th Cir. 2022) (upholding the District Court's preliminary injunction). The District Court has released its final ruling, which is currently on appeal. *See Court Cases: Brandt et al v. Rutledge et al*, *supra* note 104.

139 *See 2023 Anti-Trans Legislation, Track Trans Legislation (2023)*, https://www.tracktranslegislation.com/ [https://perma.cc/VK3R-5F6K] (illustrating that eighteen states have signed anti-trans legislation into law and four states have anti-trans bills pending).

minors [140] were child abuse under Texas law is not legally binding. Nonetheless, such opinions are "highly persuasive and are entitled to great weight."[141] Texas Governor Abbott then issued a directive to the Texas DFPS to investigate families suspected of supporting their transgender children by allowing them to receive gender-affirming care.[142] The ACLU challenged this directive in two court cases: *Doe v. Abbott*,[143] which was filed on behalf of particular families who had already been subject to an investigation in Texas state court, and *PFLAG v. Abbott*,[144] which was filed on behalf of all members of PFLAG who would have been subject to an investigation due to their membership in this LGBTQ+ advocacy group. In *Doe v. Abbott*, the Travis County district court enjoined DFPS from following the directive and investigating the specific families involved but did not extend the injunction to other families similarly situated because the statewide injunction was put on hold while the state appealed the decision.[145] *PFLAG v. Abbott* expanded the injunction to "cover[] all Texas families who are members of PFLAG national," thus preventing their investigation by DFPS.[146] In the 88th Legislative Session, however, Texas legislators

140 Texas Att'y Gen., Opinion Letter on Whether Certain Medical Procedures Performed on Children Constitute Child Abuse (Feb. 18, 2022), No. KP-040l, reprinted at https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf [https://perma.cc/NT7V-Z34T].

141 About Attorney General Opinions, Ken Paxton, Att'y Gen. of Texas, https://www2.texasattorneygeneral.gov/opinion/about-attorney-general opinions#:~:text=Attorney%20general%20opinions%20cannot%20create,what%20the%20law%20should%20say [https://perma.cc/8UXH-SX67] ("Attorney general opinions cannot create new provisions in the law or correct unintended, undesirable effects of the law. Attorney general opinions do not necessarily reflect the attorney general's personal views, nor does the attorney general in any way 'rule' on what the law should say . . . Courts have stated that attorney general opinions are highly persuasive and are entitled to great weight; however, the ultimate determination of a law's applicability, meaning or constitutionality is left to the courts.").

142 Abbott Letter, *supra* note 10.

143 *See* Petition for Plaintiff at 1, Doe v. Abbott, *supra* note 85; *see also Court Cases: Doe v. Abbott*, *supra* note 88.

144 *See* Petition for Plaintiff at 1, PFLAG v. Abbott, *supra* note 85; *see also Court Cases: PFLAG v. Abbott*, *supra* note 87.

145 Order Granting Plaintiffs' Application for Temporary Injunction, Doe v. Abbott, No. D-1-GN-22-000977 (Tex. Dist. Ct. Mar. 12, 2022), https://www.aclu.org/cases/doe-v-abbott?document=Order-Granting-Plaintiffs-Application-for-Temporary-Injunction [https://perma.cc/FG4A-DB6P]; *See* also *Court Cases: Doe v. Abbott*, *supra* note 88.

146 Press Release, ACLU, *Texas Court Expands Injunction Blocking State from Targeting Families of Trans Youth Who Are Members of PFLAG National* (Sept. 16, 2022), https://www.aclu.org/press-releases/texas-court-expands-injunction-blocking-state-targeting-families-trans-youth-who-are [https://perma.cc/942Q-BSHF].

continued their efforts to ban gender-affirming care for minors.[147] For example, in February 2023, Republican Representative Bryan Slaton sponsored House Bill 42[148] to amend the family code definition of abuse to include allowing a child to receive gender-affirming medical care.[149]

Florida's sole statewide policy concerning gender-affirming medical care for trans youth is a medical board decision, not a state law. The historic right-wing political makeup of the Florida Board of Medicine and Governor Ron DeSantis's new appointees indicate the Board's subscription to a political agenda that opposes gender-affirming care.[150] Florida's medical board has proposed and approved rules that could skirt lawsuits challenging the state for violating the Equal Protection Clause.[151] The resulting actions of Florida's policy, which in effect would result in a ban of gender-affirming care for minors, may constitute discrimination against transgender youth and thus violate their constitutional rights to equal protection under law, or simply represent a state medical board regulating licensed health care providers' practice of medicine. In response to these state actions, both the state and federal governments, as well as the medical professional community, can work to protect access to gender-affirming care.

A. Federal Solutions

1. The Transgender Bill of Rights

The Federal Transgender Bill of Rights,[152] introduced as a Senate Resolution in March

147 *See* Texas Observer Staff, *Catastrophe #88: The Texas Legislature Returns For A Brutal Year*, TEXAS OBSERVER (Jan. 9, 2023), https://www.texasobserver.org/texas-legislature-preview-2023/ [https://perma.cc/Z4NV-4M45].

148 H.B. 42, 88th Leg. Reg. Sess. (Tex. 2023).

149 *Id.*

150 *See* Christine Jordan Sexton, *Ron DeSantis is Reshaping Florida's Medical Boards*, FLORIDA POLITICS (Dec. 30, 2022), https://floridapolitics.com/archives/578266-gov-desantis-is-reshaping-floridas-medical-boards/ [https://perma.cc/9RNM-3ZD6] (discussing the anti-trans strategy indicated by DeSantis's appointments); *see also* Oriana González, *Politicians Turn to Medical Boards to Ban Gender-Affirming Care*, AXIOS (Nov. 4, 2022), https://www.axios.com/2022/11/04/state-medical-board-florida-transgender-health-care [https://perma.cc/J8U4-F3CX] (describing the agenda of recently added members of the Florida Board of Medicine).

151 *See* González, *Politicians Turn to Medical Boards to Ban Gender-Affirming Care*.

152 H.R. Res.1209, S. 2D, 117th Cong. (2022) (reintroduced as a Senate Resolution in 2023 by Sen. Markey and Rep. Jayapal).

2023, includes an unprecedented level of suggested protections for transgender people in the United States. For example, the resolution would fully codify the *Bostock* decision by amending Title VII,[153] recognize the universal right to bodily autonomy and ethical health care by "eliminating unnecessary governmental restrictions on the provision of and access to gender-affirming medical care and counseling for transgender and non-binary adults, adolescents and children,"[154] and codify *Roe v. Wade*.[155]

The Biden Administration must act concretely to truly protect the rights of transgender youth across the country. Some initial steps have been taken, but more must be done. Thus far, Biden has released an Executive Order in June 2022, titled "Executive Order on Advancing Equity for LGBTQI+ Individuals."[156] In the Executive Order, Biden "asks the federal health and education departments to expand access to gender-affirming medical care and find new ways to counter a flurry of bills passed in U.S. states."[157] Section 7 of the Executive Order the directs the Secretary of HHS to "promote expanded access to comprehensive health care for LGBTQI+ individuals, including by working with states on expanding access to gender-affirming care."[158] Despite the general positive sentiment of the Section 7, more must be done to safeguard access to health care, as state bans on gender-affirming care show no signs of slowing.[159] In a new Executive Order, President Biden should release explicit and specific guidance for the FDA to certify puberty blocking

153 H.R. Res. 1209 1(b), S. 2D, 117th Cong. (2022) (fully codifying *Bostock* by "amending Title VII . . . to explicitly clarify that employers may not discriminate on the basis of actual or perceived gender identity or sex characteristics"); *see also Bostock* v. *Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (holding that Title VII's ban on sex discrimination includes discrimination based on sexual orientation and transgender status).

154 H.R. Res. 1209 1(c)(ii), S. 2D, 117th Cong. (2022).

155 *Outlawing Trans Youth, supra* note 134.

156 Exec. Order on Advancing Equality for LGBTQI+ Individuals No. 14075, 87 Fed. Reg. 118 (June 21, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/ [https://perma.cc/MSQ9-2HBF] ("The Secretary of HHS shall: promote expanded access to comprehensive health care for LGBTQI+ individuals, including by working with States on expanding access to gender-affirming care.").

157 Trevor Hunnicutt, *Biden Targets Conversion Therapy, Transgender Bans in Pride Month Order,* REUTERS (June 15, 2022), https://www.reuters.com/world/us/biden-pride-order-aims-conversion-therapy-transgender-bans-2022-06-15/ [https://perma.cc/26CY-JDQQ].

158 Exec. Order on Advancing Equality for LGBTQI+ Individuals No. 14075, *supra* note 156.

159 *2023 Anti-Trans Legislation, supra* note 139.

medications for transgender youth as on-label use.[160] This would eliminate criticism concerning "off-label" medication use, which is currently fuel to the anti-trans legislator's fire.[161]

Additionally, Congress should codify the right to access gender-affirming care for all transgender people, both minors and adults. In its current form, the Transgender Bill of Rights is not likely to gain the bipartisan support needed to pass anytime soon. Any federal measure which is at all likely to succeed in protecting transgender minor's access to gender-affirming health care should be more narrowly focused to increase the chance of potential passage. Lastly, grounding the tenets of the Transgender Bill of Rights in scientific evidence through more research will help diminish fearmongering about the dangers of hormone treatment for transgender youth.

2. FDA Regulation

The FDA must act to make the medications currently prescribed as puberty blockers for transgender youth on-label for this purpose.[162] If the FDA makes an expert judgment that certain medications are safe and effective for delaying puberty and treating gender dysphoria in transgender youth, then states may be preempted from banning Leuprolide, a medication commonly used as a puberty blocker for transgender youth, for that purpose.[163]

An analogy to medication abortion by Mifepristone is in order. Post-*Dobbs,* Attorney

160 *Presidential Administration and FDA Guidance: A New Hope*, 2021 U. ILL. L. REV. (ONLINE: BIDEN 100 DAYS) 179 (discussing the powers of effectuating public policy through Executive Orders as guidance to the FDA).

161 *See* Akousa Mireku, *Legal Challenges Put Off Label Use of Gender-affirming Care Drugs in Jeopardy*, PHARM. TECH.(Mar. 16, 2023), https://www.pharmaceutical-technology.com/features/legal-challenges-put-off-label-use-of-gender-affirming-care-drugs-in-jeopardy/ [https://perma.cc/F8WG-EGX4].

162 *See generally Understanding Unapproved Use of Approved Drugs "Off Label"*, Fed. Drug Ass'n (Feb. 5, 2018), https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label [https://perma.cc/CY48-XZBA] (noting that "when you are prescribed a drug for its approved use, you can be sure that the FDA has conducted a careful evaluation of its benefits and risks for that use, the decision to use the drug is supported by strong scientific data, and there is approved drug labeling for healthcare providers on how to us the drug safely and effectively for that use").

163 *See What is Preemption, and How Does it Apply to a Defective Drug or Medical Device Case*?, GRAY AND WHITE (Feb. 23, 2016), https://www.grayandwhitelaw.com/faqs/how-the-preemption-doctrine-applies-to-fda-regulations.cfm [https://perma.cc/D5VH-25JL] ("The preemption doctrine has evolved over the years to include federal agency regulations and to mean that all federal laws, including regulations not passed by Congress but rather established by federal agencies, preempt all state laws.").

General Merrick B. Garland publicly asserted the Biden Administration's commitment to "protect and advance reproductive freedom," declaring "states may not ban mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."[164] Scholars have suggested the federal government act simply in the medication abortion context after *Dobbs* was decided, "attempting to use federal laws to preempt state bans."[165] In this context, federal approval of Mifepristone, "based on [the FDA's] expert determination that it is safe and effective," would preempt state laws that ban its access "based on a state's contrary conclusion about the drug's safety and effectiveness."[166]

Similarly, in the context of protecting access to gender-affirming care for transgender youth, the federal government can work to promote access to puberty blockers by making them on-label and then continually advocating for their safety and efficacy for this purpose. By doing so, the federal government can preempt new state bans on gender-affirming care for minors. This is complicated by the ongoing litigation regarding Mifepristone. *Alliance for Hippocratic Medicine v. FDA* might result in Mifepristone being taken off shelves across the country.[167] This decision is now stayed, but if allowed to go through by the Supreme Court, would have devastating consequences for medication abortion access. This kind of litigation outcome is less likely to occur in the gender-affirming care context because the medications used as puberty blockers and as cross-sex hormones are widely accepted in their use, on-label, in caring for cisgender patients.

A disanalogy between Mifepristone and puberty blockers is that puberty blockers are off-label treatments for gender dysphoria, while Mifepristone is an on-label medication abortion. That puberty blockers are "off-label" for the purpose of treating gender dysphoria in transgender youth does *not* mean that they are unsafe or ineffective for this purpose. Medications are often prescribed for off-label use for both adults and minors;"pediatricians

164 Rachel L. Sher, *FDA Preemption: Implications of* Dobbs *Decision for Uniform Access to FDA-Approved Drugs in the U.S.*, MANATT (Aug. 8, 2022), https://www.manatt.com/insights/newsletters/health-highlights/fda-preemption-implications-of-dobbs-decision-for [https://perma.cc/C7KU-KH7B] ("Garland's statement is premised on the doctrine that federal law overrides or 'preempts' inconsistent state law. In other words, the FDA's decision to approve mifepristone based on its expert determination that it is safe and effective is a federal action that preempts state laws that would ban or prevent access to the drug based on a state's contrary conclusion about the drug's safety and effectiveness.")

165 David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 1 (2023).

166 Sher, *supra* note 164.

167 Alliance for Hippocratic Medicine v. FDA, 78 F.4th 210 (5th Cir. 2023).

prescribe off-label drugs in 20% of patient visits."[168] If the FDA makes an expert judgment on the safety and efficacy of medications like Leuprolide, declares such medication on-label *for the purpose* of preventing the progression of puberty in transgender minors, and declares cross-sex hormones as on-label for treating gender dysphoria, states would be preempted from banning prescription of these medications.[169]

If the FDA does judge these medications on-label for transgender youth now, while states continue to ban the medications, the FDA's expert judgment would still be effective in sending a message on the safety and efficacy of these treatments. This would make it that much more difficult for opponents of gender-affirming care to argue against their use. It would become more difficult, if not impossible, to portray the treatment of trans minors with hormone blockers as experimental if the FDA approves them as a safe treatment for gender dysphoria.

B. State Solutions

State governors and legislatures should continue to proactively protect the rights of the transgender youth who are citizens of their own states and should also follow in the footsteps of sanctuary states like California and New York. In October 2022, California became the first sanctuary state for transgender youth seeking gender-affirming care.[170] Directly responding to Governor Abbott's directive to DFPS in Texas, California's law would "prohibit the enforcement of an order based on another state's law authorizing a child to be removed from their parent or guardian based on that parent or guardian allowing their

168 Boulware, *supra* note 34, at 24 (citing Hoon D. Taylor et al., *Trends in Off-Label Drug Use in Ambulatory Settings: 2006–2015*, AM. ACADEMY OF PEDIATRICS (Oct. 2019).

169 *See* James M. Beck, *Federal Preemption of State Attempts to Ban FDA Approved Abortion Drugs After Dobbs,* DRUG & DEVICE L., (June 28, 2022), https://www.druganddevicelawblog.com/2022/06/federal-preemption-of-state-attempts-to-ban-fda-approved-abortion-drugs-after-dobbs.html [https://perma.cc/895V-8PE9] ("However, one state's attempt to prohibit doctors in that state from prescribing an FDA-approved opioid did produce interesting precedent . . . Massachusetts was enjoined in Zogenix, Inc. v. Patrick . . . The state . . . first tried an outright ban . . . with the governor 'empower[ing]' the public health department 'to immediately prohibit the prescribing and dispensing of' the plaintiff manufacturer's drug. Zogenix I, 2014 WL 1454696, at *1–2. *The ban was preempted.*") (emphasis added).

170 McClurg, *supra* note 125 (discussing that when Governor Newsom signed the bill into law, he declared, "In California we believe in equality and acceptance. We believe that no one should be prosecuted or persecuted for getting the care they need – including gender-affirming care. Parents know what's best for their kids, and they should be able to make decisions around the health of their children without fear. We must take a stand for parental choice.").

child to receive gender-affirming health care or gender-affirming mental health care."[171] In effect, this means that families from states that prohibit access gender-affirming care or have penalties for accessing such care can access that same treatment in California and be shielded from the laws of their home state.

Sanctuary state laws should not be discouraged, but they cannot be the only solution. The abortion landscape makes clear that legality does not equal access. Families in states that ban this care may not be financially able to repeatedly travel to a sanctuary state so their child can receive gender-affirming care, which is a continuing progression of treatments. Sanctuary states also do not solve the separate issue of access itself. In many states, it is not easy to find gender-affirming care even if it is not illegal, and places that offer such care usually have extremely long waitlists.[172]

1. Medical Solutions

As illustrated by the issues presented regarding sanctuary states, any solution must work to increase the overall accessibility of such care. Puberty blockers and hormone treatments ought to be made available via Telehealth services and delivery. Title X should be protected and expanded so that all Planned Parenthood clinics will offer gender-affirming care and so that Planned Parenthoods may remain open and open more locations.[173]

Telehealth is preferable to many patients—especially those seeking gender-affirming care, which may not be available near their place of residence—due to decreased costs and travel time. Telehealth has already been implemented to supply medications to

171 S.B. 107, 2021–2022 Reg. Sess. (Cal. 2022).

172 *See Map: Comprehensive Care Programs for Gender-Expansive Children and Adolescents*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/interactive-map-clinical-care-programs-for-gender-nonconforming-childr (displaying an interactive map of states with laws or policies banning gender-affirming care of trans people ages eighteen or younger).

173 *See* Ruth Dawson, *What Federal Policymakers Must do to Restore and Strengthen Title X Family Planning Program*, 24 GUTTMACHER POL'Y REV. 22, 26–27 (2021), https://www.guttmacher.org/sites/default/files/article_files/gpr2402221.pdf [https://perma.cc/MFB8-NUDU] ("In response to patient need, traditional Title X providers are increasingly providing services such as talk therapy for anxiety and depression and gender-affirming hormone therapy for transgender patients . . . In the long term, Congress should revisit the underlying Title X statute and reframe the program from 'family planning' to 'sexual and reproductive health.' This would center patient autonomy, equity and inclusivity and more accurately reflect how the program fits into patients' lives. Congress should also clarify in statute what services providers must offer if they accept Title X funds, and which additional services may be covered by these funds to meet patients' needs.")

transgender adults during the COVID-19 pandemic.[174] Moreover, a service review of the Gender Multispecialty Service at Boston Children's Hospital found clear benefits of providing gender-affirming care to youth and adults over Telehealth during the COVID-19 pandemic.[175]

Telehealth can potentially benefit transgender youth and adults who may not have the resources to travel out of or even within state to access care.[176] This can also be beneficial if Telehealth is used for gender-affirming mental health services, as was argued in the article "Telehealth is Key to Trans Health Care," which also suggested that "[w]ell-resourced hospitals and insurers could allocate funds to families affected by bans on gender-affirming care, including covering the costs of traveling to health care facilities in states where the full spectrum of gender-affirming care is available."[177]

A 2021 survey shows that transgender youth are interested in having access to gender-

174 Danielle E. Apple et al., *Acceptability of Telehealth for Gender-Affirming Care in Transgender and Gender Diverse Youth and Their Caregivers*, 7 TRANSGENDER HEALTH 159, 159 (2021).

175 Kerry McGregor et al., *Providing Essential Gender-Affirming Telehealth Services to Transgender Youth During COVID-19: A Service Review*, 29(2) J TELEMED TELECARE 147, 149-150 (2023).

176 *See* Ole-Petter R. Hamnvik et al., *Telemedicine and Inequities in Health Care Access: The Example of Transgender Health*, 7 TRANSGENDER HEALTH 113, 113 (2022) (finding that "[t]he increased access to telemedicine may have benefits beyond the reduction in contagious risk, especially for vulnerable populations. By breaking down some of the common barriers to care for vulnerable populations, the broad implementation of telemedicine may help reduce some inequities in health care access, but telemedicine does raise other challenges that need to be considered and addressed. One vulnerable group that can benefit from telemedicine is transgender and gender nonbinary (TGNB) individuals, who have less access to both gender-affirming and general medical care due to the consequences of stigma, discrimination, and marginalization. Telemedicine allows TGNB individuals to access clinical expertise even if it is not available locally, and without the expense of travel and without the concern for exposure to discrimination and mistreatment.").

177 Dallas Ducar & Scott Hadland, *Telehealth is Key to Trans Health Care,* SCI. AM. (Aug. 12, 2022), https://www.scientificamerican.com/article/telehealth-is-key-to-trans-health-care/ [https://perma.cc/ZFF4-PQPZ] (noting that "hospitals in states with bans on gender-affirming care should widen the scope of support services beyond their walls. Transgender youth and families with financial resources can travel out of state to receive needed care, leaving lower-income families disproportionately vulnerable to the consequences of treatment bans. Many hospital systems recognize that by supporting so-called social determinants of health—housing, income, food, education and employment—they improve the health of their neighbors. Well-resourced hospitals and insurers could allocate funds to families affected by bans on gender-affirming care, including covering the costs of traveling to health care facilities in states where the full spectrum of gender-affirming care is available. Many employers' health plans have already begun to do this for other types of medical care that have been politicized, like abortion.").

affirming care over telemedicine services.[178] It has been found that "direct-to-consumer telemedicine services that provide gender-affirming hormone therapy appear to follow evidence-based guidelines and charge about the same as brick-and-mortar medical centers."[179] Planned Parenthood North Central States offers Telehealth hormones that must be picked up in person at the pharmacy.[180]

Complications that may arise with Telehealth providing gender-affirming care will depend on the laws of separate states, if it indeed becomes illegal to receive gender-affirming care in the state where the transgender child resides.[181] Telehealth raises issues regarding the licensing of health care providers. States are the deciders of cross-state licensing.[182] Telehealth is considered to be rendered at the physical location of the patient, and not of the

178 Gina M. Sequeira et al., *Brief, Transgender Youths' Perspectives on Telehealth for Delivery of Gender-Affirming Care*, 68 J. ADOLESCENT HEALTH 1207, 1209 (2021).

179 Mary Chris Jaklevik, *DTC Telemedicine Expands Access to Gender-Affirming Therapy*, MEDSCAPE (Oct. 27, 2022), https://www.medscape.com/viewarticle/983144?reg=1 [https://perma.cc/4HAC-N6HR].

180 *Gender Affirming Hormone Therapy: Patient Handbook*, PLANNED PARENTHOOD NORTH CENTRAL STATES, at 9 (Aug. 2022), https://www.plannedparenthood.org/uploads/filer_public/f9/36/f9363309-3b58-47e8-b6e6-f7421f7b4172/gaht_health_care_handbook_web.pdf [https://perma.cc/9HKT-BDQ8].

181 *Cf.* Farah Yousry, *Telemedicine abortions just got more complicated for health providers,* NPR (Sept. 26, 2022), https://www.npr.org/sections/health-shots/2022/09/26/1124360971/telemedicine-abortion-medication-ban [https://perma.cc/88KV-9SPY]; Laurie Sobel et al., *The Intersection of State and Federal Policies on Access to Medication Abortion Via Telehealth*, KFF (Feb. 07, 2022), https://www.kff.org/womens-health-policy/issue-brief/the-intersection-of-state-and-federal-policies-on-access-to-medication-abortion-via-telehealth/ [https://perma.cc/QTA4-GXU8]; Brian Lee, *Telehealth Bill Would Allow Doctors to Provide Abortion Counsel to Out of-State Patients,* NEW YORK L. J. (Sept. 2, 2022) https://www.law.com/newyorklawjournal/2022/09/02/telehealth-bill-would-allow-doctors-to-provide-abortion-counsel-to-out-of-state-patients/?slreturn=20221110164724 [https://perma.cc/DV5W-5J55] (describing interstate shield law in New York to protect providers of abortion to out of state patients); Claire Marblestone, *Medication Abortion, Telemedicine, and Dobbs—Key Considerations for Healthcare Providers*, LEXISNEXIS (Sept. 28, 2022), https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/medication-abortion-telemedicine-and-dobbs-key-considerations-for-healthcare-providers [https://perma.cc/W6C7-3JX9].

182 *Cross State Licensing*, CCHP, https://www.cchpca.org/topic/cross-state-licensing-professional-requirements/#:~:text=The%20Commissioner%20of%20Public%20Health,to%20patients%20in%20this%20state [https://perma.cc/5J4F-KGB3] (illustrating an interactive map of the United States and individual states' cross-state licensing Telehealth rules).

physician.[183] The provider will typically need to be licensed in the state where the patient is located.[184] This varies by state.

Connecticut has a statute which allows the Commissioner of Public Health to issue an order "authorizing telehealth providers who are not licensed, certified or registered to practice in this state to provide telehealth services to patients in this state."[185] Following Connecticut's model in this context would likely present its own problems, as states banning gender-affirming care for minor residents of their own states probably do not allow cross-state telemedicine for this purpose. The states where the physicians providing cross-state care are located could pass their own affirmative laws, protecting their physicians from out of state prosecutions, as scholars have suggested in the abortion context.[186]

In the U.S. Senate, democrats have introduced such an affirmative bill in the abortion context. The Let Doctors Provide Reproductive Health Care Act, introduced in August 2022, aims to protect physicians who provide abortion care to patients from states with abortion restrictions.[187] Just as with gender-affirming care, the politics of abortion care make this bill unlikely to pass any time soon. In the gender-affirming care context, individual states could pass their own laws to protect physicians located within their state lines from civil action by other states that may have banned gender-affirming care.[188]

Another way to increase access to gender-affirming care for minors would be to expand the purview of Planned Parenthood clinics to provide more holistic treatment

183 *Id.*

184 *Id.* ("A few states have licenses or telehealth specific exceptions that allow an out-of-state provider to render services via telemedicine in a state where they are not located, or allow a clinician to provide services via telehealth in a state if certain conditions are met . . . Still other states have laws that don't specifically address telehealth and/or telemedicine licensing, but make allowances for practicing in contiguous states, or in certain situations where a temporary license might be issued provided the specific state's licensing conditions are met.").

185 CONN. GEN. STAT. § 19a-906a (2023).

186 *See* David S. Cohen et al., *supra* note 165, at 1 ("Some states will pass laws creating civil or criminal liability for out-of-state abortion travel while others will pass laws insulating their providers from out-of-state prosecutions.").

187 Let Doctors Provide Reproductive Health Care Act, S. 1297, 118th Cong. (2023).

188 *See* Assemb. B. 1666, 2021–2022 Reg. Sess. (Cal. 2022) (acting as a "shield" to protect physicians who provide abortions from lawsuits filed according to the laws of the states which ban abortions); *see also* Cohen, *supra* note 165, at 43.

plans, including gender-affirming care services to minors.[189] Planned Parenthood is often the sole place that offers gender-affirming care outside of major cities.[190] The director of policy for the National Center for Transgender Equality told *The Guardia*n that "[Planned Parenthood is] one of the most important providers of trans healthcare in the country" and that "their clinics are some of the few transgender healthcare providers located outside major cities."[191]

Increasing the number of Planned Parenthood clinics offering gender-affirming care is crucial because transgender people may be hesitant to seek such care from other healthcare providers, who may be less likely to be trans affirming. Transgender people have reported that they have avoided routine medical care due to fear of harassment from their healthcare providers and have also endured negative experiences with healthcare providers.[192]

CONCLUSION

Texas, Florida, and Arkansas demonstrate three different ways in which states attempted to restrict access to gender-affirming care for transgender youth in 2022. As these state efforts appear to be mutating into more evil and pernicious forms that are backed by state medical boards, as seen in the case of Florida, the responses to these efforts must also evolve.

This Note argues that, first and foremost, the federal government must codify protections for all transgender people's access to gender-affirming care in accordance with what is appropriate for their age and accepted standards of care. Further, solutions must include making gender-affirming medications on-label for the purpose of treating

189 *See* Alec Schemmel, *Planned Parenthood Offering Transgender Hormone Therapy to Minors Across the Country*, KATV (July 13, 2022), https://katv.com/news/nation-world/planned-parenthood-giving-transgender-hormone-therapy-to-minors-across-the-country [https://perma.cc/BU2L-A756] ("Planned Parenthood is providing children as young as 16 with 'gender-affirming hormone services' . . . In other [Planned Parenthood] sectors, like Western Pennsylvania and Nashville, patients must be 18 or older to receive hormone therapy.").

190 Molly Redden, *How Defunding Planned Parenthood Could Wipe out Trans Healthcare,* THE GUARDIAN (Mar. 2, 2017), https://www.theguardian.com/society/2017/mar/02/transgender-healthcare-planned-parenthood-funding [https://perma.cc/ZPY7-ANX4].

191 *Id.*

192 James, *supra* note 40, at 93, 96 (finding that twenty-three percent of respondents reported fear of harassment and thirty-three percent reported negative experiences with healthcare providers).

transgender minors. Existing scientific research confirming the safety of gender-affirming care must be widely disseminated so ideological opponents cannot successfully argue that such care is dangerous or experimental. In the face of so many legal and political attacks, transgender children must be supported, loved, and protected.